STATE OF MICHIGAN

COURT OF APPEALS

VALERIE E. SFREDDO and JOSEPH SFREDDO, Plaintiffs-Appellants, v UNIVERSITY OF MICHIGAN REGENTS and UNIVERSITY OF MICHIGAN HEALTH SYSTEMS, Defendants-Appellees.	UNPUBLISHED August 19, 2004 No. 249912 Court of Claims LC No. 02-000179-MH

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In this medical malpractice and ordinary negligence action, plaintiffs Valerie E. Sfreddo and Joseph Sfreddo appeal as of right from the trial court's orders granting summary disposition in favor of defendants University of Michigan Regents and University of Michigan Health Systems on the grounds that the malpractice claims were barred by the statute of limitations and the ordinary negligence claims also were barred because the alleged negligence arose within the course of a professional relationship and are therefore subject to the procedural requirements of medical malpractice claims. We affirm.

This case arises from plaintiff Valerie Sfreddo[1] allegations that she sustained injuries during a magnetic resonance imaging (MRI) procedure conducted at the University of Michigan Medical Center on March 9, 2000. On May 18, 2000, plaintiffs' counsel at the time sent a letter to defendants' general counsel stating that notice was being given as required under MCL 600.2912b for a claim of professional negligence. On March 5, 2002, approximately twenty-two months after issuing their first notice and just days before the expiration of the statute of limitations, plaintiffs' subsequently retained counsel sent a second letter to defendants that again stated that notice was being given under MCL 600.2912b for a claim of medical malpractice. On

[1] Plaintiff Joseph Sfreddo's claim is for loss of consortium.

September 3, 2002,[2] plaintiffs filed their complaint for medical malpractice arising out of the claimed injury occurring during the MRI conducted on March 9, 2002.

Defendants moved for summary disposition under MCR 2.116(C)(7) asserting that plaintiffs' action was barred by the two-year statute of limitations for a medical malpractice action, MCL 600.5805(5).[3] The trial court determined that plaintiffs' initial notice of intent met the minimum requirements of the notice statute and therefore granted defendants' motion. In effect, the trial court's decision indicated that plaintiffs' second notice did not toll the running of the statute of limitations pursuant to MCL 600.5856(d).[4] However, the trial court also allowed plaintiffs time to file an amended complaint to allege ordinary negligence.

After plaintiffs filed an amended complaint, defendants filed a second motion for summary disposition under MCR 2.116(C)(7) maintaining that the amended complaint also stated a claim of medical malpractice that was barred by the statute of limitations. The trial court granted this motion and dismissed the case, determining that the allegations of the amended complaint raised questions of medical judgment. This appeal ensued.

Both issues raised by plaintiffs in this case challenge the trial court's decision to grant summary disposition under MCR 2.116(C)(7). We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations." *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). In determining whether the trial court properly granted summary disposition under this subsection, "[w]e consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001); MCR 2.116(G)(5).

Plaintiffs first argue that the trial court erred in relying on the May 18, 2000 notice to determine if the complaint was timely filed instead of holding that it was insufficient and then concluding that the second notice sent on March 5, 2002, which was shortly before the end of the two-year period for filing medical malpractice claims, tolled the running of the statute of limitations under the provisions of MCL 600.5856(d). We disagree.

Under Michigan statutory provisions that govern the tolling of the statute of limitations in medical malpractice cases, if a notice of intent to sue is given pursuant to MCL 600.2912b and the interval when a potential plaintiff is not allowed to sue under that statute expires before the limitation period ends, then the tolling provision of MCL 600.5856(d) is of no consequence. *Omelenchuk v City of Warren*, 461 Mich 567, 574; 609 NW2d 177 (2000), clarified and

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[2] The complaint is dated August 26, 2002.

[3] MCL 600.5805(5) was renumbered as MCL 600.5805(6) by 2002 PA 715, effective March 31, 2003.

[4] Our Legislature recently amended MCL 600.5856, see 2004 PA 87, effective April 22, 2004, but that amendment is not applicable here.

overruled in part on other grds in *Wyse*, *supra* at 652-655. Further, if a potential plaintiff issues more than one notice of intent under MCL 600.2912b, only the first notice can result in the tolling of the statute of limitations under MCL 600.5856(d), even if the first notice had no tolling effect. See *Ashby v Byrnes*, 251 Mich App 537, 544-545; 651 NW2d 922 (2002). Here, factually, this case is controlled by the above case law; however, plaintiffs take the novel approach of attacking the sufficiency of their first notice of intent delivered by their first attorney; thus claiming that the notice of intent prepared by their second attorney is the only operative notice and it served to toll the running of the statute.

Regardless of the sufficiency of the first notice, we do not believe that plaintiffs can attack the validity of their own notice for purposes of tolling the statute. The intent of the statutory scheme, as identified in *Ashby*, is to allow only the initial notice to result in the tolling of the statute of limitations. *Id.* Permitting a plaintiff to attack his own notice frustrates this intent because a subsequent notice can then become the one that determines whether the statute of limitations is tolled. Allowing such attacks conceivably might be consistent with the statutory scheme, but for the fact that a plaintiff has the right to send subsequent notices that read together can provide proper notice of intent to sue. See MCL 600.2912b(6); cf. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002); *Ashby, supra*. In this case, plaintiffs had many months in which to send subsequent notices to correct deficiencies, if any, in their original notice and still timely file their complaint, which they did not do. The trial court properly granted summary disposition with respect to the notice issue.

Next, plaintiffs maintain that the trial court erred in holding that plaintiffs' claims of ordinary negligence were in fact claims of medical malpractice and therefore are banned by the same statute of limitations as their medical malpractice claims. We disagree.

In the recent case of *Bryant v Oakpointe Villa Nursing Centre*, __ Mich __; __ NW2d __ (Docket Nos. 121723, 121724, decided July 30, 2004), our Supreme Court articulated a two-part test for determining whether a claim sounds in medical malpractice or ordinary negligence: A court must decide "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Id.* at slip op p 12. The *Bryant* Court explained that "[a] professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff." *Id.* at slip op pp 12-13. The next step, the *Bryant* Court explained,

> is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience. If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. [*Id.* at slip op pp 13-14.]

In the present case, plaintiff Valerie Sfreddo's alleged injuries indisputably arose within the course of a professional relationship. At a medical facility, she underwent an MRI procedure performed by a radiology technician in the radiology department during a physician-ordered diagnostic test. Further, we conclude that the MRI procedure involved questions of medical judgment requiring expert testimony. Although plaintiffs argue that the issue in this case involves the ordinary use of the MRI's intercom to respond to plaintiff Valerie Sfreddo's urgent request to be removed from the machine, we find that the decision whether to interrupt the procedure and remove a patient, and the extent and the means by which the technician conducting the procedure should maintain communication with the patient, are questions of medical judgment that require expert testimony.

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra