

STATE OF MICHIGAN  
COURT OF APPEALS

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WILLIAM NEWTON,  
Plaintiff-Appellant,

UNPUBLISHED  
April 18, 2006

v

GIDEON L. MEDINA, M.D., and GIDEON L.  
MEDINA, M.D., P.C.,

No. 266232  
Berrien Circuit Court  
LC No. 2004-003425-NH

Defendants-Appellees.

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Before: Murphy, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

In this medical malpractice action brought against defendant physician, Gideon L. Medina, M.D., and his professional corporation, Gideon L. Medina, M.D., P.C.,<sup>1</sup> defendant moved for summary disposition on the ground, *inter alia*, that plaintiff’s notice of intent to file suit did not comply with the requirements of MCL 600.2912b(4) and that, therefore, the action was barred by the two-year statute of limitations. The trial court granted the motion. Plaintiff appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was involved in a motor vehicle accident on May 5, 2002, and sustained a comminuted fracture of the right fibula with an associated fracture of the medial malleolus of his right ankle. Defendant performed open reduction and internal fixation surgery on plaintiff’s ankle that evening. Plaintiff received follow-up care from defendant from May through August 2002. On August 5, 2002, defendant released him to return to work. Plaintiff obtained a second opinion from another orthopedic surgeon, who performed a second surgery on the ankle and removed two long screws and four distal plate screws, replacing them with three shorter screws and a synthetic bone.

On May 7, 2004, plaintiff served defendant with a notice of intent to file suit as required by MCL 600.2912b. The notice of intent stated that a fibula plate was applied with a lack of

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<sup>1</sup> Defendant physician and defendant corporation are referred to as “defendant” in the singular in this opinion. Other named defendants in the litigation were dismissed by stipulated order and are not parties to this appeal.

satisfactory reduction of a central piece of the comminuted cortical fragment of the fibular fracture, such that there was a gap between the two fragments of the fibula. The notice further asserted that three screws and the plate had passed completely through bone and out the other side such that they were impinging on tissues.

On November 5, 2004, plaintiff filed a medical malpractice complaint, alleging that defendant had breached the standard of care in performing plaintiff's surgery. Along with the complaint, plaintiff filed the affidavit of Roger Dee, M.D., an orthopedic surgeon, stating that defendant had breached the standard of care by utilizing screws that were too long and by failing to properly reduce the comminuted fracture of the mid-portion of the fibula by fixing it in a poor position. On November 16, 2004, plaintiff filed an amended complaint, adding allegations that defendant had breached the applicable standard of care in his treatment of plaintiff *following* the surgery. Plaintiff subsequently filed an amended affidavit of merit, in which Dee additionally stated that defendant violated the standard of care in follow-up visits on May 24, June 7, July 16, and August 2, 2002, by failing to remove the improper hardware and to apply screws that were appropriate in length and by failing to place the nonunion in a proper position for healing.

Defendant sought summary disposition, arguing that the two-year statute of limitations for medical malpractice actions, MCL 600.5805(6), barred plaintiff's action for several reasons, including that the notice of intent was not filed until after expiration of the limitation period with respect to the May 5, 2002, surgery, and that the notice of intent and affidavits of merit did not comply with the statutory requirements.

The trial court granted defendant's motion, holding that (1) the claim as it related to the May 5, 2002, surgery was time-barred because the notice of intent was not filed until more than two years after that date,<sup>2</sup> and (2) the remaining allegations were also time-barred because the notice of intent did not address defendant's post-surgery treatment of plaintiff.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Similarly, this Court reviews de novo whether a statute of limitations bars a claim. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005).

The limitation period for a medical malpractice action is two years. MCL 600.5805(6). A plaintiff generally may not commence a medical malpractice complaint any earlier than 182 days after providing a written notice of intent to sue pursuant to MCL 600.2912b. *Mayberry v General Orthopedics, PC*, 474 Mich 1, 4; 704 NW2d 69 (2005). Once the notice is given in compliance with MCL 600.2912b, the two-year period of limitations is tolled during the notice period. MCL 600.5856(c).

MCL 600.2912b(4) sets forth the following requirements:

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

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<sup>2</sup> This portion of the trial court's ruling is not challenged on appeal.

- (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 is 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.

“[I]n order to toll the limitation period under § 5856(d),<sup>3</sup> the claimant is required to comply with all the requirements of § 2912b.” *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 686; 684 NW2d 711 (2004). Moreover, “it is plaintiff’s burden to establish compliance with § 2912b and, in turn, to establish entitlement to application of the notice tolling provision, § 5856(d).” *Id.* at 691.

A plaintiff does not have to craft the notice “with omniscience.” *Roberts, supra* at 691. However, he must “set forth *particular* allegations and claims regarding the applicable standard of care, breach, etc.,” and must do so “in good faith, in a manner that is responsive to the specific queries posed by the statute, and with enough detail to allow the potential defendants to understand the claimed basis of the impending malpractice action[.]” *Id.* at 691 n 7 (emphasis supplied).

We conclude that plaintiff’s notice of intent was insufficient to provide notice of any claims with respect to defendant’s post-surgical treatment of plaintiff. The purpose of the statutory notice requirement is to “notify[] potential malpractice defendants of the basis of the claims against them.” *Roberts, supra* at 696 n 14. Plaintiff’s notice fails to notify potential defendants of any claims based on the post-surgery follow-up care of plaintiff. Instead, the notice focuses exclusively on defendant’s alleged implantation of screws that were too long and the failure to appropriately reduce the comminuted fracture during the surgery. Paragraph 2 of the notice, labeled “The Applicable Standard of Practice or Care Alleged,” states that the appropriate surgery for plaintiff’s fracture required screws “of appropriate length” and that a comminuted fracture “must be appropriately reduced.” Paragraph 3 of the notice, addressing the manner in which the standard of care was breached, states that “[defendant’s] surgery on [plaintiff] did not meet the standard of care” because “[s]crews were placed that were too long,” “the fibula was not adequately reduced,” and “[t]he piece of bone should have been fixed in a better position than it was.” Paragraph 4, labeled “The Action That Should Have Been Taken to Achieve Compliance With the Standard of Practice or Care,” provides that defendant should have used screws of appropriate length and that he should have adequately reduced the

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<sup>3</sup> The language of § 5856(d) is now found in amended form in § 5856(c). 2004 PA 87.

comminuted mid-portion of the fracture and fixed it in a better position. Paragraph 5, referring to the manner in which the alleged breach was the proximate cause of plaintiff's injury, once again mentions only the length of the screws and the inadequate reduction of the comminuted fracture.

Plaintiff points to a single sentence in Paragraph 4 of the notice, which he claims clearly referred to defendant's follow-up treatment of plaintiff: "Knowing his mistake which was apparent on x-rays he should have corrected it." We disagree. It is far from clear that this single sentence, juxtaposed among allegations solely aimed at defendant's improper surgical treatment of plaintiff, refers to plaintiff's follow-up care. It is equally, or more, likely that this sentence refers to defendant's failure to correct his alleged mistake *during the surgery*. The plaintiff is required to "identify, in a *readily ascertainable manner*, the specific information mandated by § 2912b(4)." *Roberts, supra* at 696 (emphasis supplied). The ambiguous charge that defendant "should have corrected his mistake" is not "readily ascertainable" as a reference to conduct that occurred after surgery. Furthermore, the bare statement that an alleged mistake "should have [been] corrected" does not set forth the specific "*action*" that should have been taken to achieve compliance with the applicable standard of care. § 2912b(4)(d).

Moreover, even if this single sentence can reasonably be construed as applying to defendant's post-surgical care of plaintiff in May, June, July, and August 2002, the fact remains that each of the other sections of the statutorily-mandated notice deals solely with the standard of care and breach of that standard as it pertained to the surgery itself. The plaintiff is required "to provide 'a statement' of *each* of the enumerated categories of information" required under § 2912b(4). *Roberts, supra* at 696 (emphasis supplied). Plaintiff has set forth absolutely no standard of care with respect to the follow-up treatment of a surgical patient whose x-rays demonstrate that the screws used during that surgery have passed through the bone. Nor does the notice of intent set forth any breach of the (unstated) standard of care with respect to the post-surgery care of a patient in plaintiff's position. Thus, to the extent that plaintiff now bases his claim on defendant's follow-up treatment of plaintiff, the notice of intent was not minimally compliant with the requirements of § 2912b(4)(b), (c), and (e).

A medical malpractice claimant is limited to the issues that are raised in the notice of intent in a manner that is compliant with § 2912b(4). *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 484; 679 NW2d 98 (2004). The only issue that was properly raised in plaintiff's complaint, then, was malpractice at the time of surgery. Because this claim was time-barred, the trial court properly dismissed the complaint in its entirety on the basis of the defective notice of intent.<sup>4</sup>

Affirmed.

/s/ William B. Murphy  
/s/ Peter D. O'Connell  
/s/ Christopher M. Murray

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<sup>4</sup> In light of our resolution of this issue, it is unnecessary to address the alternative bases for summary disposition that were raised by defendant but not decided by the trial court.