



Medical Liability Practice Group

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## TIMELY, YET DEFECTIVE NOI TOLLS STATUTE IN MEDICAL MALPRACTICE CASES

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The Michigan Supreme Court recently held that a timely filed, yet defective, notice of intent (NOI) in a medical malpractice action tolls the statute of limitations as long as the claimant makes a good faith attempt to comply with statutory requirements. The court also held that a plaintiff may commence a medical malpractice action after 154 days where a defendant fails to make a good faith attempt to respond to the claimant's NOI.

In *Bush v Shabahang, et al* – N.W.2d –, 2009, W.L. 2259819, the plaintiff underwent surgical repair of an aortic aneurysm at the defendant hospital. The plaintiff alleged that in performing the repair procedure, one of the defendant surgeons lacerated the aneurysm and, as a consequence of injuries suffered during surgery and recovery, he was rendered unable to lead an independent life.

The plaintiff served an NOI just days prior to the expiration of the statute of limitations. Some, but not all, of the defendants responded to plaintiff's NOI pursuant to MCL 600.2912b(7). The plaintiff filed his complaint against all defendants 175 days after service of the NOI.

Various defendants thereafter moved for summary disposition, arguing that plaintiff failed to file an NOI in compliance with MCL 600.2912b and failed to wait the requisite 182-days prior to filing his complaint. The plaintiff responded that the NOI met the minimum statutory requirements and that he was permitted to file his complaint after 154 days from service of the notice because the defendants' responses to it were insufficient.

The trial court ruled that the NOI was deficient with regard to certain defendants and granted summary disposition in their favor. However, the trial court found that as to other defendants the NOI was sufficient and, therefore, ruled that the plaintiff's complaint was not prematurely filed.

The defendants appealed the trial court's rulings and the Michigan Court of Appeals found that, when read as a whole, the notice of intent complied with MCL 600.2912b(4) (excepting claims of direct liability for training and supervision against one defendant and noting that certain claims for vicarious liability were not properly pled). *Bush v Shabahang*, 278 Mich App 703; 753 NW 2d 271 (2008). The appellate court reversed the trial court's denial of summary disposition regarding the direct liability claims and remanded the case. The court affirmed the trial court's ruling that the complaint was timely filed and held that the plaintiff

could take advantage of the abbreviated 154-day waiting period because the various defendants' responses to the NOI were deficient. The defendants appealed to the Michigan Supreme Court.

The Supreme Court reasoned that the defects in the plaintiff's NOI did not bar tolling of the statute of limitations pursuant to MCL 600.5856(c) because the plain language of § 5856(c), as amended in 2004, states the statutes of limitations are tolled when "notice is given in compliance with the applicable **notice period** under § 2912b . . ." (emphasis supplied)

Prior to this amendment, § 5856(c) stated the statute of limitations was tolled "after the date notice is given **in compliance with § 2912b.**" (emphasis supplied) According to the Supreme Court, this "clearly and unequivocally sets forth that a plaintiff's NOI must comply only with the applicable notice period."

With regard to the consequences of serving a defective NOI, the court noted that § 2912b(1) is silent. There is no specific reference to "a mandatory dismissal penalty in the event of a defect." Also, the stated purpose of § 2912b was to promote settlement and reduce costs of litigation and to hold that the statute mandates dismissal would be inconsistent with this purpose. The court also examined the statute as a whole in reaching its conclusion, noting it was designed to impose equivalent requirements on plaintiffs and defendants. The only penalty provision in § 2912b is very minor, that is the shortening of the defendants waiting period by 28 days (from 182 to 154) in the event a response to the NOI is not served.

The Supreme Court then turned to MCL 600.2301, which allows a party to cure certain defects and pleadings. The court applied this statute to the service of an NOI as they considered it part of a "process, pleading or proceeding" pursuant to the statute. § 2301 provides that courts disregard errors or defects where (1) they do not affect substantial rights of the parties and (2) a cure is in the furtherance of justice.

As notices of intent are served at an early stage in the proceedings, the court reasoned that defects are to be expected, defendants receiving such notices are sophisticated health professionals with the ability to understand the nature of the claims asserted even in the presence of defects, and therefore no substantial right of a health care provider is implicated.

Further, the court held that the cure is in the furtherance of justice when a party makes a good faith attempt to comply with the content requirements of § 2912b. Therefore, "only when a plaintiff has not made a good faith attempt to comply with § 2912b(4) should a trial court consider dismissal of an action without prejudice."

The NOI in this case was 13 pages long, and the court found the plaintiff made a good faith attempt to address the subsections listed in § 2912 b(4). While the Supreme Court agreed with the lower appellate court that certain omissions did constitute defects, such defects fell squarely within § 2301 and should be disregarded or cured by amendment. For instance, the NOI did not adequately address one defendant's standard of care for "failure to properly train or hire" as it specifically failed to state how the hiring practices or training methods violated the standard of care, which practices or methods it should have employed, and how the improper practices and methods proximately caused the alleged injuries.

Finally, the Supreme Court held that MCL 600.2912b(7) clearly states that a defendant must provide the plaintiff with a written response within 154 days of receipt of the NOI. This is a mandatory provision and such a response must include a statement of the factual basis for the defense, the applicable standard of care, the manner in which the standard of care was complied, and the manner in which the healthcare professional contends the alleged negligence was not the proximate cause of the plaintiff's injuries. If the plaintiff does not receive such a response within the 154-day period, the plaintiff may file suit.

The court went on to rule that the defendants must also make a good faith attempt to comply with the content requirements of the statute to avail themselves of § 2301. Here, the response at issue was one page long and “utterly lacking in a good faith attempt to comply.”

This decision greatly relaxes the notice of intent requirements for plaintiffs. Plaintiffs now need only make a “good faith effort” to comply with the NOI provisions to toll the statute of limitations. To a lesser extent, this case also aids defendants as the court confirmed the plain language of the statute in holding the only penalty for not responding, or insufficiently responding, to an NOI is abbreviating the waiting period for which plaintiffs have to file their complaint from 182 days to 154 days.