STATE OF MICHIGAN

COURT OF APPEALS

GARY L. BUSH, Guardian of GARY E. BUSH, a Protected Person,

Plaintiff-Appellee,

v

BEHROOZ-BRUCE SHABAHANG, M.D.,

Defendant-Appellant,

and

JOHN CHARLES HEISER, M.D., WEST MICHIGAN CARDIOVASCULAR SURGEONS, GEORGE T. SUGIYAMA, M.D., M. ASHRAF MANSOUR, M.D., VASCULAR ASSOCIATES, P.C., and SPECTRUM HEALTH BUTTERWORTH CAMPUS,

Defendants.

FOR PUBLICATION
May 1, 2008
9:00 a.m.

No. 274708
Kent Circuit Court
LC No. 06-000982-NM

GARY L. BUSH, Guardian of GARY E. BUSH, a Protected Person,

Plaintiff-Appellee,

v

BEHROOZ-BRUCE SHABAHANG, M.D., GEORGE T. SUGIYAMA, M.D., M. ASHRAF MANSOUR, M.D., VASCULAR ASSOCIATES, P.C., and SPECTRUM HEALTH BUTTERWORTH CAMPUS,,

Defendants,

and

No. 274709
Kent Circuit Court
LC No. 06-000982-NM

JOHN CHARLES HEISER, M.D., WEST MICHIGAN CARDIOVASCULAR SURGEONS,

Defendants-Appellants.

GARY L. BUSH, Guardian of GARY E. BUSH, a Protected Person,

Plaintiff-Appellee,

v

No. 274726
Kent Circuit Court
LC No. 06-000982-NM

BEHROOZ-BRUCE SHABAHANG, M.D., JOHN CHARLES HEISER, M.D., WEST MICHIGAN CARDIOVASCULAR SURGEONS, GEORGE T. SUGIYAMA, M.D., M. ASHRAF MANSOUR, M.D., VASCULAR ASSOCIATES, P.C.,

Defendants,

and

SPECTRUM HEALTH BUTTERWORTH CAMPUS,

Defendant-Appellant.

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

SMOLENSKI, J.

In this medical malpractice case, defendant Behrooz-Bruce Shabahang appeals by leave granted the trial court's April 28, 2006 order denying his motion for summary disposition on the grounds that plaintiff's notice of intent to sue was deficient and that he prematurely filed suit. Defendants John Heiser, West Michigan Cardiovascular Surgeons (WM Cardiovascular) and Spectrum Health Butterworth Campus also appeal by leave granted the trial court's April 28, 2006 order denying their motion for summary disposition on the ground that plaintiff's notice was deficient.[1] Because we conclude that plaintiff's notice did not meet the minimum

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[1] This Court originally denied defendants' request for leave to appeal. See *Gary L. Bush v Behrooz-Bruce Shabahang, M.D.,* unpublished order of the Court of Appeals, entered August 4, 2006 (Docket No. 270433); *Gary L. Bush v Behrooz-Bruce Shabahang, M.D.,* unpublished order of the Court of Appeals, entered August 4, 2006 (Docket No. 270437); and *Gary L. Bush v* (continued…)

requirements of MCL 600.2912b(4) with respect to the imposition of direct liability against WM Cardiovascular and for the nursing and physicians assistants of Spectrum Health, we reverse in part the decision of the trial court. However, because defendants have failed to demonstrate that the notice was otherwise deficient and plaintiff did not prematurely file suit in contravention of MCL 600.2912b, we affirm the trial court's denial of summary disposition in all other respects.

I. Facts and Procedural History

On August 7, 2003, Gary E. Bush (Bush), who was 33 at the time, had surgery to repair an aortic aneurysm at Spectrum Health's Butterworth Campus. Shabahang and Heiser, who are surgeons employed by WM Cardiovascular, performed the surgery. Plaintiff, Bush's guardian, claims that when Shabahang cut open Bush's chest, he lacerated the aneurysm, which made it necessary for Heiser to cannulate Bush's femoral artery and femoral vein so that Bush could be placed on a heart bypass machine before the surgery could proceed. Sugiyama and Mansour, who are vascular surgeons with Vascular Associates, P.C., repaired Bush's femoral artery and femoral vein, respectively. According to plaintiff, the injuries Bush suffered during the surgery and during his recovery rendered him unable to lead an independent life.

On August 5, 2005, which was just days before the expiration of the applicable period of limitations, plaintiff served a notice of intent to file a medical malpractice complaint against Shabahang, Heiser, Sugiyama, Mansour, WM Cardiovascular, Vascular Associates, and Spectrum Health. Sugiyama, Mansour, Vascular Associates, and Shabahang responded to plaintiff's notice as required by MCL 600.2912b(7). On January 27, 2006, which was 175 days after plaintiff served notice on defendants, plaintiff filed his complaint against all defendants.

Shortly thereafter, Sugiyama, Mansour and Vascular Associates moved for summary disposition under MCR 2.116(C)(7), (8) and (10). They argued that dismissal was appropriate on two grounds: (1) plaintiff failed to file a notice that complied with the requirements of MCL 600.2912b and (2) plaintiff failed to wait the required 182 days before filing his complaint. Shabahang, Heiser and WM Cardiovascular joined the motion. Spectrum Health later filed its own motion for summary disposition based solely on the alleged deficiency of the notice.

In response to these motions, plaintiff argued that the notice met the minimum statutory requirements. Plaintiff responded to the allegations that the complaint was prematurely filed by arguing that the responses to the notice were deficient. Because the defendants' responses to the notice were deficient, plaintiff contended that he could properly file his complaint after 154 days

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(…continued)

Behrooz-Bruce Shabahang, M.D., unpublished order of the Court of Appeals, entered August 4, 2006 (Docket No. 270897). However, in lieu of granting leave to appeal, our Supreme Court remanded these appeals as if on leave granted. See *Bush v Heiser,* 477 Mich 934; 723 NW2d 888 (2006); *Bush v Shabahang,* 477 Mich 934; 723 NW2d 888 (2006); *Bush v Spectrum Health Butterworth Campus,* 477 Mich 935; 723 NW2d 870 (2006). On remand from our Supreme Court, the cases were assigned new docket numbers and were consolidated. See *Gary L. Bush v Behrooz-Bruce Shabahang, MD,* unpublished order of the Court of Appeals, entered December 21, 2006 (Docket Nos. 274708, 274709, 274726).

from the date of service of the notice. Hence, plaintiff concluded, his complaint was not prematurely filed.

The trial court determined that the notice was insufficient as to Sugiyama, Mansour, and Vascular Associates. Based on that conclusion, the trial court granted summary disposition in favor of Sugiyama, Mansour and Vascular Associates.[2] The trial court also granted summary disposition in favor of Spectrum Health, but only to the extent that its liability was based on the actions of Sugiyama and Mansour. The trial court also granted summary disposition in favor of Spectrum Health as to the claims of negligence on the part of Spectrum Health's physician assistants because plaintiff failed to file a conforming affidavit of merit. However, "[a]s to the other doctors and defendants . . . the Court's of the opinion that the [notice] is clearly sufficient, so those motions are denied." The trial court also determined that plaintiff's complaint was not prematurely filed.

The trial court entered an order reflecting its decision on April 28, 2006.

These appeals followed.

II. Sufficiency of the Notice

We shall first address defendants' various arguments that plaintiff's notice of intent failed to satisfy the requirements of MCL 600.2912b(4).[3]

A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Boodt v Borgess Med Ctr*, 272 Mich App 621, 624-625; 728 NW2d 471 (2006). This issue also involves questions of statutory interpretation, which this Court reviews de novo. *Tousey v Brennan*, 275 Mich App 535, 538; 739 NW2d 128 (2007).

B. Notice Requirements of MCL 600.2912b

Before commencing an action alleging medical malpractice against a health professional or health facility, a medical malpractice claimant must provide each health professional and health facility with written notice of intent to file a claim. MCL 600.2912b(1); see also *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 685; 684 NW2d 711 (2004). The notice must include several statutorily enumerated statements about the intended suit. See MCL 600.2912b(4). Dismissal is an appropriate remedy for noncompliance with the notice provisions of MCL 600.2912b. *Burton v Reed City Hosp Corp*, 471 Mich 745, 753; 691 NW2d 424 (2005).

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[2] The trial court's dismissal of these defendants is not at issue in the present appeal.

[3] On January 23, 2006, plaintiff served defendants with an amended notice. However, in an order entered on April 28, 2006, the trial court voided this amended notice. Because plaintiff has not challenged this order on appeal, we shall only consider the sufficiency of the August 5, 2005 notice.

However, a notice is presumed valid until successfully challenged. *Potter v McCleary*, ___ Mich App ___, ___; ___ NW2d ___ (2008). Hence, even a deficient notice will toll the period of limitations during the notice period under MCL 600.5856(d). *Potter*, *supra* at ___. And, if the notice is successfully challenged, the remedy is dismissal without prejudice so that the plaintiff may have the opportunity to cure the deficiency within the unexpired portion of the period of limitations. *Id.*

Although the notice must include each of the statements enumerated under MCL 600.2912b(4), the claimant is not required to ensure that the statements are correct. *Boodt*, *supra* at 626. Rather, the claimant need only make "a good-faith effort to 'set forth [the information] with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them.'" *Id.*, quoting *Roberts*, *supra* at 701. For that reason, the notice need only meet the level of specificity generally required of a medical malpractice complaint. *Id.* at 626-627. Further, MCL 600.2912b does not require a particular format for the statements in the notice; they need only be present in some "readily decipherable form." *Id.* at 628. Hence, the relevant question is not "whether any specific portion of the notice" contains the required information, but whether the notice—when read as a whole—contains the required information. *Id.*

C. Standard of Care Statements

WM Cardiovascular, Heiser[4] and Shabahang[5] argue that plaintiff's notice failed to include a proper statement of the specific standard of care applicable to each of them. We disagree.

Under MCL 600.2912b(4)(b), plaintiff's notice had to include a statement of the standard of care. The alleged standard must be particularized for each of the professionals and facilities named in the notices. *Roberts*, *supra* at 694.

1. West Michigan Cardiovascular Surgeons

Plaintiff's notice does not adequately address the standard of care applicable to WM Cardiovascular under a direct theory of liability for failure to properly train or hire. The notice merely provides that WM Cardiovascular should have hired competent staff members and

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[4] We note that, in their brief on appeal, WM Cardiovascular and Heiser also allege that plaintiff's notice did not properly include statements regarding what WM Cardiovascular and Heiser should have done to comply with the applicable standard of care. Although this argument was only given cursory treatment on appeal, we have examined the issue and conclude that plaintiff's notice was not deficient in this regard.

[5] Shabahang argues generally that the notice was entirely deficient, but on appeal only directly addresses plaintiff's purported failure to give notice of the applicable standard of care. By failing to adequately brief any other claims of error with regard to the sufficiency of plaintiff's notice, Shabahang abandoned those claims. See *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 173; 721 NW2d 233 (2006). Therefore, we shall limit our analysis accordingly.

properly trained them. But the notice identifies no relevant standard for determining competency or properly training staff persons. Nor can the standard be gleaned from the other sections of the notice: plaintiff failed to state how WM Cardiovascular's hiring and training practices violated that standard, failed to state which hiring practices or training methods it should have employed, and failed to state how those improper practices proximately caused Bush's injuries. For this reason, to the extent that plaintiff's claims rest on these theories, the trial court should have granted summary disposition in favor of WM Cardiovascular. *Id.* at 694-695.

However, when read as a whole, see *Boodt*, *supra* at 628, the notice did provide WM Cardiovascular with adequate notice of vicarious liability. The notice provided that facilities such as WM Cardiovascular had a duty to "properly train and hire competent employees…including physicians…who are able to competently treat, assess, chart, monitor, diagnose, care for, refer…and surgically treat patients . . . ." The notice further provided that, based on these duties, WM Cardiovascular was "responsible for the breach of the standard of practice of all their employees." This was sufficient to place WM Cardiovascular on notice that plaintiff alleged that WM Cardiovascular could be held vicariously liable for a breach of the applicable standard of care by its employees.

2. Heiser

If plaintiff's notice of the standard of care is read in isolation from the remainder of the notice, it clearly does not provide a particularized standard for Heiser. See *Roberts*, *supra* at 694. The standards of care for all the physicians are lumped together and stated in the most general of terms: "The standard of care or practice requires that physicians . . . be able to competently treat, diagnose, monitor, care for, refer to other specialties and surgically treat patients . . . ." Reduced to its core, this statement merely asserts that the standard requires physicians to be competent. But this sort of general averment is insufficient to satisfy the requirements of MCL 600.2912b(4)(b). See *id.* (noting that general assertions that the standard of care requires the defendants to give 'proper care' and render 'competent advice' are not adequately responsive). Nevertheless, when this section is read in conjunction with the other sections, plaintiff's notice adequately addressed the standard of care applicable to Heiser.

In the sections dealing with the manner of breach and the recommended actions, plaintiff noted that Heiser was required to be prepared "for possible aortic aneurysm laceration during repeat sternotomy" and had to "properly and carefully cannulate" Bush. The notice also provided that Heiser should have given Bush an anti-coagulant to reduce the likelihood of an "embolic event" and that after the surgery Heiser had a duty to "diagnose or treat the signs or symptoms of stroke." Although plaintiff did not directly indicate that these things were required under the standard of care, the context leaves no doubt that these statements are statements of the standard of care applicable to a cardiothoracic surgeon acting under the given facts. Hence, the notice provides that Heiser had a duty under the standard of care to be prepared for the types of complications that arise during a "repeat sternotomy," to take steps to reduce the likelihood of an "embolic event," to properly perform the cannulation procedure by placing the clamp in the proper place and in such a way as to reduce damage to the artery and prevent plaque fragmentation, and to ensure proper post-operative monitoring for stroke, which Heiser should have known was a possible complication with this type of surgery. Therefore, when read as a whole, plaintiff's notice contained a good faith statement of the standard of care plaintiff alleged applied to Heiser. *Boodt*, *supra* at 626.

2. Shabahang

As already noted, plaintiff's notice did not contain an adequate statement of the applicable standards of care under the heading of that name. But as was the case with Heiser, when the notice is examined as a whole and without regard to the specific headings, the notice met the minimal requirements of MCL 600.2912b(4)(b).

In addition to the general statement that Shabahang had a duty under the applicable standard of care to competently treat and diagnose patients, plaintiff's notice also alleged that Shabahang had a duty to properly evaluate the risks associated with the various procedures based on Bush's history before recommending a particular procedure. Specifically, plaintiff stated that Shabahang "should have advised Mr. Bush of the extreme risks involved" based on Bush's "history of pediatric cardiac surgery and the location of the aneurysm." The notice also provided that Shabahang, like Heiser, should have been prepared for the specific issues that might arise during a procedure of this nature and should have taken specific steps to reduce the likelihood of both operative and postoperative complications. As part of this duty, plaintiff alleged that Shabahang should have ensured that Bush was properly monitored for complications, such as stroke. Finally, plaintiff also clearly indicated that Shabahang had a duty to use the oscillating saw with sufficient care as to avoid lacerating the aneurysm.

Plaintiff's notice adequately addressed the standard of care applicable to Shabahang as a cardiothoracic surgeon.

D. Statements of Proximate Cause

WM Cardiovascular and Heiser also argue that plaintiff's notice failed to contain a proper statement concerning how these defendants' alleged breaches of the standard of care proximately caused Bush's injuries. We do not agree.

Plaintiff's notice had to also include a statement of the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." MCL 600.2912b(4)(e). In order to satisfy this requirement, the notice must contain specific allegations regarding the conduct of the named defendants. *Roberts*, *supra* at 699-700.

In the present case, we have already concluded that plaintiff's notice met the minimum requirements for alleging that WM Cardiovascular could be held vicariously liable for the actions of Heiser and Shabahang. Hence, whether plaintiff's notice met the requirements for the statements of proximate cause depends on whether the statements of proximate cause for Heiser and Shabahang met the requirements of MCL 600.2912b(4)(e).[6]

[6] Because WM Cardiovascular has not contested the statement of proximate cause for Shabahang, we shall here limit our analysis to the statement of proximate cause applicable to Heiser. Nevertheless, as noted below, we conclude that the notice also contained an adequate statement of proximate cause for Shabahang.

As with the standard of care, plaintiff's statement of proximate cause improperly bundled all defendants under one umbrella statement that was too general to meet the particularity requirements of the statute. See *Roberts*, *supra* at 699-700, citing MCL 600.2912b(4)(e). However, when read as a whole, the notice adequately states the manner in which Heiser's breaches of the standard of care are alleged to have caused Bush's injuries.

The notice provides that, because Heiser failed to properly perform the cannulation procedure, Bush's artery suffered injury and there was "fragmentation of the plaque." Plaintiff also alleged that Heiser's improper technique caused "compartment syndrome" and all this resulted in the cannulae being in for an excessive time. Finally, plaintiff asserted that, had Heiser ordered the use of an anti-coagulant, Bush might not have suffered an embolic event and had Heiser ensured proper monitoring, Bush's stroke could have been properly treated. These failures, plaintiff claimed, caused Bush to suffer "neurological injury, stroke, seizures, speech impairment, ambulation deficits, embolic phenomenon with subsequent brain stem syndrome with supranuclear opthalmoplegia, proximal upper extremity weakness and myocardial infarction." These statements, when read together, were sufficient to meet the notice requirements for proximate causation as applied to Heiser.

E. Spectrum Health's Claims of Error

Spectrum Health also challenges the sufficiency of plaintiff's notice. Specifically, Spectrum Health contends that the notice does not meet the requirements for a statement of the standard of care and a statement of proximate causation for the hospital's staff or Heiser or Shabahang. We agree in part and disagree in part.

Although plaintiff's notice alleges errors on the part of Spectrum Health's nursing staff and physician's assistants, the notice does not purport to state a separate standard of care for the nurses and physician's assistants. This problem is compounded by the fact that the notice does not delineate the specific actions taken by the nursing staff or physician's assistants that purportedly breached the standard of care. Rather, plaintiff's notice generally asserts that the staff should have performed monitoring, charting, assessing and reporting and engaged in advocacy for the patient and otherwise challenged the actions of physicians. Finally, the notice does not state the manner by which the identified breaches proximately caused Bush's injuries. Thus, even when the notice is read as a whole, it does not adequately address the standard of care applicable to Spectrum Health's staff other than Heiser and Shabahang. For that reason, we agree with Spectrum Health that the trial court erred when it concluded that plaintiff's notice met the minimum requirements of MCL 600.2912b(4)(b) with regard to Spectrum Health's nursing staff and physician's assistants. Likewise, to the extent that plaintiff purported to give notice that Spectrum Health could be held directly liable for Bush's injuries based on the theories that it negligently hired or failed to train its staff, for the same reasons explained above with regard to WM Cardiovascular, we conclude that the notice did not meet the requirements of MCL 600.2912b.

However, we disagree with Spectrum Health's contention that plaintiff failed to adequately provide notice that Spectrum Health could be held vicariously liable for the actions of Heiser and Shabahang. As noted above with regard to WM Cardiovascular, plaintiff provided notice that entities such as Spectrum Health were "responsible for the breach of the standard of practice of all their employees[,] agents[,] or assigns," which includes Heiser and Shabahang.

Further, we reject Spectrum Health's argument that plaintiff had to include a statement that asserted that, had Spectrum Health's employees complied with the standard of care, Bush's chance of obtaining a more favorable result would have been at least 51 percent or higher, see *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 539; 687 NW2d 143 (2004), or a statement that Bush's injuries were reasonably foreseeable. The Legislature did not include these requirements in MCL 600.2912b(4), and we decline to read them into the statute.

Spectrum Health also argues that the notice did not provide proper statements of the standard of care or proximate cause for Heiser and Shabahang. As already noted, plaintiff's notice included proper statements of the standard of care for both Heiser and Shabahang. And we have also already considered and rejected the argument that plaintiff's notice failed to make a proper statement of proximate cause for Heiser. Therefore, the only remaining question is whether the notice properly included a statement of proximate cause applicable to Shabahang.

As with the statement of proximate cause applicable to Heiser, when read in its entirety, plaintiff's notice met the minimum requirements for a statement of proximate cause regarding the actions of Shabahang. *Boodt*, *supra* at 626. The notice provided that Shabahang should not have recommended such a dangerous procedure and should have properly informed Bush of the degree of danger. It also provided that Shabahang should have been better prepared for the complications associated with this type of surgery and should not have lacerated the aneurysm. Plaintiff further alleged that this laceration directly "initiated the cascade of events described herein leading to brain injury and left leg compartment syndrome." Finally, plaintiff stated that, with the use of an anti-coagulant and proper monitoring, the injuries associated with the embolic event might have been avoided or mitigated. These statements were sufficient to meet the requirements for a statement of proximate cause under MCL 600.2912b(4)(e) as to Shabahang.

F. Conclusion

When read as a whole, plaintiff's notice met the minimum requirements for statements of the standard of care and proximate cause for Heiser and Shabahang and adequately gave notice that WM Cardiovascular and Spectrum Health could be vicariously liable for the actions of Heiser and Shabahang. However, the notice did not meet the requirements of MCL 600.2912b to the extent that plaintiff sought to hold WM Cardiovascular and Spectrum Health directly liable under a negligent hiring or failure to train theory and to the extent that plaintiff sought to hold Spectrum Health liable based on the actions of staff members other than Heiser or Shabahang.

III. Premature Filing of Complaint

We shall next address Shabahang's argument that the trial court erred when it concluded that plaintiff did not prematurely file suit in violation of MCL 600.2912b(1).

A. Statutory Notice Requirements

A plaintiff is prohibited from commencing an action alleging medical malpractice unless the plaintiff has given the health professional written notice "not less than 182 days before the action is commenced." MCL 600.2912b(1). The notice must include a statement of the factual basis for the claim, the applicable standard of care, the manner in which it is claimed that the health professional breached the standard of care, the alleged actions that should have been taken

to achieve compliance with the standard of care, the manner that the breach proximately caused the injury, and the names of all health professionals notified under the section in relation to the claim. MCL 600.2912b(4). The defendant's remedy for a plaintiff's failure to comply with these provisions is dismissal of the plaintiff's case. *Burton*, *supra* at 753. Our Supreme Court has further held that the filing of a complaint before the expiration of the 182-day notice period does not commence the suit. *Id.* at 754. Hence, a suit filed before the expiration of the 182-day notice period will not toll the period of limitations under MCL 600.5856(a). *Id.* at 756.

Within 154 days after receipt of the notice required by MCL 600.2912b(1), the defendant must furnish a written response to the plaintiff. MCL 600.2912b(7). The response must include a statement of the factual basis for the defense, the standard of care the health professional claims applies, the manner in which it is claimed that the health professional complied with the standard of care, and the manner in which the health professional contends that the alleged negligence was not the proximate cause of the plaintiff's injuries. MCL 600.2912b(7)(a) to (d). If the plaintiff does not receive the written response required under MCL 600.2912b(7) within the 154-day time period, the plaintiff may commence the suit "upon the expiration of the 154-day period." MCL 600.2912b(8). Hence, although the remedy for a plaintiff's failure to provide an adequate notice is dismissal of the action, the plaintiff's remedy for a defendant's failure to file an adequate response is that the plaintiff *may* commence the suit up to 28 days earlier than would otherwise be required under MCL 600.2912b(1).

B. Premature Filing and Notice

In the present case, it is undisputed that Shabahang provided a response to plaintiff's notice. However, on appeal plaintiff argues that the notice did not meet the requirements of MCL 600.2912b(7). Therefore, plaintiff further contends, it could properly commence its suit upon the expiration of the 154-day period. See MCL 600.2912b(8). Shabahang counters that plaintiff could not unilaterally determine that the response was inadequate. Instead, the response must be considered presumptively adequate. Therefore, Shabahang continues, once he filed his response, plaintiff was required to wait the full 182 days.[7] We do not agree that plaintiff had to successfully challenge the validity of the response before filing his complaint under the shortened period provided by MCL 600.2912b(8).

Under the plain language of MCL 600.2912b(7), a medical malpractice defendant must provide a written response that includes the statements enumerated under MCL 600.2912b(7)(a) through (d). Further, a plaintiff is entitled to commence the suit up to 28 days before the expiration of the 182 waiting period required under MCL 600.2912b(1), if the plaintiff "does not receive the written response *required* under [MCL 600.2912(7)] within the 154-day time period." MCL 600.2912b(8) (emphasis added). Because the plaintiff is entitled to the response *required* by MCL 600.2912b(7) within the 154-day period, it is clear that the defendant's response must

[7] After hearing oral arguments on the adequacy of Shabahang's response to plaintiff's notice, the trial court ruled that plaintiff's complaint was not prematurely filed. Hence, the trial court implicitly determined that Shabahang's response did not meet the requirements of MCL 600.2912b(7). On appeal, Shabahang does not challenge this determination.

be timely *and* must meet the substantive requirements of MCL 600.2912b(7)(a) through (d). Therefore, if a defendant's response is either untimely or does not meet the requirements of MCL 600.2912b(7), the plaintiff will be entitled to the remedy provided under MCL 600.2912b(8). However, the statute does not directly address whether a plaintiff must first challenge the validity of a defendant's response before utilizing the early filing provisions of MCL 600.2912b(8).

Shabahang relies in part on our Supreme Court's decision in *Saffian v Simmons*, 477 Mich 8; 727 NW2d 132 (2007), for the proposition that plaintiff cannot unilaterally determine that his response did not meet the requirements of MCL 600.2912b(7).

In *Saffian*, the plaintiff sued for malpractice. After the defendant failed to answer plaintiff's complaint, plaintiff filed a default. *Id.* at 10. On appeal, the defendant argued that it did not have to answer the plaintiff's complaint because the plaintiff's affidavit of merit did not meet the substantive requirements of MCL 600.2912d and, therefore, never commenced the suit. Our Supreme Court disagreed.

The Court first noted that MCL 600.2912e(1) "provides that a defendant in a medical malpractice action 'shall' answer the complaint within 21 days after the plaintiff has filed 'an affidavit in compliance with section 2912d.'" *Id.* at 12. The Court then explained that "nothing in either MCL 600.2912e(1) or MCR 2.108(A)(6) authorizes a defendant to determine unilaterally whether the plaintiff's affidavit of merit satisfies the requirements of MCL 600.2912d." *Id.* at 13. After noting the absence of statutory language providing for a defendant's unilateral determination concerning the sufficiency of the affidavit, the Court approvingly noted that the Court of Appeals majority and concurrence had determined that it was up to the trial court to determine the sufficiency of the pleadings. *Id.* As such, until properly rebutted in a judicial proceeding, an affidavit of merit is presumed valid. *Id.* The Court also justified its holding on policy grounds; it explained that the presumption would establish a "more orderly process" for challenging affidavits and advance "the efficient administration of justice." *Id.* at 14.

Just a few months later, our Supreme Court reiterated that affidavits of merit are presumptively valid. See *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007), citing *Saffian*, *supra* at 13. It further clarified that "a complaint and affidavit of merit toll the period of limitations until the validity of the affidavit is successfully challenged in 'subsequent judicial proceedings.'" *Id.* "Thus, if the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit." *Id.* And, if the challenge is successful, the proper remedy is dismissal without prejudice, after which time the period of limitations resumes running. *Id.*

This Court, in turn, adopted by analogy our Supreme Court's treatment of potentially deficient affidavits of merit in *Kirkaldy* as the proper method for treating potentially deficient notices under MCL 600.2912b(1). See *Potter*, *supra* at ___. Hence, under *Potter*, a notice of intent is presumed valid until successfully challenged. *Id.* Further, the remedy for a successful challenge "is dismissal without prejudice, affording the plaintiff the opportunity to cure the deficiency within the time remaining within the limitations period as theretofore tolled by the now-invalidated notice or the subsequent filing of the complaint." *Id.*

Although the presumption of validity for affidavits of merit and notices under *Saffian*, *Kirkaldy*, and *Potter* appears applicable by analogy to the response required by MCL

600.2912b(7), on closer examination, the underlying bases in support of a presumption of validity for affidavits of merit and notices actually militate against such a presumption for the response required by MCL 600.2912b(7). As a preliminary matter, it must be noted that the Court in *Potter* adopted the presumption for notices based solely on *Kirkaldy*, which in turn relied exclusively on *Saffian*; neither the Court in *Kirkaldy* nor the Court in *Potter* offered an independent analysis of the bases for the presumption. In *Saffian*, our Supreme Court relied on three bases for the creation of the presumption of validity for affidavits of merit: (1) the absence of statutory language permitting a defendant to unilaterally determine whether the affidavit was valid, (2) the fact that trial courts typically determined the sufficiency of pleadings, and (3) based on policy reasons such as the orderly and efficient administration of justice. *Saffian*, *supra* at 13-14.

Under the statutory provisions governing affidavits of merit and notices of intent, the Legislature did not specifically provide a remedy for a plaintiff's failure to comply with the substantive requirements for affidavits of merit and notices. See MCL 600.2912d and MCL 600.2912b. In contrast, MCL 600.2912b(8) provides a remedy for a defendant's failure to file the response required by MCL 600.2912b(7). Under the plain language of this statute, the plaintiff "may commence" the medical malpractice suit after the passage of 154 days rather than waiting the full 182 days required by MCL 600.2912b(1). See MCL 600.2912b(8). By stating that the plaintiff "may commence" the suit, the Legislature implicitly—if not explicitly—gave the plaintiff the discretion to decide whether to avail himself of the benefit of MCL 600.2912b(8).

Moreover, a defendant's response is not a pleading under MCR 2.110(A) and is not a prerequisite for the filing of any pleading. This is in contrast to the requirements for an affidavit of merit and notice, which are both prerequisites to commencing a medical malpractice suit. See MCL 600.2912b(1) and MCL 2912d(1); see also *Scarsella v Pollak*, 461 Mich 547, 553; 607 NW2d 711 (2000) (noting that a filing of a medical malpractice complaint is ineffective without an affidavit of merit) and *Burton*, *supra* at 752-753 (noting that compliance with MCL 600.2912b(1) is mandatory before the commencement of a medical malpractice suit). Thus, a challenge to the sufficiency of an affidavit of merit or notice constitutes a challenge to the suit as a whole. Because a defective affidavit of merit or notice will result in the dismissal of the plaintiff's suit, it is essential to the efficient administration of justice that the trial court determine the validity of the affidavit or notice. In contrast, a plaintiff's unilateral decision to file early in belief that the defendant's response under MCL 600.2912b(7) was deficient does not substantively affect the defendant's rights; the defendant may still challenge the plaintiff's filing as premature under MCL 600.2912b(1). Indeed, a plaintiff who files before the expiration of the 182-day waiting period in reliance on MCL 600.2912b(8) assumes the risk that the trial court will conclude that the defendant's response was adequate and, therefore, dismiss the plaintiff's case. Finally, because of the limited number of days within which a plaintiff may make use of MCL 600.2912b(8), it is impractical to require plaintiffs to challenge the defendant's response by motion and hearing before the trial court. By the time the parties could schedule a hearing and brief the issue, much—if not all—of the time afforded to the plaintiff by MCL 600.2912b(8) would be lost.

For these reasons, we conclude that a plaintiff does not need to challenge the sufficiency of the response required under MCL 600.2912b(7) before utilizing the shortened filing period

provided by MCL 600.2912b(8). Nevertheless, we caution that a plaintiff who files suit before the expiration of the 182 day period required under MCL 600.2912b(1) on the basis that the defendant's response did not meet the requirements of MCL 600.2912b(7) still risks dismissal of his suit if the trial court later determines that the defendant's response was adequate. See *Burton*, *supra* at 756.

C. Conclusion

For these reasons, we conclude that plaintiff could properly choose to file after the 154-day period specified in MCL 600.2912b(8) on the basis that defendant's response did not meet the requirements of MCL 600.2912b(7). Consequently, the trial court did not err when it concluded that plaintiff's complaint was not prematurely filed.

IV. General Conclusions

Although it could have been drafted more artfully, plaintiff's notice contained adequate statements of the standard of care and proximate causation applicable to Heiser and Shabahang. Further, the notice put WM Cardiovascular and Spectrum Health on notice that plaintiff claimed that they could be held vicariously liable for the actions of Shabahang and Heiser. Therefore, the trial court did not err when it refused to grant summary disposition based on defendants' claims that the notice was deficient in these regards. However, plaintiff's notice did not meet the requirements of MCL 600.2912b for purposes of holding WM Cardiovascular and Spectrum Health directly liable under a negligent hiring or failure to train theory. It was also insufficient to provide notice of vicarious liability as to Spectrum Health's staff members other than Heiser and Shabahang. Therefore, the trial court should have granted summary disposition in favor of WM Cardiovascular and Spectrum Health to the extent that plaintiff's claims rely on direct liability theories and to Spectrum Health to the extent that plaintiff's claims arise from the actions of Spectrum Health's staff other than Heiser and Shabahang.[8] Finally, because plaintiff could properly elect to file suit after 154 days based on his belief that Shabahang's response to the plaintiff's notice was deficient, the trial court did not err when it concluded that plaintiff's suit was not prematurely filed.

Reversed in part and remanded for entry of partial summary disposition without prejudice in favor of WM Cardiovascular and Spectrum Health consistent with this opinion. The applicable limitations periods remain tolled until entry of the grants of summary disposition. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Jane M. Beckering

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[8] As noted above, the trial court already dismissed plaintiff's claims against Spectrum Health to the extent that those claims were based on the actions of Spectrum Health's physician assistants.

STATE OF MICHIGAN

COURT OF APPEALS

GARY L. BUSH, Guardian of GARY E. BUSH, a Protected Person,

Plaintiff-Appellee,

v

BEHROOZ-BRUCE SHABAHANG, M.D.,

Defendant-Appellant,

and

JOHN CHARLES HEISER, M.D., WEST MICHIGAN CARDIOVASCULAR SURGEONS, GEORGE T. SUGIYAMA, M.D., M. ASHRAF MANSOUR, M.D., VASCULAR ASSOCIATES, P.C., and SPECTRUM HEALTH BUTTERWORTH CAMPUS,

Defendants.

FOR PUBLICATION
May 1, 2008

No. 274708
Kent Circuit Court
LC No. 06-000982-NM

GARY L. BUSH, Guardian of GARY E. BUSH, a Protected Person,

Plaintiff-Appellee,

v

BEHROOZ-BRUCE SHABAHANG, M.D., GEORGE T. SUGIYAMA, M.D., M. ASHRAF MANSOUR, M.D., VASCULAR ASSOCIATES, P.C., and SPECTRUM HEALTH BUTTERWORTH CAMPUS,

Defendants,

and

No. 274709
Kent Circuit Court
LC No. 06-000982-NM

JOHN CHARLES HEISER, M.D., and WEST MICHIGAN CARDIOVASCULAR SURGEONS,

Defendants-Appellants.

GARY L. BUSH, Guardian of GARY E. BUSH, a Protected Person,

Plaintiff-Appellee,

v

No. 274726
Kent Circuit Court
LC No. 06-000982-NM

BEHROOZ-BRUCE SHABAHANG, M.D., JOHN CHARLES HEISER, M.D., WEST MICHIGAN CARDIOVASCULAR SURGEONS, GEORGE T. SUGIYAMA, M.D., M. ASHRAF MANSOUR, M.D., and VASCULAR ASSOCIATES, P.C.,

Defendants,

and

SPECTRUM HEALTH BUTTERWORTH CAMPUS,

Defendant-Appellant.

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

FITZGERALD, P.J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's conclusion in Issue III that the shortened notice period contained in MCL 600.2912b(8) applies when a plaintiff unilaterally determines that a defendant's response does not satisfy the requirements of MCL 600.2912b(7).

In *Westfall v McCririe,* unpublished opinion per curiam of the Court of Appeals, issued March 30, 2006 (Docket No. 265386),[1] the plaintiffs argued that they were relieved of their obligation to wait 182 days to file their complaint because the defendants' response to their notice of intent (NOI) failed to comply with MCL 600.2912b(7), thus triggering the shortened

[1] The Supreme Court denied leave to appeal in an order dated April 24, 2007. I was a member of the *Westfall* panel.

154-day notice provision in MCL 600.2912b(8) and eliminating the 182-day notice provision of MCL 600.2912b(1). A panel of this Court determined that, "Resolution of this issue requires this Court to construe MCL 600.2912b to ascertain whether the Legislature intended to authorize a plaintiff in a medical malpractice case to unilaterally determine that a defendant's response failed to comply with MCL 600.2912b(7) so as to relieve the plaintiff of the obligation to wait 182 days after filing the NOI before filing the complaint." The panel disagreed with the plaintiff's argument, and opined at slip op p 4:

> Plaintiffs, who filed their complaint against defendants 156 days after providing defendants with the NOI, argue that the shortened notice period contained in MCL 600.2912b(8) applies in this case. However, plaintiffs did receive defendants' written response within the 154-day time period. The language of MCL 600.2912b(8) does not permit a plaintiff to unilaterally determine whether a defendant's response satisfies the detailed requirements of MCL 600.2912b(7). Furthermore, MCL 600.2912b does not authorize a plaintiff to ignore the 182-day notice requirement in MCL 600.2912b(1) if the defendant's response does not comply with MCL 600.2912b(7). The Legislature could have specifically authorized a plaintiff to make a determination regarding whether a defendant's response complied with MCL 600.2912b(7). However, it did not do so. If the Legislature had intended to allow medical malpractice plaintiffs to unilaterally determine whether a defendant's response failed to comply with MCL 600.2912b(7) so as to relieve plaintiffs of the obligation to wait 182 days after submitting their NOI before filing a complaint, it would have expressly provided such authority in MCL 600.2912b. Nothing in the language of MCL 600.2912b indicates that the Legislature intended to grant plaintiffs the authority to unilaterally make such a determination. When the language of a statute is not ambiguous, a statute must be enforced as written. *Pohutski*, *supra* at 683. A court may not speculate as to the probable intent of the Legislature beyond the language used in the statute. *Cherry Growers, Inc* [*v Agricultural Marketing & Bargaining Bd,* 240 Mich App 153; 610 NW2d 613 (2000)], *supra* at 173. Furthermore, in construing a statute, this Court should assume that an omission in the statute was intentional. *People v Wilson*, 257 Mich App 337, 345; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004). Because the Legislature did not specifically authorize a medical malpractice plaintiff to unilaterally determine whether a medical malpractice defendant's response complied with MCL 600.2912b(7) as to relieve the plaintiff of his obligation to wait 182 days after filing the NOI before filing the complaint, we presume that the Legislature's omission of such language was intentional and refused to expand MCL 600.2912b(8) beyond the language used in the statute. Irrespective of whether defendants' response satisfied the detailed requirements of MCL 600.2912b(7), plaintiffs received defendants' response within 154 days after providing defendants with their NOI. Therefore, the shortened notice period contained in MCL 600.2912b(8) does not apply.

I agree with the *Westfall* analysis and, therefore, disagree with the majority's conclusion that plaintiff could properly choose to file the complaint after the 154-day period specified in MCL 600.2912b(8) on the basis that the defendant's response did not meet the requirements of MCL

600.2912b(7). Even assuming, as the majority does, that "a plaintiff's unilateral decision to file early in belief that the defendant's response under MCL 600.2912b(7) was deficient does not substantively affect the defendant's rights," such a policy consideration is not relevant to determining whether the language of the statute is clear on its face.

/s/ E. Thomas Fitzgerald