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**JORDYN LYNN DAVID, a Minor, by her Next Friend, ANDREA DAVID, Plaintiff-Appellant, v. LAWRENCE STERNBERG, DPM; CHARLANNE BRATTON, DPM; KARI PRESCOTT, DPM; ANGELA RENSHAW, DPM; and GENESYS REGIONAL MEDICAL CENTER, Defendants-Appellees.**

**No. 267833**

**COURT OF APPEALS OF MICHIGAN**

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**August 22, 2006, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published October 10, 2006.

**PRIOR HISTORY:** Midland Circuit Court. LC No. 04-007420-NH.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** In plaintiff patient's medical malpractice action against defendants, the Midland Circuit Court (Michigan) granted summary disposition in defendants' favor. The patient appealed.

**OVERVIEW:** The patient alleged that she had a bunionectomy. Three days later she complained of tightness in the dressing, pain, and an elevated body temperature. When the dressing was removed there were problems. The patient alleged that, as a result of defendants' negligence, she suffered permanent anatomical and neurological damage to her foot. Because the patient did not file an affidavit of merit for her medical malpractice claim, defendants' motion for summary disposition was properly granted on the medical malpractice claim. The patient adamantly asserted that her claim was only about defendants' failure to respond to her complaints. Because discerning infection, capillary flow, and post-surgical condition of the patient's surgical site, and identifying and treating her medical condition were not within the realm of common knowledge, her complaints involved medical judgment. Thus, her claim involved medical malpractice, not ordinary negligence, and the trial court properly granted defendants' motion for summary disposition on plaintiff's negligence claim. In addition, the affidavit of merit requirement in *MCL 600.2912d* was not merely procedural and should not be waived.

**OUTCOME:** The appellate court affirmed the trial

court's judgment.

**LexisNexis(R) Headnotes**

***Torts > Malpractice & Professional Liability > Healthcare Providers***

[HN1] *MCL 600.2912d* requires that a complaint alleging medical malpractice must be accompanied by an affidavit of merit.

***Civil Procedure > Summary Judgment > Appellate Review > Standards of Review***

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

[HN2] An appellate court reviews de novo a trial court's decision on a motion for summary disposition.

***Civil Procedure > Summary Judgment > Standards > General Overview***

[HN3] Where the parties and a trial court rely on matters outside the pleadings, review under *MCR 2.116(C)(10)* is appropriate. Summary disposition under *MCR 2.116(C)(10)* is appropriate when there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law.

***Civil Procedure > Pleading & Practice > General Overview***

[HN4] It is well established that the gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim.

***Torts > Malpractice & Professional Liability >***

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**Healthcare Providers**

**Torts > Negligence > General Overview**

[HN5] A complaint cannot avoid the application of the procedural requirements of a medical malpractice action by couching its cause of action in terms of ordinary negligence.

**Torts > Malpractice & Professional Liability > Healthcare Providers**

[HN6] The two defining characteristics of a medical malpractice claim are (1) medical malpractice can occur only within the course of a professional relationship; and (2) claims of medical malpractice necessarily raise questions involving medical judgment. After ascertaining that a case involves a professional relationship, the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience.

**Civil Procedure > Pleading & Practice > Service of Process > Proof > General Overview**

**Torts > Malpractice & Professional Liability > Healthcare Providers**

[HN7] See *MCR 2.112(L)*.

**Governments > Courts > Authority to Adjudicate**

**Torts > Malpractice & Professional Liability > Healthcare Providers**

[HN8] Where the Michigan Supreme Court has adopted a court rule that specifically enforces the provisions of *MCL 600.2912d* requiring an affidavit of merit in a medical malpractice suit, an appellate court cannot conclude that the statute has usurped the Michigan Supreme Court's rule-making power.

**Torts > Malpractice & Professional Liability > Healthcare Providers**

[HN9] Compliance with *MCL 600.2912d* requiring an affidavit of merit in a medical malpractice suit is mandatory and a complaint filed without it is insufficient to commence a lawsuit.

**Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Waiver & Preservation**

**Civil Procedure > Summary Judgment > Time Limitations**

**Torts > Malpractice & Professional Liability > Healthcare Providers**

[HN10] In a medical malpractice suit, where defendants have not brought their motion for summary disposition until the period of limitations has run for a plaintiff to file

an affidavit of merit, defendants do not waive the defense. *MCL 600.2912b* places the burden of complying with the notice provisions on the plaintiff. Where defendants specifically raise the statute of limitations and plaintiff's compliance with *MCL 600.2912b* in their answer and affirmative defenses, that direct assertion of those defenses by defendants can by no means be considered a waiver. To the contrary, it is a clear affirmation and invocation of those defenses.

**Constitutional Law > Equal Protection > Scope of Protection**

[HN11] When a statute violates equal protection, it impermissibly causes similarly situated litigants to be treated differently.

**COUNSEL:** Skinner Professional Law Corporation (by David R. Skinner and Staci M. Richards) for Jordan L. David. Bay City.

Chapman and Associates, P.C. (by Ronald W. Chapman, Brian J. Richtarcik, and David B. Mammel), for Lawrence T. Sternberg, D.P.M. Bloomfield Hills.

Garan Lucow Miller, P.C. (by David M. Shafer and Boyd E. Chapin, Jr.), for Charlanne Bratton, D.P.M. Detroit.

Foley, Baron & Metzger, PLLC (by Judith A. Sherman and Matthew T. Ajluni), for Kari Prescott, D.P.M.; Angela Renshaw, D.P.M.; and Genesys Regional Medical Center. Ann Arbor.

**JUDGES:** Before: Kelly, P.J., and Markey and Meter, JJ.

**OPINION BY:** Kirsten Frank Kelly

**OPINION:** [\*\*90] [\*379] PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in defendants' favor. We affirm.

I. Facts

On May 28, 2004, plaintiff filed a complaint alleging medical malpractice by defendants. Plaintiff alleged that on February 15, 2002, she underwent a bunionectomy. On February 18, 2002, plaintiff complained of tightness in the dressing, pain, and an elevated body temperature. On February 22, 2002, the dressing was removed and there was "extreme erythema with signs of prolonged pressure to the heel." Plaintiff alleged that defendants were negligent in not considering orthotics, improperly applying the cast, failing to address plaintiff's complaints of pain, and failing to assess, diagnose, and treat her injury. Plaintiff alleged that, as a result of defendants'

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negligence, she suffered [\*\*\*2] permanent anatomical and neurological damage to her foot.

Defendants filed motions for summary disposition pursuant to *MCR 2.116(C)(7)* and *(C)(10)* arguing that plaintiff had failed to file an affidavit of merit with her claim. n1 Plaintiff responded, stating that the affidavit of merit was inadvertently not stapled to the complaint. Plaintiff also filed a motion to amend the complaint to [\*380] add a count of ordinary negligence. The trial court entered an order granting the motions for summary disposition and granting plaintiff's motion to amend her complaint.

n1 [HN1] *MCL 600.2912d* requires that a complaint alleging medical malpractice be accompanied by an affidavit of merit. *Scarsella v Pollak*, 461 Mich. 547, 549; 607 N.W.2d 711 (2000).

Plaintiff filed an amended complaint adding an ordinary negligence count, in which she alleged that defendants failed to take the following actions and breached the following duties:

a. To apply strictures to the leg, ankle and foot of the [plaintiff] [\*\*\*3] in such a way as to not cut off the blood supply to the tissues below the stricture or strictures.

b. To apply such strictures as to not cause the morbid narrowing of some canal or duct of the body.

c. Failure to take steps to relieve the [plaintiff's] pain and loss of circulation when she complained of pain and tightness of dressing.

d. Failure to take steps to protect patient when she informed defendants [\*\*\*91] prior to permanent injury of pain and tightness.

e. Failure to properly train individuals responsible for the proper care, handling and examination of [plaintiff] and to prevent injury to her.

f. To respond to [plaintiff's] complaints of pain in the area below the strictures to determine whether there was adequate blood supply, or, whether there were signs of morbidity to the tissues.

g. Defendants knew of the tightness and complaints of pain and did nothing.

h. Failure to properly clean and

change the dressing when the tissue began to die because of the stricture.

Defendants filed another motion for summary disposition pursuant to *MCR 2.116(C)(7)* and *(C)(10)* arguing that plaintiff's added claim sounded [\*\*\*4] in medical malpractice, not ordinary negligence, and should be dismissed for failure to file an affidavit of merit. Plaintiff [\*381] responded, arguing that her claim did not involve matters of professional judgment because a jury would not need expert testimony to understand "that a bandage placed too tight is what caused the constriction of blood resulting in necrosis." The trial court entered an order dismissing all counts against all defendants with prejudice.

## II. Analysis

Plaintiff first contends that the trial court erred in granting defendants' motion for summary disposition on the basis of her failure to file an affidavit of merit when she stated a claim of ordinary negligence. It is undisputed that plaintiff failed to file an affidavit of merit with her complaint. Plaintiff's argument on appeal focuses solely on whether the trial court erred in ruling that her claim was a medical malpractice claim rather than an ordinary negligence claim.

[HN2] We review de novo a trial court's decision on a motion for summary disposition. [HN3] Because the parties and the trial court relied on matters outside the pleadings, review under *MCR 2.116(C)(10)* is appropriate. Summary disposition [\*\*\*5] under *MCR 2.116(C)(10)* is appropriate when there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Driver v Hanley (After Remand)*, 226 Mich. App. 558, 561-562; 575 N.W.2d 31 (1997).

[HN4] It is well established that "[t]he gravamen of an action is determined by reading the claim as a whole," *Simmons v Apex Drug Stores, Inc*, 201 Mich. App. 250, 253; 506 N.W.2d 562 (1993), and looking "beyond the procedural labels to determine the exact nature of the claim," *MacDonald v Barbarotto*, 161 Mich. App. 542, 547; 411 N.W.2d 747 (1987). Our Supreme Court has [\*382] held, [HN5] "[A] complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich. 26, 43; 594 N.W.2d 455 (1999), quoting *McLeod v Plymouth Court Nursing Home*, 957 F. Supp. 113, 115 (ED Mich, 1997).

In *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich. 411, 422; [\*\*\*6] 684 N.W.2d 864 (2004), our Supreme Court set forth [HN6] the "two defining characteristics" of a medical malpractice claim: "First, medical malpractice can occur only "within the course of a professional relationship." Second, claims of medical

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malpractice necessarily 'raise questions involving medical judgment.'" (Citations omitted). Accordingly, after ascertaining that the case involves a professional relationship, the next step is determining "whether the claim raises questions of medical judgment requiring expert testimony or, on the other [\*\*92] hand, whether it alleges facts within the realm of a jury's common knowledge and experience." *Id. at 423*.

In this case, there is no dispute about whether the case involves a professional relationship. Plaintiff contends that the claim does not raise questions of medical judgment requiring expert testimony; rather, it alleges facts within the realm of a jury's common knowledge and experience. Plaintiff argues that her claim is like the "failure to take steps" claim discussed in *Bryant*. In *Bryant*, the plaintiff alleged that the defendant "[n]egligently and recklessly fail[ed] to take [\*\*\*7] steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 [1997] entangled between the bed rails and the mattress." *Id. at 430*. The Court held:

This claim sounds in ordinary negligence. No expert testimony is necessary to determine whether defendant's [\*383] employees should have taken *some* sort of corrective action to prevent future harm after learning of the hazard. The fact-finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges. [*Id. at 430-431*.]

Plaintiff attempts to draw similarities between the claim of failure to take steps in *Bryant* and her claim in this case. Plaintiff asserts that her claim is not about how the bandage was wrapped, but about defendants' failure to take corrective action despite plaintiff's complaints of pain and fever. Plaintiff also cites the deposition testimony of Dr. Barry Bean, who testified that it is within the common knowledge of a layperson that these types of complaints indicate a cutoff in blood supply and require removal of the bandage.

Plaintiff alleged in her ordinary [\*\*\*8] negligence claim that defendants failed to properly apply strictures to the leg, ankle, and foot, failed to take steps to relieve pain and loss of circulation, failed to properly train their staff, failed to respond to plaintiff's complaint of pain, and failed to clean and change the dressing. Because plaintiff adamantly asserts that this claim is *only* about defendants' failure to respond to plaintiff's complaints and makes no argument concerning her other claims, we consider plaintiff to have abandoned all claims except the claim that defendants failed to respond to her complaints.

n2 Plaintiff states on appeal, "This case has nothing to do with how the bandage was wrapped." Plaintiff also makes no mention of her failure to train claim. Although we do not address these abandoned claims, we note that the proper way to bandage a surgical site clearly requires medical expertise, as does training medical staff regarding bandaging surgical sites, assessing the condition of postsurgical sites, and diagnosing and treating infections.

[\*\*\*9]

[\*384] Because plaintiff's claim raises questions of medical judgment, it is a claim sounding in medical malpractice, not ordinary negligence. According to defendant Charlanne Bratton's deposition testimony, plaintiff underwent surgery on her foot on February 15, 2002. On February 18, 2002, Dr. Bratton removed the outer layers of the surgical dressing and decided not to reapply certain parts of the dressing. On February 22, 2002, Dr. Bratton removed all the layers of the dressing and reapplied some layers more loosely. X-rays were also taken and read at this time. Dr. Bratton assessed plaintiff's condition and determined there was no infection or abnormal microbial growth. On February 25, 2002, Dr. Bratton removed all the dressing and reapplied some layers. At [\*\*93] each of these visits, Dr. Bratton determined that there was appropriate capillary fill in the toes and no signs of infection. In all these visits, Dr. Bratton exercised medical judgment in evaluating plaintiff's condition and deciding how to treat her. On the basis of plaintiff's complaint and the record evidence, we conclude that discerning infection, capillary flow, and the postsurgical condition of plaintiff's surgical site, and identifying [\*\*\*10] and treating plaintiff's medical condition are not within the realm of common knowledge. Contrary to plaintiff's assertion, defendants' responses to plaintiff's complaints involved medical judgment. This is different from the *Bryant* case, in which the action the defendant failed to take was simply untangling the plaintiff from bedsheets. Because plaintiff's allegations in this case raise questions involving medical judgment, her claim sounds in medical malpractice, not ordinary negligence.

Plaintiff next argues that *MCL 600.2912d* is unconstitutional because it infringes on the rule-making powers of our Supreme Court, specifically *MCR 2.101(A)* and *(B)*, which provide that filing a complaint [\*385] commences a civil suit. Plaintiff overlooks the fact that our Supreme Court adopted *MCR 2.112(L)*, which provides:

[HN7] In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in *MCL 600.2912d*, *600.2912e*.

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Notice of filing the affidavit must be promptly served on the opposing party. If the opposing party has appeared [\*\*\*11] in the action, the notice may be served in the manner provided by *MCR 2.107*. If the opposing party has not appeared, the notice must be served in the manner provided by *MCR 2.105*. Proof of service of the notice must be promptly filed with the court.

[HN8] Because our Supreme Court has adopted a court rule that specifically enforces the provisions of *MCL 600.2912d*, we cannot conclude that the statute has usurped the Court's rule-making power.

Plaintiff next argues that because defendants were completely informed by plaintiff's timely filing of a notice of intent to sue and are not prejudiced by plaintiff's failure to file an affidavit of merit, the affidavit of merit requirement is merely procedural and should be waived to avoid a Draconian result. Plaintiff also argues that the trial court should have deemed the affidavit of merit requirement waived because defendants were fully informed, plaintiff's claim is not frivolous, discovery has taken place, and defendants waited for the statutory period of limitations to expire before filing their motion for summary disposition. We disagree.

Our Supreme Court has already ruled that [HN9] compliance [\*\*\*12] with *MCL 600.2912d* is mandatory and that a complaint filed without it is insufficient to commence a lawsuit. *Scarsella v Pollak*, 461 Mich. 547, 553; 607 N.W.2d 711 (2000). Further, defendants stated in their affirmative defenses that plaintiff failed to file an affidavit [\*386] of merit; therefore, plaintiff was on notice of this defect before defendants filed their motion for summary disposition. Our Supreme Court has held:

[HN10] The fact that defendants did not bring their motion for summary disposition until the period of limitations had run does not constitute a waiver of the defense. *MCL 600.2912b* places the burden of complying with the notice provisions on the plaintiff. . . . Here, defendants specifically raised the statute of limitations and plaintiff's compliance with *MCL 600.2912b* in their answer and affirmative defenses. Such a direct assertion of these defenses by defendants can by no means be considered [\*\*\*94] a waiver. To the contrary, it was a clear affirmation and invocation of such defenses. Defendants' pleadings were more than sufficient to comply with the requirements of [\*\*\*13] *MCR 2.116(D)(2)* (requiring the statute of

limitations to be raised in the first responsive pleading or in a motion filed before the responsive pleading.) [*Burton v Reed City Hosp Corp*, 471 Mich. 745, 754-755; 691 N.W.2d 424 (2005) (citation omitted).]

Therefore, plaintiff's argument is without merit.

Plaintiff also argues that *MCL 600.5851(7)* violates constitutional equal protection guarantees because it does not permit minors the same two years' extension that *MCL 600.5852* permits from the time letters of authority are issued to personal representatives in wrongful death actions. First, this Court has already addressed the constitutionality of *MCL 600.5851* and its treatment of minors stating:

Clearly, the object of the challenged legislation was to limit the period of time during which health-care providers would be at risk from malpractice suits. In our opinion, the means sought by the Legislature was reasonably related to this objective because of the large number of children receiving health care and the lengthy exposure to malpractice claims that would result in the absence of [\*\*\*14] the enacted limitation period. The state unquestionably has a legitimate interest in securing adequate and affordable health [\*387] care for its residents. And it is reasonable to assume that a lessening of exposure to malpractice claims would encourage health-care providers to remain in this state. Plaintiff has failed to show that the classification is arbitrary and does not bear a rational relation to the object of the legislation. [*Bissell v Kommareddi*, 202 Mich. App. 578, 580-581; 509 N.W.2d 542 (1993).]

Second, [HN11] when a statute violates equal protection, "it impermissibly causes similarly situated litigants to be treated differently." *Phillips v Mirac, Inc*, 470 Mich. 415, 420; 685 N.W.2d 174 (2004). We disagree with plaintiff's assertion that minors and decedents are similarly situated litigants. Therefore, we conclude that this issue is also without merit.

Finally, plaintiff contends, that *MCL 600.2912d* violates the due process rights of minors and their attorneys because it "arbitrarily bars the actions of victims." (Citation omitted.) Again, this Court has already decided that *MCL 600.2912d* [\*\*\*15] does not violate due process. *Barlett v North Ottawa Community Hosp*, 244 Mich. App. 685, 694-696; 625 N.W.2d 470

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(2001). Therefore, this issue, too, is without merit.

/s/ Jane E. Markey

Affirmed.

/s/ Patrick M. Meter

/s/ Kirsten Frank Kelly