STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

KEVIN GARRIES and WENDY GARRIES,
Individually,

Plaintiffs,

v

File No. 04-23873-NH
HON. PHILIP E. RODGERS, JR.

MUNSON MEDICAL CENTER, a Domestic Non-Profit Corporation; WILLIAM RANGER, M.D.; MICHAEL VANDERKOLK, M.D.; SURGICAL ASSOCIATES OF TRAVERSE CITY, P.L.L.C.; LAURA GOTTFRIED, M.D.; and GRAND TRAVERSE PATHOLOGY, P.L.L.C.,

Defendants.
/

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DECISION AND ORDER REGARDING
DEFENDANT MUNSON MEDICAL CENTER'S MOTION FOR SUMMARY DISPOSITION
AND
DEFENDANTS DR. RANGER, DR. VANDERKOLK, SURGICAL ASSOCIATES OF TRAVERSE CITY'S JOINDER AND CONCURRENCE WITH
DEFENDANT MUNSON MEDICAL CENTER'S MOTION FOR SUMMARY DISPOSITION

This is a medical malpractice action in which Plaintiffs Kevin Garries and Wendy Garries allege the negligent performance of a laporoscopic appendectomy on November 6, 2002,

negligent performance of the pathological examination of the removed tissue, and negligent performance of follow-up care. Plaintiffs assert that Plaintiff Kevin Garries appendix was not actually removed until a second operation was performed on November 10, 2002 and that, in the interim, he developed peritonitis, requiring additional surgeries.

Munson Medical Center ("Munson") was named as a health care facility Defendant. Munson filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Munson contends that there is no genuine issue of material fact concerning whether the Plaintiffs failed to comply with the statutory requirements of MCL 600.2912b. As a consequence, the statute of limitations was not tolled and has expired without the Defendants having been given proper notice.

William Ranger, M.D. ("Ranger"), Michael Vanderkolk, M.D. ("Vanderkolk") and Surgical Associates of Traverse City ("Surgical Associates") filed a Joinder and Concurrence with Defendant Munson's Motion for Summary Disposition, pursuant to MCR 2.116(C)(7), (8) and (10). In addition to the deficiencies alleged by Munson, these Defendants contend that the Plaintiffs' Notice of Intent was defective as to them because "it fails to identify the specific standard of practice or care applicable to any particular Defendant" or "properly detail how that specific standard of practice or care was allegedly breached by each particular Defendant" - "including as to surgeons Dr. Ranger and Dr. Vanderkolk, who had differing roles in regard to Plaintiff's treatment."

The Court heard the oral arguments of counsel in Monday, February 7, 2005 and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, denies the Defendants' motions.

STANDARDS OF REVIEW

MCR 2.116(C)(7)

MCR 2.116(C)(7) sets forth the following grounds for summary disposition:

> The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (2000), the Court of Appeals said:

> When a motion for summary disposition is premised on MCR 2.116(C)(7), the nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery. *Stabley, supra* at 365; 579 NW2d 374; *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). '[T]he court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties.' *Horace v City of Pontiac*, 456 Mich. 744, 749; 575 NW2d 762 (1998). If no facts are in dispute, whether the claim is statutorily barred is a question of law. *Dewey, supra* at 192; 572 NW2d 715.

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc,* 167 Mich App 202, 205; 421 NW2d 631 (1988).

MCR 2.116(C)(10)

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich. 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary

evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

APPLICABLE STATUTE

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.

(2) The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.

(3) The 182-day notice period required in subsection (1) is shortened to 91 days if all of the following conditions exist:

(a) The claimant has previously filed the 182-day notice required in subsection (1) against other health professionals or health facilities involved in the claim.

(b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).

(c) The claimant has filed a complaint and commenced an action alleging medical

malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).

(d) The claimant did not identify, and could not reasonably have identified a health professional or health facility to which notice must be sent under subsection (1) as a potential party to the action before filing the complaint.

(4) 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.

(5) Within 56 days after giving notice under this section, the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. Subject to section 6013(9), within 56 days after receipt of notice under this section, the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility. This subsection does not restrict a health professional or health facility receiving notice under this section from communicating with other health professionals or health facilities and acquiring medical records as permitted in section 2912f. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law.

(6) After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified.

(7) Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

(a) The factual basis for the defense to the claim.

(b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.

(c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.

(d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage.

(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.

(9) If at any time during the applicable notice period under this section a health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility does not intend to settle the claim within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health professional or health facility, so long as the claim is not barred by the statute of limitations.

MCL 600.2912b(1) precludes a medical malpractice claimant from commencing suit against a health professional or health facility unless written notice is provided to that professional or facility before the action is commenced. After providing the written notice, the claimant is required to wait for the applicable notice period to pass before filing suit.

The two-year period of limitation for medical malpractice actions is tolled during the notice period "after the date notice is given in compliance with section 2912b." MCL 600.5856(d). Thus, in order to toll the limitation period under § 5856(d), the claimant is required to comply with all the requirements of § 2912b. *Roberts v Atkins*, 470 Mich 679, 685; 684 NW2d 711 (2004).

THE NOTICE OF INTENT IN THIS CASE

The Section 2912b Notice of Intent to File Claim that the Plaintiffs sent to the Defendants was the following:

SECTION 2912b NOTICE OF INTENT TO FILE CLAIM

This Notice is intended to apply to the following health care professionals, entities, and/or facilities as well as any employees or agents, actual or ostensible, thereof, who were involved in the treatment of the patient, KEVIN GARRIES:

Munson Medical Center, Dr. William Ranger, Dr. Michael Vanderkolk, Surgical Associates of Traverse City, Dr. Laura Gottfried, Grand Traverse Pathology, P.C., and all agents and employees, actual or ostensible, thereof who furnished treatment to the patient.

1. FACTUAL BASIS FOR CLAIM

On November 6, 2002, Kenvin Garries was admitted to Munson Medical Center through the Emergency Room. At that time, Dr. Ranger, a surgeon, felt that Mr. Garries had appendicitis. At that time, Dr. Ranger performed a laparoscopic appendectomy. The specimen from this appendectomy was sent to Pathology and reviewed by Dr. Laura Gottfried. Dr. Gottfried diagnosed the specimen as revealing vermiform appendix and portion of cecum. Following the November 6, 2002 surgery, Mr. Garries was noted to be in pain, with elevated temperatures and abnormal blood pressure. As of November 8, 2002, Dr. Ranger was paged by the nurses because of severe abdominal pain. On November 9, 2002, Dr. Gottfried re-reviewed the pathology slides and determined that the correct diagnosis was diverticulitis. The possibility that the appendix may not have been initially resected was discussed with Dr. Vanderkolk who was covering for Dr. Ranger by Dr. Gottfried. On November 10, 2002, a second operation was performed at which time Mr. Garries' appendix was actually removed. From November 6, 2002 through November 10, 2002 Mr. Garries developed peritonitis which necessitated multiple surgeries and a prolonged hospitalization.

2. THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

The standard of practice is that of a general surgeon and/or pathologist.

3. THE MANNER IN WHICH IT IS CLAIMED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED.

As to the surgeon:

A) Failed to recognize that the appendectomy of November 6, 2002 was unsuccessful;
B) Failed to timely and appropriately diagnose sepsis;
C) Failed to order a CT of the abdomen and/or gastro gaffin enema in light of Mr. Garries' signs and symptoms;
D) Failed to timely and appropriately prescribe antibiotics;

E) Failed to timely and appropriately perform necessary surgery.

As to the pathologist:

A) Failed to timely and appropriately recognize that the specimen of November 6, 2002 labeled appendix was not, in fact, an appendix;
B) Failed to timely and appropriately advise the surgeon that the appendectomy was unsuccessful.

4. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE

As to the surgeons:

Once Mr. Garries began to have abdominal pain and abdominal vital signs, it was the standard of practice to perform a CT scan of the abdomen and/or to perform a gastro gaffin enema. Following this, the appropriate treatment was to prescribe I.V. antibiotics and/or perform surgery.

As to the pathologist:
Appropriately diagnose the surgical specimen of November 6, 2002 (the laparoscopic appendectomy) and timely and appropriately advise the surgeon that the appendectomy was unsuccessful.

5. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY

As a result of the breaches of the standard of care, Kevin Garries developed intra-abdominal sepsis requiring multiple surgeries, a prolonged hospital stay and permanent injury including both economic and non-economic damages.

6. NAMES OF HEATH PROFESSIONALS, ENTITIES, AND FACILITIES NOTIFIED:

Munson Medical Center
Dr. William Ranger
Dr. Michael Vanderkolk
Surgical Associates of Traverse City
Dr. Laura Gottfried
Grand Traverse Pathology, P.C.
And any agents thereof, actual or ostensible.

TO THOSE RECEIVING NOTICE: YOU SHOULD FURNISH THIS NOTICE TO ANY PERSON, ENTITY OR FACILITY, NOT SPECIFICALLY NAMED HEREIN THAT YOU REASONABLY BELIEVE MIGHT BE ENCOMPASSED IN THIS CLAIM.

MUNSON'S MOTION

The crux of Munson's Motion for Summary Disposition is that the Plaintiffs did not give Munson notice that they planned to proceed against Munson on a vicarious liability theory. Therefore, the statute of limitations was not tolled and has expired and this action against Munson should be dismissed with prejudice. Munson relies upon the statute and *Gulley-Reaves v Baciewicz*, 260 Mich App 478; 679 NW2d 98 (2004) and *Roberts v Atkins*, 470 Mich 679; 684 NW2d 711 (2004).

The cases relied upon by Munson are factually distinguishable and, therefore, not dispositive. Since the notice of intent filed in each case is factually specific and must be applied against the statutory requirements of MCL § 600.2912b, the sufficiency of a notice of intent must be evaluated on a case-by-case basis. *Gulley-Reaves, supra* at n 6.

In *Gulley-Reaves,* a patient alleged in her notice of intent that the standard of care required that the her surgery be performed without damaging her vocal cords. Later in her malpractice action against a surgeon and the hospital, she alleged a second breach of the standard of care in the administration of anesthesia. The defendants filed a motion for summary disposition claiming that the notice of intent was defective because it did not contain any claim involving the administration of anesthesia. The trial court denied the motion. The Court of Appeals reversed, holding that the patient failed to comply with the statutory notice requirements with regard to any claim involving the administration of anesthesia.

The Court reasoned that, because the purpose of the notice requirement is to promote settlement, citing *Neal v Oakwood Hosp Corp*, 226 Mich.App. 701, 705; 575 NW2d 68 (1997), the defendant hospital was not given the opportunity to engage in any type of settlement negotiation with regard to the anesthesia claims because it was not given notice of the existence of any such claim.

> Moreover, MCL § 600.2912b(7) provides that the health facility 'shall' furnish a response to the notice by presenting a factual defense, the applicable standard of care and compliance therewith, and the basis for the contention that any alleged negligence by the health facility was not the proximate cause of injury or damage. The omission of the identification of administration of anesthesia as a breach of the standard of care and proximate cause of the alleged injury precluded defendant hospital from fulfilling its obligation to respond to the notice of intent. *Gulley-Reaves* at 488.

The Notice of Intent in the instant case did not contain any allegations of active negligence on the part of Defendant Munson. It also did not contain the specific words "vicarious liability." However, it did state that it was intended to apply to Munson Medical Center, Dr. William Ranger, Dr. Michael Vanderkolk, Surgical Associates of Traverse City, Dr. Laura Gottfried, Grand Traverse Pathology, P.C., and *all agents and employees, actual or ostensible, thereof who furnished treatment to the patient, Kevin Garries.*

"[A] hospital's vicarious liability arises because the hospital is held to have done what its agents have done." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 15; 651 NW2d 356 (2002). The Notice of Intent gave Munson notice that the Plaintiff intended to file suit against it for its agents' (the surgeons' and the pathologist's) breach of the standard of care applicable to each.

In *Roberts, supra*, a patient brought a medical malpractice action against a hospital, physicians, and other medical caregivers, for their alleged failure to properly diagnose an ectopic pregnancy. The defendants asserted that plaintiff's notices of intent to file a claim failed to sufficiently state the standard of care, the manner in which the standard was breached, the action the defendants should have taken, and the proximate cause of the injury. Our Supreme Court ultimately agreed.

The notice of intent in *Roberts* stated the applicable standard of practice or care as follows:

> Claimant contends that the applicable standard of care required that Obstetrics & Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC, provide the Claimant with the services of competent, qualified and licensed staff of physicians, residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case and to render same in accordance with the applicable standard of care.

The Defendant Munson relies upon the Court's finding that this notice neither alleged a standard specifically applicable to the defendant facilities, nor did they serve as adequate notice to these defendants that plaintiff planned to proceed under a vicarious liability theory at trial.

In *Roberts*, the plaintiff claimed in her complaint that the hospital and the professional corporation were vicariously liable for the negligence of their agents. The notices of intent, however, implied that the plaintiff alleged direct negligence against these defendants for

negligently hiring or negligently granting staff privileges to the individual defendants. For this reason, the plaintiff's notices neither alleged a standard specifically applicable to the defendant facilities, nor did they serve as adequate notice to these defendants that plaintiff planned to proceed under a vicarious liability theory at trial.

In the instant case, the Plaintiffs did not allege direct negligence against Munson in their Notice of Intent and then allege vicarious liability in their complaint. Instead, the Plaintiffs alleged direct negligence in their Notice of Intent only on the part of the surgeons and pathologist. The Notice of Intent is not ambiguous. It can only be read as a allegation of vicarious liability against Defendant Munson.

Therefore, the purpose of the statute was realized. Defendant Munson was given the opportunity to engage in settlement negotiations with regard to its alleged vicarious liability for the surgeons' and pathologist's breach of the standard of care applicable to each.

THE SURGEONS' MOTION

The crux of the surgeons' motion is that the Notice of Intent is defective because the Plaintiff failed to identify a specific standard of practice or care applicable to any particular surgeon Defendant and failed to identify how the individual surgeon breached the applicable standard of care and state what actions he should have taken to comply with the appropriate standard of care.

As noted above, the Notice of Intent states that the standard of care is the standard of care applicable to a general surgeon. The Notice of Intent further states that the surgeons breached that standard of care by failing to recognize that the appendectomy of November 6, 2002 was unsuccessful; failing to timely and appropriately diagnose sepsis; failing to order a CT scan of the abdomen and/or gastro gaffin enema in light of Mr. Garries' signs and symptoms; failing to timely and appropriately prescribe antibiotics; and failing to timely and appropriately perform necessary surgery. In addition, the Notice of Intent states the action that a general surgeon should have taken, specifically "to perform a CT scan of the abdomen and/or to perform a gastro gaffin enema, prescribe IV antibiotics and/or perform surgery."

According to the Notice of Intent and the Complaint, the Plaintiffs are not alleging negligence in the performance of the first surgery by Dr. Ranger nor are the Plaintiffs alleging negligence in the performance of the second surgery by Dr. Vanderkolk. If the Plaintiffs were making such allegations, the Notice would be clearly inadequate. However, the matters at issue in this case arise out of the care and treatment that these Defendants provided to Plaintiff Kevin Garries between the first and second surgeries. During this time, the surgeons provided shared or overlapping care. What the Plaintiff gave notice of and what is alleged in the Complaint is that both surgeons failed to recognize that the first surgery was unsuccessful and failed to properly diagnose and treat Plaintiff Kevin Garries' condition after the first surgery, during which time he developed sepsis which required additional surgeries and prolonged hospitalization. With this understanding, the Court finds that the Notice of Intent was adequate to advise these surgeon Defendants of the malpractice that would be, and in fact was, alleged against them.

CONCLUSION

The Plaintiffs' Notice of Intent complied with MCL 600.2912b and adequately notified the Defendants of the Plaintiffs' malpractice claims. The Plaintiffs only gave notice of vicarious liability claims against Defendant Munson which is consistent with the vicarious liability allegations against Defendant Munson in the Complaint. The Defendant Munson's Motion for Summary Disposition is denied.

Admittedly, the Plaintiffs did not make separate, specific allegations regarding the applicable standard of care, breach thereof and proximate cause against each Defendant surgeon in their Notice of Intent. In fact, the Plaintiffs alleged the same standard of practice or care and the same acts of negligence against both surgeons. This was appropriate, however, because the surgeons' alleged negligence arises during a period of time when they had shared or overlapping care of the Plaintiff Kevin Garries and they both allegedly failed to recognize that the first surgery was unsuccessful and failed to properly diagnose and treat his post-operative condition.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 3/02/05