STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JEANNE HARRISON,

Plaintiff,

v

Case No. 09-27430-NH
HON. PHILIP E. RODGERS, JR.

MUNSON HEALTHCARE, INC. and
RICHARD BURGETT,

Defendants.

Thomas C. Miller (P17786)
Attorney for Plaintiff

Thomas R. Hall (P42350)
Attorney for Defendants

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DECISION AND ORDER GRANTING
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

This action arises out of the alleged negligent use of an electrocautery device during a thyroidectomy performed by Dr. William Potthoff at Defendant Munson as a result of which the Plaintiff suffered a burn to her left forearm. The Plaintiff alleges that Defendant Burgett, a surgical assistant, was present during the procedure and mishandled the electrocautery device.

The Plaintiff originally filed an action in 2008, alleging negligence on behalf of Munson and "members of the operating room staff." That action was assigned Grand Traverse County Circuit Case No. 08-26921-NO. The Defendants filed a motion for summary disposition, claiming that the Plaintiff failed to give the requisite notice of intent to file a medical negligence action as required by MCL 600.2912b, and failed to file an affidavit of merit with her complaint as required by MCL 600.2816d. The Court heard the arguments of counsel and found that the action was one for medical, not general, negligence, and that the Plaintiff was required to give notice of intent and file an affidavit of merit which she had not done. The Court, therefore, dismissed the case, without prejudice.

The Plaintiff subsequently gave notice of intent to all possible Defendants of which Plaintiff was aware. Plaintiff ultimately filed suit against Defendants Munson and Burgett, only. In response, the Defendants filed a motion for summary disposition, claiming that this second action was barred by the doctrine of collateral estoppel because the issue of whether the action sounds in medical, rather than general, negligence requiring the Plaintiff to comply with the requirements of MCL 600.2912b and 2912d, had already been determined. In addition, Defendant Burgett filed an affidavit of noninvolvement.

The Court heard the oral arguments of counsel on October 5, 2009 and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, grants the Defendants' motion.

The Plaintiff contends that she is not required to comply with the provisions of MCL 600.2912b and MCL 600.2912d because Defendant Burgett is not a "health professional" as defined by the Michigan statutes. She "agrees that if a 'surgical assistant' is a 'health professional' as provided in Michigan statutes, then Defendant Burgett would be entitled to summary disposition based upon collateral estoppel. However, if a surgical assistant is not a 'health professional,' then collateral estoppel does not preclude this action against Mr. Burgett and his employer."

MCL 600.2912, entitled "Actions for malpractice; member of state licensed profession," provides, in pertinent part, as follows:

> (1) A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable against any person who holds himself out to be a member of a state licensed profession.

This statutory provision pertains to any professional malpractice action; not just a medical malpractice action. MCL 600.5838a, entitled "Medical malpractice claim; accrual; definitions; limitations" more specifically addresses civil actions for medical malpractice. It provides, in pertinent part, as follows:

> (1) For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, **or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment,** whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is

> engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. As used in this subsection:
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> (a) "Licensed health facility or agency" means a health facility or agency licensed under article 17 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20101 to 333.22260 of the Michigan Compiled Laws.
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> (b) "Licensed health care professional" means an individual licensed or registered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, and engaged in the practice of his or her health profession in a sole proprietorship, partnership, professional corporation, or other business entity. However, licensed health care professional does not include a sanitarian or a veterinarian. [Emphasis added.]

"[A]n employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment" is expressly mentioned as a potential defendant in a medical malpractice action.

Even if Mr. Burgett does not fit the definition of a state licensed professional under MCL 600.2912 because surgical assistants are not licensed or registered by the State of Michigan, he is nonetheless a potential medical malpractice defendant if he was employed by Munson and he engaged in or assisted in the medical care and treatment of the Plaintiff. MCL 600.5838a(1).

This conclusion is supported by the case law. In one of the cases consolidated in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999), a patient alleged that she was the victim of an assault and battery occurring at the hospital. She argued that her claim was a claim of ordinary negligence and not medical negligence and, therefore, the claim was not subject to the notice of intent and affidavit of merit requirements applicable to medical malpractice cases. Our Supreme Court held that the patient should have been required to provide a notice of intent to sue and an affidavit of merit. The Court cited *Bronson v Sisters of Mercy Health Corp,* 175 Mich App 647; 438 NW2d 276 (1989), in which the plaintiff's complaint included allegations that the defendant hospital had failed to supervise and adequately maintain its staff. The plaintiff argued that the trial court erred in granting summary

disposition for failure to file the claim within the two-year period of limitation applicable to medical malpractice claims, because the complaint stated a claim for ordinary negligence only, which is governed by a three-year period of limitation. The Court of Appeals affirmed the trial court's order of summary disposition, agreeing with the trial court that the allegations within the plaintiff's complaint involve issues of medical judgment. Following *Bronson*, the Court in *Dorris* said:

> The key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. The providing of professional medical care and treatment by a hospital includes supervision of staff physicians and decisions regarding selection and retention of medical staff. [175 Mich App at 652-653; 438 NW2d 276 (citations omitted).]
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> 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. *Wilson v Stilwill,* 411 Mich 587, 611; 309 NW2d 898 (1981); *McLeod v Plymouth Court Nursing Home, supra* at 115. In *Starr v Providence Hosp,* 109 Mich App 762, 766; 312 NW2d 152 (1981), the Court of Appeals found that issues involving whether the defendant hospital exercised appropriate supervision in a 'special care unit' were 'issues involving professional judgments which are beyond the common knowledge and experience of laymen to judge.'
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> In *Waatti v Marquette Gen'l Hosp,* 122 Mich App 44, 49; 329 NW2d 526 (1982), the Court of Appeals held that '[w]hether a seizure patient requires constant medical attendance or restraints is an issue of medical management to be established by expert testimony,' citing *Wilson v Stilwill and Starr v Providence Hosp, supra.* [*Doirris* at 45-46.]

In the instant case, determining when and how to use the electrocautery device involves professional medical judgment. As an employee of Munson, Mr. Burgett's negligence and the hospital's vicarious liability depend upon whether he exercised appropriate care in the use of the device. The answer to this question is not within the common knowledge and experience of a jury. Instead, it must be established by expert testimony.

In conclusion, the allegations of negligence against Mr. Burgett are allegations of medical negligence and the Plaintiff is required to comply with the notice of intent and affidavit of merit requirements of MCL 600.2912b and 600.2912d. Having failed to do so, the Defendant's motion for summary disposition should be and hereby is granted and the case

dismissed again, without prejudice. Provided the statute of limitations has not expired, the Plaintiff may refile her Complaint if she can obtain an appropriate affidavit of merit.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/09/09