STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL K. PUTNAM and CHERI PUTNAM,

Plaintiffs-Appellants/Cross-Appellees,

V

YUCEL SEZGIN, M.D. and YUCEL SEZGIN, M.D., P.C.,

Defendants-Appellees/Cross-Appellees,

and

DOCTORS HOSPITAL a/k/a BORGESS HEALTH ALLIANCE,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
December 2, 2004

No. 248053
Jackson Circuit Court
LC No. 02-000456-NH

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

In this medical malpractice case, summary disposition was granted for defendant Doctors Hospital in June 2002. Subsequently, on March 10, 2003, summary disposition was granted to defendant Yucel Sezgin, M.D.[1] Plaintiffs appeal as of right. Defendant Doctors Hospital cross appeals, arguing that an alternate ground exists to support the grant of summary disposition. We affirm.

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[1] The order granting summary disposition does not expressly indicate that summary disposition was being granted for Yucel Sezgin, M.D. and Yucel Sezgin, M.D., P.C. However, because summary disposition was appropriate for both defendants on the same grounds and the trial court declared that its March 10, 2003, order disposed of all matters between the plaintiffs and defendant Dr. Sezgin, it is apparent that the order was intended to dispose of claims against both Dr. Sezgin and his professional corporation.

On July 29, 1999, plaintiff Michael Putnam[2] underwent an anterior discectomy, decompression, corpectom and fusion, which was preformed by Dr. Sezgin at Doctors Hospital. Plaintiff thereafter suffered "blacking out" symptoms, chronic numbness in his face and head, shortness of breath, neck pains, and numbness in two fingers. He subsequently treated with another physician, who concluded that the symptoms were caused by the misplacement of screws during the initial surgery. On July 19, 2001, plaintiffs served a notice of intent to file a claim against defendants. During the 182-day waiting period, MCL 600.2912b(1), defendant Dr. Sezgin filed for bankruptcy. Although plaintiffs were listed on schedule F of the bankruptcy petition, and potential creditors were notified by the bankruptcy court on November 26, 2001, plaintiffs claimed they were unaware of the bankruptcy stay. On January 24, 2002, within days of the expiration of the statutory 182-day waiting period, plaintiffs filed suit in circuit court.

By February 19, 2002, being fully aware of the pending bankruptcy proceedings, plaintiffs filed a complaint in the bankruptcy court, objecting to Dr. Sezgin's discharge in bankruptcy. While the complaint was pending in the bankruptcy court, plaintiffs sought an extension of their summons in the circuit court. On April 25, 2002, the date the initial summons was due to expire, a second summons was ordered, extending the time for service to July 25, 2002. While plaintiffs sought and obtained an extension on the expiring summons, plaintiffs failed to serve Dr. Sezgin or his professional corporation.

On May 20, 2002, Dr. Sezgin's bankruptcy attorneys formally notified the circuit court of the pending bankruptcy proceedings and automatic stay. On the same day, the court entered an order administratively closing the circuit court case. While the case was administratively closed, the second summons expired without Dr. Sezgin or his professional corporation having been served. The case proceeded against Doctors Hospital, however, and summary disposition for the hospital was granted in two separate orders.

On October 31, 2002, Dr. Sezgin was discharged from bankruptcy. Plaintiffs took no action in the circuit court until December 26, 2002, when they moved to extend the second summons. The court ordered issuance of a third summons. This summons and a copy of the complaint were served on Dr. Sezgin in January 2003. His counsel thereafter entered a limited appearance, moved to quash the third summons, and moved for an order granting summary disposition on the ground that the complaint filed during the pendency of the bankruptcy stay was void. The trial court granted summary disposition on March 10, 2003.

I

Plaintiffs first argue that summary disposition was improperly granted on their claim of vicarious liability against Doctors Hospital. Doctors Hospital moved for summary disposition on this claim under MCR 2.116(C)(10). We review the trial court's decision de novo. *Stopcynzski v Woodcox*, 258 Mich App 226, 229; 671 NW2d 119 (2003).

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[2] When used in the singular in this opinion, the term "plaintiff" shall refer to Michael Putnam. Cheri Putnam has only brought a derivative claim for loss of consortium.

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a trial court's decision to grant a motion for summary disposition, we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. The court should grant the motion only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [*Steward v Panek,* 251 Mich App 546, 555; 652 NW2d 232 (2002) (citations omitted).]

Reviewing the record de novo, we conclude that summary disposition was appropriate on the vicarious liability claim. In *Wilson v Stilwill*, 411 Mich 587, 609-610; 309 NW2d 898 (1981), citing *Grewe v Mt Clemens General Hosp,* 404 Mich 240; 273 NW2d 429 (1978), the Court acknowledged that a hospital may be liable for the acts of medical personnel who are ostensible agents. There may be vicarious liability where a plaintiff looks to the hospital for the treatment and does not merely view the hospital as the "situs" where his physician will treat him. *Id.* A hospital is not liable, however, for the malpractice of independent contractors. *Chapa v St Mary's Hospital*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991). In order to prove that a physician is an agent of a defendant hospital, the plaintiff must show that he dealt with the physician with a reasonable belief in the physician's authority as an agent of the hospital, that his belief was generated by an act or neglect on the part of the hospital, and that he was not guilty of negligence. *Zdrojewski v Murphy,* 254 Mich App 50, 66; 657 NW2d 721 (2002). "[A]n independent relationship between a doctor and a patient that preceded a patient's admission to a hospital precludes a finding of ostensible agency, unless the acts or omissions of the hospital override the impressions created by the preexisting relationship and create a reasonable belief that the doctor is an agent of the hospital." *Id.*

Dr. Sezgin's medical records established that Michael Putnam's relationship with Dr. Sezgin predated his admission to the hospital by several months. Sioma's uncontroverted affidavit[3] establishes that Dr. Sezgin was not an employee of Doctors Hospital. Plaintiffs did not allege that Dr. Sezgin or his professional corporation were actual or ostensible agents of the hospital, and they failed to allege any facts that would support such a finding. In fact, they alleged that Dr. Sezgin was an employee of his own professional corporation. In opposing summary disposition, plaintiffs failed to file any affidavits or other evidence indicating that they dealt with Dr. Sezgin with the reasonable belief that he was an agent of the hospital and that their belief was generated by some act or neglect on the part of the hospital. *Id.* These facts were peculiarly within their knowledge. At the very least, they could have supplied affidavits to attempt to demonstrate that a genuine issue of material fact may exist. They failed to do so.

[3] Plaintiff does not dispute the content of the affidavit, rather the lack of a signature at the time of filing. However, a signed affidavit was later submitted, see MCR 2.114(C)(2), and plaintiff failed to demonstrate resulting prejudice. See *Hubka v Pennfiled Twp*, 197 Mich App 117, 119-120; 494 NW2d 800 (1992), rev'd on other grounds 443 Mich 864 (1993).

Because the record demonstrated that there was no question of fact with respect to vicarious liability, summary disposition of this claim was appropriate.[4]

II

We also affirm the grant of summary disposition to Doctors Hospital on the direct claims against it. Although the hospital moved for summary disposition under MCR 2.116(C)(8), summary disposition was proper under MCR 2.116(C)(7) because suit was not properly commenced against the hospital before the statute of limitations expired. *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003). An order granting summary disposition under an incorrect subrule may be reviewed under the correct subrule. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997).

The direct claims against the hospital were for medical malpractice. Crucial to any medical malpractice claim "is whether it is alleged that the negligence occurred within the course of a professional relationship." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002), quoting *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (1999). A hospital may be directly liable for *malpractice* through claims of negligence in selection and retention of medical staff. *Cox, supra*. In *Dorris, supra* at 46, the Court stated:

> The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment.[5]

Allegations concerning staffing decisions and patient monitoring involve questions of professional management and not issues of ordinary negligence. *Id.* at 47.

In this case, plaintiffs alleged a direct action against the hospital for failing to adopt and enforce appropriate policies and procedures related to the performance of orthopedic surgery and failing to provide adequate facilities, services, and staff to perform orthopedic surgery. The adequacy of the hospital's policies and procedures and the alleged failures of the hospital with respect to facilities, services, and staff, involve questions of professional medical management.

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[4] Plaintiffs' contention that summary disposition was premature prior to the completion of discovery is without merit. Plaintiffs were obligated to assert that a dispute existed and support that allegation with some independent evidence, *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994), and failed to do so. Moreover, the trial court may take judicial notice of the court files and records. *Knowlton v Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959). In any event, regardless of the consideration of the other case records, reversal would not be required because the correct decision was reached. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

[5] See also *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 420-424; 684 NW2d 864 (2004).

Because the alleged claim is a malpractice one, it was subject to the procedural requirements of a medical malpractice claim. *Id.* at 46.

Therefore, plaintiffs were required to submit an affidavit of merit delineating the standard of care, the affiant's opinion regarding the breach of the standard of care, the omissions or actions that needed to be taken to comply with the standard of care, and the manner in which the breach was the proximate cause of the injury. See MCL 600.2912d. Plaintiffs failed to file any affidavit of merit containing a statement setting forth the standards applicable to the hospital, setting forth the standards that were allegedly breached by the hospital, setting forth the actions that should have been taken or omitted by the hospital in order to comply with the applicable standards, or setting forth the manner in which the alleged breach by the hospital was the proximate cause of plaintiff Michael Putnam's injuries. Thus, with respect to their claims against the hospital, plaintiffs completely failed to comply with MCL 600.2912d. Therefore, dismissal was the appropriate action. See *Mouradian, supra.*

We reject plaintiffs' argument that they had a reasonable belief that the affidavit that was filed, addressing Dr. Sezgin's negligence, was sufficient against the hospital. MCL 600.2912d(1) provides that a plaintiff *shall* file an affidavit by a health professional, which the plaintiff's attorney reasonably believes meets the requirements for an expert under MCL 600.2169. In other words, at the "affidavit of merit" stage, a reasonable belief that the expert is qualified is sufficient. *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002). While there must be a reasonable belief that the affiant was qualified to testify under MCL 600.2169, there is no exception to the actual requirements of the affidavit. The affidavit must contain the information set forth in the statute. The use of the word *shall* in MCL 600.2912d make the requirements of the statute mandatory. See *Salter v Patton,* 261 Mich App 559, 564; 682 NW2d 537 (2004) (the use of the word "shall" is unambiguous and is used to denote mandatory, rather than discretionary, action); see also *Fournier v Mercy Community Health Care System-Port Huron,* 254 Mich App 461, 463-464; 657 NW2d 550 (2002). In this case, even if plaintiffs reasonably believed that the affiant was qualified to testify for plaintiffs, the affidavit of merit failed to include the requisite information concerning the allegations against Doctors Hospital. MCL 600.2912d.

We additionally conclude that the affidavit filed by plaintiffs was wholly insufficient to commence any medical malpractice action against any of the defendants, including Dr. Sezgin and his professional corporation. Dr. Sezgin was a neurosurgeon. The affidavit of merit was signed by Dr. Theodore G. Zaleski, a board-certified orthopedic surgeon. MCL 600.2912 requires that the plaintiff file an affidavit of merit signed by a health professional, which the plaintiff's attorney *reasonably believes* meets the requirements for an expert witness under MCL 600.2169. Thus, in order to testify against Dr. Sezgin, the expert had to be a neurosurgeon. It is undisputed that Dr. Zaleski was not a neurosurgeon.

The affidavit is thus appropriate only if plaintiffs' attorneys reasonably believed, at the time of the filing of the affidavit of merit, that Dr. Zaleski met the requirements of an expert under MCL 600.2169. See *Grossman v Brown,* 470 Mich 599-600; 685 NW2d 198 (2004). However, plaintiffs took no action to investigate the qualifications and certifications of Dr. Sezgin, and merely assumed that the affidavit of an orthopedic surgeon was necessary. Because there is no evidence that plaintiffs' attorney utilized any resources to conclude that there was a sufficient match in qualifications, summary disposition was proper for failing to satisfy MCL

600.2169d. See *Grossman, supra*. Because the statute of limitations has expired, plaintiffs are precluded from filing their claim.

III

Because the trial court determined that the affidavit of merit was sufficient to commence suit against Dr. Sezgin, it did not dismiss the case in June 2002. However, after Dr. Sezgin was served in January 2003, the court considered whether the complaint was void because it was filed in violation of a bankruptcy stay. It granted summary disposition on this basis.

When an automatic bankruptcy stay is in place, a plaintiff may not file a medical malpractice action. *Ashby v Byrnes*, 251 Mich App 537, 539; 651 NW2d 922 (2002). 11 USC 362 provides that a petition for bankruptcy operates as a stay, applicable to all entities, of the commencement of an action or proceeding against the debtor. The majority of federal circuits have held that actions taken in violation of the automatic stay are void, not just voidable. *Easley v Pettibone MI Corp*, 990 F2d 905, 909-910 (CA 6, 1993). Actions are generally void, even where the creditor had no notice of the automatic stay. *Smith v First America Bank*, 876 F2d 524, 526 (CA 6, 1989). In *Easley, supra* at 911, the court held that actions filed in contravention of the automatic stay are invalid and voidable but are not automatically void. However, they *shall* be voided "absent limited equitable circumstances." The court in *Easley* suggested that "only where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result, will the protections of section 362(a) be unavailable to the debtor." *Id.*

In this case, the trial court correctly found, as a matter of law, that plaintiffs' action was void. There existed no limited, equitable circumstances that would preclude a declaration that the action was not void. Dr. Sezgin included plaintiffs on the list of potential creditors in his bankruptcy petition. The bankruptcy court notified potential creditors of the bankruptcy. While plaintiffs and their counsel claim that they were unaware of the bankruptcy when they filed the complaint on January 24, 2002, this issue is not dispositive. *Smith, supra.* They were aware of the bankruptcy no later than February 19, 2002, when they filed a complaint in the bankruptcy court. At that point, they had all of the information necessary to properly chart their course of litigation in light of the bankruptcy. On the record before this Court, it cannot be concluded that Dr. Sezgin unreasonably withheld notice of the bankruptcy or stay. Thus, the first equitable exception recognized in *Easley, supra* at 911, is not present.

Further, the record also does not establish that Dr. Sezgin is attempting to use the stay unfairly as a shield to avoid an unfavorable result. Plaintiffs argue that he is doing so because he never raised the issue of the void nature of the complaint before moving to quash the summons and obtain summary disposition in the trial court. Plaintiffs fail to acknowledge, however, that Dr. Sezgin was never served with the summons and complaint until January 2003. In his first responsive pleading, Dr. Sezgin raised the issue of the automatic stay and the voiding of the complaint. MCR 2.107(A) does not require a defendant to file an answer or take any other action until being served with the summons and complaint. The record does not indicate that Dr. Sezgin lulled plaintiffs into believing that he would not rely on the automatic stay. *Easley, supra* at 911-912. Plaintiffs' additional argument that Dr. Sezgin should have raised the issue in the bankruptcy court when litigating plaintiffs' bankruptcy complaint is abandoned. Plaintiffs cite

no authority to support this proposition. Rather, they leave it to this Court to discover and rationalize whether that position has any basis in bankruptcy law. An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis of the position, nor may he give the position cursory treatment with no citation to supporting authority. *Houghton v Keller,* 256 Mich App 336, 339-340; 662 NW2d 854 (2003). Plaintiffs have not provided any authority or logical reason to support their position that this Court should conclude that the filing of the complaint during the pendency of the automatic stay was not void.

Because the filed complaint was void and no complaint could be filed during the pendency of the automatic stay, plaintiffs had thirty days to file their action after the stay was lifted. 11 USC 108(c) provides:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –
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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
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> (2) 30 days after notice of the termination or expiration of the stay under section 362 . . . of this title, as the case may be, with respect to such claim.

In *Ashby, supra* at 541, the plaintiffs timely filed their notice of intent to file a malpractice claim. The defendants' insurance carrier denied the claim within three months of the notice. Thereafter, the plaintiffs could have filed their claim, and the statute of limitations was not due to run until October 26, 1997. *Id.* However, the defendants filed a petition for bankruptcy on November 11, 1996, thereby triggering the automatic stay, which precluded the plaintiffs from filing their complaint. *Id.* The plaintiffs argued that the statute of limitations was tolled from the date of the automatic stay until the date the stay was lifted. *Id.* This Court disagreed, finding that 11 USC 108(c) is clear and unambiguous. *Id.* at 541-542. Where a limitation period fixed by a statute of limitations or similar nonbankruptcy law, order, or agreement expires during the bankruptcy stay, claimants have thirty days from the termination of that stay to bring their action. *Id.* at 543.

In this case, it cannot be disputed that the period of limitation set by Michigan law expired while the automatic stay was in place. Thus, 11 USC 108(c) permitted the filing of the medical malpractice action within thirty days after notice of the termination of the bankruptcy stay, which was October 31, 2002. *Id.* Plaintiffs did not file a valid complaint within thirty days of learning of the termination of the stay. Accordingly, they have lost their claims. *Ashby, supra; Easley, supra* at 912.

We disagree with plaintiffs that the thirty-day time period is not applicable. Specifically, we find no merit to their claim that the administrative order closing the case was an "order entered in a nonbankruptcy proceeding" and that the order allowed plaintiffs to continue

litigating their case within a reasonable time of the lifting of the bankruptcy stay. The administrative order did not fix a period for commencing or continuing the medical malpractice action. Plaintiffs argue, without citation or explanation, that this Court should interpret the order as permitting a reasonable time for moving to reopen the case and thus, a reasonable time period should trump the thirty-day limitation of 11 USC 108(c). Because of plaintiffs' failure to cite authority in support of this position, their cursory treatment of the issue, and the plain language of 11 USC 108(c), we reject this strained argument. We also reject the suggestion that this case is unlike *Ashby, supra.* Plaintiffs argue that they should not be treated like the plaintiff in *Ashby* because they actually filed their complaint in contravention of the automatic stay. Plaintiffs provide no rationale, and we are unable to conceive of any rationale, that would allow us to reward plaintiffs for violating the automatic stay and provide them with an unlimited time frame to continue their litigation while holding the *Ashby* plaintiff to the thirty-day time frame of 11 USC 108(c).

Where plaintiffs' complaint was void when filed and plaintiffs failed to file a complaint within thirty-days of the lifting of the bankruptcy stay, we conclude that dismissal of their claims was appropriate under MCR 2.116(C)(7). Because we affirm the ruling of the trial court, and alternatively find that the case should have been dismissed based on plaintiffs' failure to file an appropriate affidavit at the outset, it is unnecessary to consider the additional, alternative grounds that may support dismissal of the action.

IV

Finally, plaintiffs argue that the trial court "erred" when it denied their motion for rehearing or reconsideration. The denial of a motion for reconsideration is generally reviewed for an abuse of discretion. *Herald Company, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). This issue may be deemed abandoned on appeal by plaintiffs' cursory treatment of the issue, without citation to appropriate authority. *Houghton, supra* at 336. Nevertheless, we have considered the issue, and conclude that the trial court did not abuse its discretion. Plaintiffs failed to demonstrate a palpable error by which the court and the parties were misled, and they failed to show that a different disposition of the motion must result from correction of any error. MCR 2.119(F)(3). The trial court initially heard, and implicitly rejected, the argument that the impending bankruptcy order would operate to change the outcome of the case. Our review of the order that was eventually entered by the bankruptcy court fails to reveal any intent by that court to retroactively lift the stay, thereby making the initial filing of the complaint valid. Thus, the order has no effect on the trial court's decision granting Dr. Sezgin summary disposition.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood