STATE OF MICHIGAN

COURT OF APPEALS

DONALD SHIELDS,

Plaintiff-Appellee,

v

JAMES E. MCLACHLAN, M.D.,

Defendant,

and

SELECT SPECIALTY HOSPITAL-KALAMAZOO, INC.

Defendant-Appellant.

UNPUBLISHED
August 18, 2009

No. 286624
Kalamazoo Circuit Court
LC No. 07-000502-NH

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

Defendant, Select Specialty Hospital, appeals by leave granted, the denial of its motion for summary disposition in this action for medical malpractice. We affirm.

This medical malpractice action arises from problems incurred following plaintiff, Donald Shields', discharge from defendant, Select Special Hospital (hereinafter "the Hospital"). Plaintiff was admitted to the Hospital following a motorcycle accident where he sustained burns and developed osteomyelitis of his great left toe. At the time of admission, plaintiff was 66 years of age and reportedly suffered from a myriad of medical conditions. Defendant, James E. McLachlan, M.D., an internist, was assigned to provide plaintiff's medical care. While an inpatient, plaintiff underwent the amputation of his left great toe. Following surgery, plaintiff remained at the Hospital to recuperate and was ultimately discharged to his home, where he lived alone. Three days after his discharge, plaintiff fell and incurred a hip fracture that required an open reduction of the hip and subsequent inpatient care. Plaintiff's premise for this lawsuit is that defendants' failure to conduct proper discharge planning proximately caused his fall and injury.

Plaintiff forwarded a notice of intent (NOI) to the Hospital and filed a complaint with an affidavit of merit (AOM), signed by Marc Allen Eisenbaum, M.D., a board certified physician in internal medicine. The AOM provided, in relevant part: "[t]he required standard of care for a

medical doctor specializing in internal medicine and applicable hospital staff required careful discharge planning . . . and significant input by Dr. McLachlan as well as the ancillary support staff." The AOM repeatedly referenced Dr. McLachlan and "ancillary support staff" of the Hospital in failing to adequately address or evaluate plaintiff's discharge planning needs and the negligence of "[t]he social services and therapy departments" in their assessment of plaintiff's home environment and anticipation of problems.

The Hospital filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), asserting the NOI submitted by plaintiff was defective because it failed to identify any licensed medical professionals employed by the Hospital that allegedly committed the malpractice and the applicable standard of care for those professionals and the Hospital. The Hospital further contended that the AOM was ineffective because it was signed only by a medical doctor and not by individuals licensed in the same areas of practice as the employees alleged to have committed the malpractice. The trial court denied the Hospital's motion for summary disposition, finding the NOI and AOM complied with the relevant statutory provisions. The trial court also denied the Hospital's subsequent motion for reconsideration.

A trial court's decision regarding a motion for summary disposition is reviewed by this Court de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Issues of statutory interpretation are also subject to de novo review. *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

The Hospital challenges the sufficiency of the NOI, asserting it is deficient because it failed to identify, or put on notice, those individuals or professionals that comprised "ancillary support staff" alleged to have breached the standard of care. The Hospital contends the NOI fails to identify the standard of care applicable to the Hospital and that the standard of care alleged is not necessarily the same or applicable to all medical professionals, as implied by plaintiff. In addition, the Hospital asserts that the NOI fails to adequately articulate how the alleged breach was the proximate cause of plaintiff's injuries. Because the NOI was deficient it did not toll the period of limitations requiring dismissal of the complaint.

MCL 600.2912b(1) requires a litigant to send a notice of intent to any healthcare facility or provider at least 182 days before commencing an action for medical malpractice. In addition, MCL 600.2912b(4) delineates the content of the NOI, stating:

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

The statutory provision was discussed in *Miller v Malik*, 280 Mich App 687; 760 NW2d 818 (2008), with this Court stating in relevant part:

> A claimant must present this information "with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them." Although some of the information supplied in the notice of intent will evolve as discovery proceeds, a claimant is "required to make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings." With respect to causation, it is not sufficient to state that the defendants' negligence caused the alleged harm. Rather, the claimant must describe the manner in which the actions or lack thereof caused the complained-of injury. Further, no portion of the notice of intent may be read in isolation; rather, the notice of intent must be read as a whole. [*Id.* at 695-696 (internal citations omitted, emphasis in original).]

Reviewing plaintiff's NOI in conjunction with the statutory mandates for content delineated in MCL 600.2912b(4) and as interpreted by this Court, the trial court properly denied the Hospital's motion for summary disposition regarding the adequacy of the NOI.

The NOI clearly delineates the factual basis for plaintiff's claim describing his health, reason for admission, medical procedures performed, his subsequent condition and injuries incurred after discharge in accordance with MCL 600.2912b(4)(a). The applicable standard of care was described in the NOI as necessitating "careful discharge planning" and "input" into such planning by his treating physicians and "ancillary support staff." The NOI alleged, "[t]he standard of care required that attention be paid to Mr. Shields home physical environment before discharge." Implied in the NOI are statements indicating that the Hospital and its staff were required to investigate plaintiff's home environment and needs before discharge to determine the adequacy of the plan. This is sufficient to meet the requirements of MCL 600.2912b(4)(b) to identify the applicable standard of care. Plaintiff's NOI also adequately addressed MCL 600.2912b(4)(c) in explaining how the applicable standard of care was breached, identifying the failure of staff to participate in discharge planning, the failure to devise a discharge plan that took into consideration plaintiff's needs and health concerns and the absence of any investigation to evaluate his living environment or determine the deficiencies in that environment to sustain plaintiff's medical recovery. The NOI also enumerates, pursuant to MCL 600.2912b(4)(d) the actions that should have been taken to achieve compliance with the standard of care as including: (1) greater involvement by the physicians in discharge planning, (2) the identification and "voic[ing]" of concerns or "objections" by staff with the discharge, (3) consideration of alternative settings for plaintiff's discharge, and impliedly, (4) the actual investigation of his home environment to determine its suitability and the availability of support to plaintiff following discharge.

The Hospital contends the NOI failed to comply with MCL 600.2912(4)(e) in not sufficiently elucidating the manner in which breach of the standard of care was the proximate cause of plaintiff's injuries. While the Hospital is correct that tautological statements limited to referencing "deviations in the standard of care" or asserting that "defendants' negligence caused the alleged harm" are insufficient to meet the requirements of this subsection, the Hospital fails, as required by *Miller*, to read the NOI "as a whole." When viewed in its full context, the NOI indicates that plaintiff's fall and commensurate injuries are directly attributable to the lack of planning for his discharge, which placed him in an unsafe environment. The NOI makes clear that it is plaintiff's contention that the failure of the Hospital to evaluate plaintiff's ability to live on his own and his home environment, with his existing health conditions and current medical requirements, when developing his discharge plan or to consider viable alternative settings, permitted a physically and mentally compromised individual to return home, without proper support, resulting in his fall and subsequent injury. Contrary to the Hospital's argument, this comprises a sufficient averment to survive summary disposition.

Finally, with regard to the sufficiency of the NOI, the Hospital contends plaintiff did not comply with MCL 600.2912b(4)(f) by failing to identify "ancillary hospital staff" in any detail by profession or name. Plaintiff's complaint identifies only two defendants, Dr. McLachlan and the Hospital, despite referencing "ancillary support staff" and the Hospital's social services and therapy departments in the NOI. As such, the Hospital contends the failure to identify the other disciplines by either naming individuals or their professions (and their applicable standard of care) does not adequately put the Hospital on notice regarding plaintiff's claim of liability. While the failure to identify these individuals or disciplines influences our review regarding the adequacy of the AOM, *infra*, it does not impact the sufficiency of the NOI. Viewing the NOI in its totality, it is clear that the claims pertaining to deficiencies regarding the performance of various hospital staff in discharge planning for plaintiff indicate that the allegations relevant to the hospital are premised in a theory of vicarious liability. As noted recently in *Esselman v Garden City Hosp*, ___ Mich App ___; ___ NW2d ___ (Docket Numbers 280723 and 280816, issued June 4, 2009), slip op, p 5:

> [T]he statement of the standard of care does not need to contain any explicit statement of whether a corporate defendant is directly or vicariously liable; rather, it only needs to "serve as adequate notice" to the defendants whether plaintiff intends to proceed against them on a vicarious liability theory. Although all of the information required by the statute must be "specifically identified in an ascertainable manner within the notice," it does not need to be set forth in any particular "method or format." [*Id.* citing *Roberts v Mecosta Co Hosp (After Remand)*, 470 Mich 679, 701; 684 NW2d 711 (2004).]

Contrary to the Hospital's contention, for purposes of the NOI and the assertion of vicarious liability, the general reference to hospital staff is adequate to meet the requirements of MCL 600.2912b(4)(f) for the provision of notice regarding the theory and gravaman of the complaint.

The Hospital next contends the trial court erred in finding the AOM signed by a physician was sufficient to impose liability regarding the allegations that "ancillary support staff" breached the applicable standard of care. Specifically, the Hospital argues that plaintiff was required to provide individual AOMs for each discipline or profession alleged to have breached the standard of care.

The relevant statutory provisions are MCL 600.2169 and MCL 600.2912d. MCL 600.2912d(1), provides, in pertinent part:

> [T]he plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

MCL 600.2169(1) delineates the criteria to be met for qualification of an expert witness in an action for medical malpractice.

While the Hospital is correct that the failure of plaintiff to submit AOMs from any medical professionals or disciplines, other than Dr. Eisenbaum, precludes proceeding on a theory of vicarious liability based on the alleged negligence of these unidentified "ancillary support staff," it did not require the trial court to grant summary disposition. The Hospital did not dispute or challenge the content of the AOM; merely that it was insufficient by itself to impose liability on the Hospital based on the alleged malpractice of non-physician staff.

Notably, plaintiff's complaint names the Hospital and Dr. McLachlan as defendants. The complaint specifically alleges that Dr. McLachlan "was acting as the agent and/or servant" of the Hospital. As opined by this Court in *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 15; 651 NW2d 356 (2002):

> [I]n order to find a hospital liable on a vicarious liability theory, the jury must be instructed regarding the specific agents against whom negligence is alleged and the standard of care applicable to each agent . . . . a hospital's vicarious liability arises because the hospital is held to have done what its agents have done.

This concept identified in *Cox* was expanded on by this Court in *Nippa v Botsford Hosp (On Remand)*, 257 Mich App 387, 391-393; 668 NW2d 628 (2003), which states in relevant part:

> [A] plaintiff who sues an institutional defendant such as defendant hospital must premise her claim on vicarious liability because the institution itself is incapable of committing any independent actions, including negligence. Vicarious liability imposes a legal fiction on defendant hospital providing that the principal is only liable because the law creates a practical identity with its agents so that the hospital is held to have done what the agents have done. The law treats the principal and the agent as sharing a single identity, transporting the acts of the doctors (the agents) to the hospital (the principal). Just as an institution itself is incapable of committing any independent actions, including negligence, an institution itself is incapable of making an averment in an affidavit of merit. Therefore, the term "party" under MCL 600.2169(1)(a) encompasses the agents for whose alleged negligent acts the hospital may still be liable. A plaintiff must submit with a medical-malpractice complaint against an institutional defendant an affidavit of merit from a physician who specializes or is board-certified in the same specialty as that of the institutional defendant's agents involved in the alleged negligent conduct. [Internal citations omitted.]

Consequently, while we do not address the substantive merits of plaintiff's complaint, we find that the AOM was sufficient to preclude the grant of summary disposition at that stage of the proceedings and to permit the matter to proceed on a theory of vicarious liability against the Hospital based solely on the alleged relationship between it and Dr. McLachlan. As such, we emphasize that as presented the existing claim is extremely narrow in scope and plaintiff is precluded from attempting to establish the vicarious liability of the Hospital based on the negligence of any additional individuals or employees due to the failure to submit AOMs for other professions or disciplines.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher