

MSC Opinion: Amendment of original Notice of Intent to add nonparty defendant will not relate back to original filing date for purposes of tolling the statute of limitations

2. August 2011 By Madelaine Lane

In *Driver v. Naini, M.D., et al., Case No. 140922*, the Michigan Supreme Court clarified its earlier ruling in *Bush v. Shabahang* and held that an amended notice of intent (“NOI”) will not relate back to the date of the original filing, and therefore the statute of limitations will not be tolled, where the plaintiff seeks to add a nonparty defendant. This is a 4 to 3 decision authored by Justice Mary Beth Kelly. The Court affirmed the Court of Appeals’ conclusion but reversed the judgment in all other respects. The case was remanded to the trial court for entry of an order of summary disposition in favor of CCA.

Plaintiff visited Dr. Naini in 2003. The physician administered a carcinoembryonic antigen test to identify whether plaintiff, who had a history of colon cancer, was suffering from any disease of the liver, pancreas or blood. The test revealed that the plaintiff has a slightly elevated CEA level, but Dr. Naini did not order a colonoscopy or take any further action. Two years later, in 2005, the plaintiff was diagnosed by another physician with stage IV colon cancer.

On April 25, 2006, plaintiff’s counsel sent a NOI to Dr. Naini and Michigan Cardiology Associates, P.C.. After the mandatory waiting period prescribed in MCL 600.2912(b), plaintiff filed a medical malpractice action against these two defendants. In January 2007, the defendants filed a notice of nonparty fault pursuant to MCR 2.112(K). Defendants named Cardiovascular Clinical Associates P.C. (“CCA”) as a potential defendant because Dr. Naini had been employed at CCA during the time period when plaintiff treated with him. On February 1, 2007, plaintiff sent a NOI to CCA and on March 22, 2007, plaintiff amended the complaint to add CCA as a defendant. The amended complaint was filed only 49 days after plaintiff issued the NOI to CCA. Under MCL 600.2912b(3), a plaintiff must wait 91 days after issuing a NOI before adding a defendant to an existing medical malpractice lawsuit.

CCA filed a motion for summary disposition arguing that plaintiffs’ complaint was barred by the statute of limitations because plaintiff failed to comply with the 91-day notice period. Plaintiff argued that his complaint was timely because he complied with the nonparty fault statute, MCL 600.2957(2). The circuit court agreed with the defendant and denied CCA’s motion for summary disposition.

The Court of Appeals granted leave to appeal and reversed the trial court’s ruling. In reaching this decision, the court concluded that there was an irreconcilable conflict between MCL 600.2957(2), which generally applies to civil actions, and MCL 600.2919b, which applies specifically to medical malpractice actions. Because MCL 600.2919b is more specific and governed medical malpractice claims, the court applied the 600.2919b analysis and concluded that plaintiff’s claims against CCA were time barred.

The Michigan Supreme Court affirmed the result reached by the Court of Appeals but reversed the judgment in all other respects. First, the Court ruled that the Court of Appeals erred by holding MCL 600.2919b irreconcilably conflicts with MCL 600.2957. Both statutes include a 91-day waiting period and nothing in MCL 600.2957 allows a plaintiff to forgo the 91-day waiting period between filing a NOI

and filing an amended complaint. Indeed, the Court concluded that MCL 600.2957 does not require that an amended complaint be filed within 91 days of the identification of a nonparty defendant. Rather, only a motion to file an amended complaint must be filed within the 91-day window. However, the Court noted that MCL 600.2957 does not save plaintiff's claim. When plaintiff commenced his lawsuit against Dr. Naini and Michigan Clinical Associates, P.C., the statute of limitations on any claim against CCA had expired. Although the original NOI tolled the statute of limitations as to Dr. Naini and Michigan Clinical Associates, P.C., CCA was not listed on the original NOI. And, the subsequent NOI issued to CCA does not relate back to the date of the original filing.

Second, the Court held that *Bush v Shabahang* was inapplicable to this case. Plaintiff could not merely amend his original NOI to name CCA as a defendant, and thereby get around the applicable statute of limitation. The Court clarified that its ruling in *Bush* was limited to amended a defective yet timely NOI. That rule is not applicable in this case where CCA never received a timely NOI. If this were not the case, plaintiffs would be allowed to add a countless nonparty defendants simply by filing a NOI against one single defendant.

Chief Justice Young authored a concurring opinion in which he reasserted his dissent in *Potter v McLeary*, 484 Mich 397 (2009). Justice Hathaway authored the dissenting opinion, joined by Justice Marilyn Kelly and Justice Cavanagh. The dissenters noted that Dr. Naini's treatment of plaintiff did not end until October 18, 2005. CCA was served with a NOI on February 1, 2007. Under the two-year statute of limitations for medical malpractice claims, plaintiff may proceed with any claims against CCA which accrued on or after February 1, 2005. Further, if plaintiff was unaware he had a claim against CCA until he received the notice of nonparty fault on January 15, 2007, that claim is subject to a six-month statute of limitations beginning on January 15, 2007. Finally, the dissenting justices concluded that MCL 600.2957 creates an additional 91-day window in which to bring claims against nonparty defendants. To the extent that this provision conflicts with MCL 600.2919b, the proper remedy would be to disallow the use of notices of nonparty fault in medical malpractice cases all together.