STATE OF MICHIGAN

COURT OF APPEALS

SHEILA ELLOUT, as Personal Representative of the ESTATE OF CYNTHIA LATIMORE, Deceased Plaintiff-Appellant, v DETROIT MEDICAL CENTER, DETROIT RECEIVING HOSPITAL and UNIVERSITY HEALTH CENTER, and CHRISTINA L. COULBECK, R.N., Defendants-Appellees.	FOR PUBLICATION October 8, 2009 9:05 a.m. No. 286207 Wayne Circuit Court LC No. 06-635635-NH Advance Sheets Version

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

SHAPIRO, J.

In this medical malpractice case, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We reverse and remand for entry of an order reinstating plaintiff's complaint and dismissing plaintiff's claim against defendant Christina L. Coulbeck, R.N., without prejudice. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At issue is whether plaintiff's suit against all defendants is barred because the filing of her complaint occurred before the end of the 154/182-day no-suit period of MCL 600.2912b with regard to Nurse Coulbeck, whose actions were the gravamen of the respondeat superior claim against the other defendants.[1] Plaintiff sent her notice of intent (NOI) naming defendant

[1] In relevant part, MCL 600.2912b provides:

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

(continued…)

Coulbeck on July 28, 2006, and filed her complaint on December 27, 2006, waiting less than 154 days after sending the notice. She had, however, previously sent an NOI to the other defendants and the complaint was timely with regard to them. Plaintiff moved to voluntarily dismiss Coulbeck, which the trial court denied without explanation. The trial court then concluded that plaintiff's filing suit against Coulbeck before the expiration of the 154/182-day period required a dismissal with prejudice with regard to Coulbeck and that such a dismissal constituted an adjudication on the merits regarding the remaining defendants pursuant to *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280; 731 NW2d 29 (2007), resulting in a grant of the remaining defendants' motion for summary disposition.

This Court reviews de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Here, we conclude that the trial court erred by granting defendants' motion for summary disposition. The law is abundantly clear that where a plaintiff has failed to comply with § 2912b by prematurely filing suit, the appropriate remedy is dismissal without prejudice. "[D]ismissal without prejudice was the appropriate remedy for plaintiff's noncompliance with § 2912b(1) . . . ." *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 715; 575 NW2d 68 (1997). See also *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 48; 594 NW2d 455 (1999) (holding that "dismissal without prejudice would be the appropriate sanction" where a plaintiff fails to provide an NOI).

The trial court recognized these cases, but relied on *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703; 620 NW2d 319 (2000). However, *Holmes* involved a failure to file an affidavit of merit under MCL 600.2912d. It did not involve the NOI provision under § 2912b at issue in this case. The trial court also relied on *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005). In *Burton*, the Michigan Supreme Court held that the plaintiff's premature filing of the complaint did not toll the statute of limitations. *Id.* at 756. It held that "dismissal is an appropriate remedy for noncompliance with the notice provisions of MCL 600.2912b and that when a case is dismissed, the plaintiff must still comply with the applicable statute of limitations." *Burton*, *supra* at 753. It did not state, however, that the dismissal must be with prejudice.

In any case, even if *Burton* were controlling, the Michigan Supreme Court recently held in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), that § 2912b contains no mandatory dismissal penalty. *Bush*, *supra* at 173. Indeed, it concluded that "it was not the intent of the Legislature to incorporate a mandatory dismissal penalty into § 2912b." *Bush*, *supra* at 174. The Court explained:

(…continued)

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> (8) If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period.

> The stated purpose of § 2912b was to provide a mechanism for "promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs . . . ." To hold that § 2912b in and of itself mandates dismissal with prejudice would complicate, prolong, and significantly increase the expense of litigation. Dismissal with prejudice would be inconsistent with these stated purposes. [*Bush*, *supra* at 174-175 (citation omitted).]

The Court further noted that the only penalty to a defendant who fails to comply is "very minor" and that "it would be inconsistent . . . to assume that the Legislature intended to impose on plaintiffs the harshest penalty possible: dismissal with prejudice." *Id.* at 175. Although *Bush* involved a question regarding a defective NOI rather than premature filing, the result is the same, because the NOI statute does not set forth an express penalty for premature filing.

Thus, we conclude that the trial court erred in dismissing Coulbeck with prejudice because the proper sanction for plaintiff's premature filing against Coulbeck was dismissal without prejudice.[2] Moreover, because Couldbeck's dismissal should have been without prejudice, it was not an adjudication on the merits.[3] *Yeo v State Farm Fire & Cas Ins Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000). Accordingly, the trial court erred in granting defendants' motion for summary disposition.

We reverse the trial court's grant of summary disposition to defendants, remand for entry of an order reinstating plaintiff's complaint, and order that the trial court enter an order dismissing plaintiff's claim against Coulbeck without prejudice. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Michael J. Kelly

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[2] It makes no difference that the period of limitations had run against Nurse Coulbeck at the time the motion was brought. A defendant against whom the period of limitations has run is protected from further litigation even when the dismissal is without prejudice. If a plaintiff should subsequently file against that defendant, the defendant would be entitled to summary disposition. However, where the basis for dismissal is that the plaintiff has prematurely filed under § 2912b, the proper remedy is dismissal without prejudice, regardless of whether the period of limitations has run.

[3] Having found that the dismissal should have been without prejudice, *Al-Shimmari* is inapplicable, because it involves a dismissal with prejudice. Accordingly, we need not determine whether its holding is retroactive in contexts outside the late service of process issue, the setting that *Al-Shimmari* specifically addressed.