

STATE OF MICHIGAN
COURT OF APPEALS

SHEILA ELLOUT, as Personal Representative of
the ESTATE OF CYNTHIA LATIMORE,

Plaintiff-Appellant,

v

DETROIT MEDICAL CENTER, DETROIT
RECEIVING HOSPITAL & UNIVERSITY
HEALTH CENTER, and CHRISTINA L.
COULBECK, R.N.,

Defendants-Appellees.

FOR PUBLICATION
October 8, 2009
9:05 a.m.

No. 286207
Wayne Circuit Court
LC No. 06-635635-NH

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

SHAPIRO, J.

In this medical malpractice case, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We reverse and remand for entry of an order reinstating plaintiff's complaint and dismissing plaintiff's claim against defendant Christina Coulbeck without prejudice. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At issue is whether plaintiff's suit as to all defendants is barred because the filing of her complaint occurred before the end of the 154/182-day no-suit period of MCL 600.2912b as to Nurse Coulbeck, whose actions were the gravamen of the respondeat superior claim against the other defendants.¹ Plaintiff sent her notice of intent (NOI) naming defendant Coulbeck on July

¹ In relevant part, 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.

* * *

(continued...)

28, 2006, and filed her complaint on December 27, 2006, waiting less than 154 days after sending the notice. She had, however, previously sent an NOI to the other defendants and the complaint was timely as to them. Plaintiff moved to voluntarily dismiss Coulbeck, which the trial court denied without explanation. The trial court then concluded that plaintiff's filing suit against Coulbeck prior to the expiration of the 154/182-day period required a dismissal with prejudice as to Coulbeck and that such a dismissal constituted an adjudication on the merits as to the remaining defendants pursuant to *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280; 731 NW2d 29 (2007), resulting in a grant of the remaining defendants' motion for summary disposition.

This Court reviews de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Here, we conclude that the trial court erred in granting defendant's motion for summary disposition. The law is abundantly clear that where a plaintiff has failed to comply with § 2912b by prematurely filing suit, the appropriate remedy is dismissal without prejudice. "[D]ismissal without prejudice was the appropriate remedy for plaintiff's noncompliance with § 2912b(1)." *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 714-715; 575 NW2d 68 (1997). See also *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26, 48; 594 NW2d 455 (1999) (holding that "dismissal without prejudice would be the appropriate sanction" where a plaintiff fails to provide an NOI).

The trial court recognized these cases, but relied on *Holmes v Mich Capital Med Ctr*, 242 Mich App 703; 620 NW2d 319 (2000). However, *Holmes* involved a failure to file an affidavit of merit under § 2912d. It did not involve the NOI provision under § 2912b at issue in this case. The trial court also relied on *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005). In *Burton*, the Michigan Supreme Court held that the plaintiff's premature filing of the complaint did not toll the statute of limitations. *Id.* at 756. It held that "dismissal is an appropriate remedy for noncompliance with the notice provisions of MCL 600.2912b and that when a case is dismissed, the plaintiff must still comply with the applicable statute of limitations." *Id.* at 753. It does not state, however, that the dismissal must be with prejudice.

In any case, even if *Burton* was controlling, the Michigan Supreme Court recently held in *Bush v Shabahang*, 484 Mich 156; ___ NW2d ___ (2009), that § 2912b contains no mandatory dismissal penalty. *Id.* at 173. Indeed, it concluded that "it was not the intent of the Legislature to incorporate a mandatory dismissal penalty into § 2912b." The Court explained:

The stated purpose of § 2912b was to provide a mechanism for "promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs" To hold that § 2912 in an of itself mandates dismissal with prejudice would complicate, prolong, and significantly increase the expense of

(...continued)

(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.

litigation. Dismissal with prejudice would be inconsistent with these stated purposes. [*Id.* at 174-175.]

The Court further noted that the only penalty to a defendant who fails to comply is “very minor” and that “it would be inconsistent . . . to assume that the Legislature intended to impose on plaintiffs the harshest penalty: dismissal with prejudice.” *Id.* at 175. Although *Bush* involved a question regarding a defective NOI rather than premature filing, the result is the same, as the NOI statute does not set forth an express penalty for premature filing.

Thus, we conclude that the trial court erred in dismissing Coulbeck with prejudice because the proper sanction for plaintiff’s premature filing against Coulbeck was dismissal without prejudice.² Moreover, because Coulbeck’s dismissal should have been without prejudice, it was not an adjudication on the merits.³ *Yeo v State Farm Fire & Cas Ins Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000). Accordingly, the trial court erred in granting defendant’s motion for summary disposition.

We reverse the trial court’s grant of summary disposition to defendant, reinstate plaintiff’s complaint, and order that the trial court enter an order dismissing plaintiff’s claim against Coulbeck without prejudice. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Michael J. Kelly

² It makes no difference that the statute of limitations had run against Nurse Coulbeck at the time the motion was brought. A defendant against whom the statute of limitations has run is protected from further litigation even when the dismissal is without prejudice. If a plaintiff should subsequently file against that defendant, the defendant would be entitled to summary disposition. However, where the basis for dismissal is that the plaintiff has prematurely filed under § 2912b, the proper remedy is dismissal without prejudice, regardless of whether the statute of limitations has run.

³ Having found that the dismissal should have been without prejudice, *Al-Shimmari, supra*, is inapplicable, as it involves a dismissal with prejudice. Accordingly, we need not determine whether its holding is retroactive in contexts outside of the late service of process issue, the setting which *Al Shimmari* specifically addressed.