

STATE OF MICHIGAN
COURT OF APPEALS

NANCY GILLESPIE and GARY GILLESPIE,

Plaintiffs-Appellees,

v

LANSING OB-GYN ASSOCIATES,

Defendant-Appellant.

UNPUBLISHED

February 26, 2004

No. 244194

Ingham Circuit Court

LC No. 01-093592-NH

Before: Schuette, P.J., and Whitbeck, C.J. and Owens, J.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its motion for summary disposition. We reverse and remand for entry of summary disposition in favor of defendant. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

On April 1, 1998 plaintiff Nancy Gillespie presented to defendant for evaluation of a discharge from and possible lump in her left breast. Bonnie McClure¹, a nurse practitioner, examined Nancy Gillespie and scheduled a mammogram. Nancy Gillespie was not examined by a physician on this occasion. The mammogram was interpreted as negative. On November 24, 1998 Nancy Gillespie returned to defendant and was examined by James Barton, II, M.D. A repeat mammogram was suspicious for a malignancy in the left breast. Nancy Gillespie underwent a mastectomy and was found to have breast cancer.

On May 7, 2001 plaintiffs filed a complaint alleging medical malpractice against defendant and Dr. Barton. The complaint was accompanied by an affidavit of merit from Dr. David, a Massachusetts-based board-certified obstetrician/gynecologist, who opined that defendant and Barton breached the applicable standard of care by failing to examine Nancy Gillespie after the nurse practitioner did so and by failing to re-check her in four to six weeks. The complaint and affidavit of merit referred to treatment rendered on April 1, 1998 only;

¹ McClure is mistakenly referred to in plaintiff's complaint as "Bonnie McChurch."

therefore, Dr. Barton filed an affidavit asserting his non-involvement as authorized by MCL 600.2912e. The trial court entered a stipulated order dismissing Barton, only, with prejudice.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiffs' affidavit of merit was insufficient because it was not signed by a nurse practitioner, and therefore, the filing of plaintiffs' complaint did not toll the limitations period. The trial court denied defendant's motion, finding that plaintiffs filed the affidavit in good faith and that the affidavit complied with statutory requirements.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

III. ANALYSIS

The statute of limitations for a medical malpractice action is two years. MCL 600.5805(6). The two-year limitations period is subject to a six-month discovery rule exception. Under this exception, a claim may be commenced after the expiration of the two-year period if it is commenced within six months after the plaintiff discovered or should have discovered the claim. MCL 600.5838a(2). In a medical malpractice action, the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). An institution may be vicariously liable for the acts of its agents. If an institution is the only named defendant, the issue is whether the institution's agents violated the standard of care applicable to them. *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 11, 14-15; 651 NW2d 356 (2002).

The applicable standard of care for nurses is the skill and care ordinarily possessed and exercised by practitioners in the same or similar localities. Expert testimony is necessary to establish the standard of care because the ordinary layperson is not equipped to judge the skill and competence of the service rendered and to determine whether it meets the applicable standard of care. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003).

A medical malpractice plaintiff must file with the complaint an affidavit of merit signed by a health professional who meets or who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169(1). The affidavit must contain a statement of the applicable standard of practice or care, the health professional's opinion that the applicable standard of practice or care was breached by the health professional or facility, the actions which should have been taken or omitted by the health professional or facility in order to have complied with the applicable standard of practice or care, and the manner in which the breach of the standard of practice or care was the proximate cause of the alleged injury. MCL 600.2912d(1). MCL 600.2169(1) provides that a person may not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional, and if the party against whom the testimony is offered is a specialist, specializes at the time of the occurrence which is the basis for the action in the same specialty as the party against whom the testimony is offered.

We reverse the trial court's decision and remand for entry of summary disposition in favor of defendant. Plaintiffs claim that defendant is vicariously liable for malpractice committed by McClure, a nurse practitioner in its employ. A plaintiff who brings a medical malpractice action against an institution only must file with the complaint an affidavit of merit executed by a health professional who specializes in the same specialty as the professional on whose conduct the action is based. *Nippa v Botsford General Hosp (On Remand)*, 257 Mich App 387, 392-393; 668 NW2d 628 (2003). Plaintiffs' affidavit of merit was signed by a board-certified obstetrician/gynecologist and not by a nurse practitioner. In opposition to defendant's motion for summary disposition, plaintiffs asserted that the affidavit should be deemed sufficient because a physician was familiar with and could testify regarding the standard of care applicable to nurses. However, under the plain language of MCL 600.2169(1), plaintiffs' named expert was not qualified to give expert testimony against McClure, the agent whose actions formed the basis of the claim against defendant.

Furthermore, plaintiffs' affidavit is not sufficient to sustain the vicarious liability action against defendant because it does not meet the requirements set out in MCL 600.2912d(1). The affidavit does not contain the following required elements: a statement of the standard of care applicable to nurse practitioners who practice in the same locality, *Wiley, supra*; a statement that McClure breached the applicable standard of care; and a statement of the actions McClure should have taken or omitted in order to comply with the applicable standard of care. An affidavit of merit which is grossly nonconforming to the statutory requirements is not an affidavit of merit which satisfies the statutory filing requirements, and thus does not support the filing of a complaint that tolls the running of the statute of limitations. *Mouradian v Goldberg*, 256 Mich App 566, 571-575; 664 NW2d 805 (2003). The filing of plaintiffs' complaint and affidavit did not toll the limitations period, and defendant was entitled to dismissal of the suit with prejudice. *Id.*; see also *Geralds v Munson Healthcare*, ___ Mich App ___, ___ NW2d ___ (Docket No. 240159; pub'd October 28, 2003 at 9:05 a.m.), slip op at 7.

Reversed and remanded. We do not retain jurisdiction.

/s/ Bill Schuette

/s/ Donald S. Owens

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WHITBECK, C.J., (*concurring*).

Although I concur in the majority’s opinion, I write separately to note that I do so only because precedent requires it. As I explained in my dissent in *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 397-411; 668 NW2d 628 (2003) (Whitbeck, C.J., dissenting), it is my view that MCL 600.2912d(1) does not require a plaintiff to file an affidavit of merit signed by a board-certified specialist if that plaintiff has sued only the hospital for medical malpractice under a vicarious liability theory. I hold this view because MCL 600.2169(1) requires that an expert testifying in a medical malpractice case have the same credentials as “the *party* against whom or on whose behalf the testimony is offered” (emphasis added). In this case, the “party” is a hospital, not a specialist, and the word “party” — which is a term of art meaning “those by or against whom a legal suit is brought” or “the party plaintiff or defendant” — should not be construed to extend to agents of a party. *Nippa, supra* at 402 (internal quotations omitted). However, because we are bound by MCR 7.215(J)(1) to follow the published opinion in *Nippa*, I agree that we must reverse and remand.

/s/ William C. Whitbeck