STATE OF MICHIGAN

COURT OF APPEALS

CHANDRA JOHNSON, and ELISHA JACKSON, JR, as Personal Representative of the Estate of Richard Anthony Jackson, Deceased,

Plaintiffs-Appellees/Cross-Appellants,

v

PETER ABRAMS, JR, and EMCEA TRANSPORT,

Defendants-Appellants/Cross-Appellees,

and

TITAN INSURANCE COMPANY,

Defendant,

and

DETROIT MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
February 24, 2011

No. 287906
Wayne Circuit Court
LC No. 07-701656-NI

Before: STEPHENS, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendants Peter Abrams, Jr. and EMCEA Transport ("EMCEA") appeal by way of leave granted the trial court's order striking defendants' notice of nonparty at fault, striking one of defendants' affirmative defenses and limiting discovery. Additionally, Plaintiffs Chandra Johnson and Elisha Johnson, as Personal Representatives of the estate of Richard Jackson, cross-appeal the trial court's rulings regarding motions to strike defendants' notice of nonparty at fault. The parties have raised a myriad of issues, including the interplay between the medical malpractice statutes and the notice of nonparty at fault court rules; the interpretation of MCL MCL 600.2912b as it relates to subsequent medical providers and the sufficiency of the notice filed in this case and the court's exercise of authority in awarding a discovery sanction. We find that the dispositive issue is whether MCL 600.2957 and MCL 600.6304 apply to this case and

therefore do not address the other issues. We affirm the trial court's striking of the notice of nonparty at fault, albeit for reasons other than those stated by the court and reverse the court's limitation on discovery.

On June 26, 2006, Mr. Jackson was driving his car on Newburgh Road near its intersection with Schoolcraft Road in Livonia. At the same time, Abrams was operating a vehicle that was owned by EMCEA and was doing so with EMCEA's consent. The vehicle that Abrams was operating collided with Mr. Jackson's car. Mr. Jackson survived the accident, though he allegedly suffered numerous injuries, including injuries to several discs in his back.

On January 18, 2007, Mr. Jackson filed his complaint. The complaint contained three counts. The first two counts alleged negligence on the part of Abrams and EMCEA. The third count asserted a first party claim against Titan Insurance Company ("Titan"). On March 19, 2007, defendants petitioned to remove this matter to federal district court. The cause of action was subsequently removed to the United States District Court for the Eastern District of Michigan. However, on August 29, 2007, upon Mr. Jackson's motion, the matter was remanded to Wayne Circuit Court.

As a result of injuries allegedly suffered in the car accident, Mr. Jackson required surgery, which was performed by staff of the Detroit Medical Center ("DMC"). Following the surgery, it is alleged that there were complications with the extubation and Mr. Jackson did not recover the ability to breath. He therefore entered cardiac arrest and died. Subsequently, Chandra Johnson and Elisha Jackson, Jr., were appointed as personal representatives of the estate.

Defendants filed their notice of nonparties at fault on October 1, 2007. Defendants alleged that the negligent acts and omissions of the surgeons, medical staff and hospitals that were involved in the cervical disectomy caused or contributed to decedent's death.

Plaintiffs filed their first amended complaint on November 26, 2007. The amended complaint contained the same three counts as the original complaint. However, unlike the original complaint, it sought damages pursuant to the Michigan Wrongful Death Act. Defendants filed their answer to the first amended complaint on December 17, 2007. In their corresponding affirmative defenses, defendants asserted that a nonparty to the litigation caused decedent's injuries and, similarly, that the injuries resulted from an intervening, superseding event.

On February 20, 2008, plaintiffs filed a motion to strike defendants' notice of nonparty at fault. In the motion, plaintiffs alleged that the notice failed to comply with MCR 2.112(K)(3)(b) where it did not contain a statement that explained the basis for believing that the nonparty was at fault. Plaintiffs further argued that the notice should be struck pursuant to a discovery sanction. The trial court held a hearing on the motion on March 14, 2008. After brief arguments from each party, the trial court stated that the notice of nonparty at fault was in compliance with the cited court rule. The court further held that defendants' responses to the interrogatories were adequate when considering the early stages of the litigation and when considering that defendants were continuing to expand upon their theories. Consequently, the court denied the motion.

On July 10, 2008, plaintiffs again filed a motion that sought to strike the notice of nonparty at fault. The motion further sought partial summary disposition and an order compelling the depositions of Mr. Jackson's treating doctors. Regarding the notice of nonparty at fault, plaintiffs argued that the notice should be stricken because a tortfeasor is liable for all foreseeable injuries arising from his conduct, including damages that result from subsequent medical treatment. Plaintiffs asserted that the medical providers would be considered successive tortfeasors, as opposed to joint tortfeasors, and could not share in the liability for Mr. Jackson's injuries. Regarding the motion for partial summary disposition, plaintiffs argued that partial summary disposition was proper where the only causation issue was whether the surgery that resulted in the death reasonably related to the injuries suffered in the car accident. Consequently, plaintiffs further argued that because it was necessary to determine the relationship between the surgery and the car accident, the trial court should order the depositions of the treating doctors.

On July 30, 2008, DMC filed a response to plaintiff's motion seeking to compel depositions of DMC employees. DMC argued that any such action would be improper where no notice of intent or affidavit of merit had been filed because Michigan law expressly required the medical providers be aware of the theory of malpractice before the initiation of the discovery period.

The trial court held a hearing on the motions to strike the notice of nonparty at fault, for partial summary disposition and to compel discovery on August 1, 2008. At the hearing, plaintiffs reiterated their arguments that the Michigan allocation of fault statutes did not permit a successive tortfeasor to share in liability and that the common law prevented an alleged act of medical malpractice from being classified as an intervening, superseding cause. In response, defendants argued that plaintiffs were improperly interpreting the allocation of fault statutes and that those statutes broadly permitted the filing of notices of nonparties at fault and did not require corresponding affidavits of merit or notices of intent. The trial court indicated that it did not believe that the legislature and the courts of this state intended the notice of nonparty at fault statute to trump the medical malpractice pleading requirements. DMC reiterated the arguments from its brief and alleged that defendants were trying to transform the cause of action into one for medical malpractice without meeting the requirements for a medical malpractice action. Following DMC's argument, the trial court stated that DMC's argument "was the strongest argument [the court] heard all morning." The court concluded that the statutes relating to nonparties at fault were not intended to subvert the medical malpractice statutes. The court consequently struck defendants' notice of nonparty at fault, struck the corresponding affirmative defense and limited any deposition of medical personnel to the subject of whether the surgery reasonably related to the car accident. The court issued a written order on September 4, 2008. The order stated that there could be no allocation of fault to Mr. Jackson's medical providers and that any affirmative defense relating to those medical providers was consequently stricken. The order also provided that the parties could conduct discovery only relating to whether the surgery was reasonably necessary.

On appeal, defendants argue that the comparative fault statutes permitted the filing of their notice of nonparty at fault. We disagree. This case involves questions of statutory interpretation, which we review de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

We conclude that the comparative fault statutes do not allow for a finding of liability on behalf of the medical providers. We base our conclusion on this Court's recent opinion in *Slager v Kid's Kourt, LLC*, ___ Mich App ___; ___ NW2d ___ (2010), in which this Court disallowed a defendant's notice of nonparty at fault that named the minor plaintiff's parents. The court reasoned that the injury occasioned by Kid's Kourt's negligence was separate from that caused by the parent's failure to follow certain medical advice for the injury. *Id*., slip op at 1-2. Admittedly, *Slager* did not address the long standing precedent that medical negligence was a foreseeable consequence of any tort requiring medical care and not actionable. Likewise, *Slager* did not tackle the thorny procedural issues raised by the interplay of the pre-suit jurisdictional affidavit requirements of MCL 600.2912b(1) and MCR 2.112(k)(3)(b) However, the relevant and controlling precedent established by *Slager* is that MCL 600.2957 allows a notice of nonparty at fault against any party, immune or not, who contributes to a single injury. As the Court stated, "[w]e find nothing in MCL 600.2957 that conflicts with our assessment that the comparative fault statutes are inapplicable with respect to fact patterns entailing multiple torts separated in time, multiple torts separated by individual causal chains, and multiple torts which did not produce a single, indivisible injury."

In *Slager*, the plaintiff's fingers were crushed and lacerated at a day care center. He was treated by a physician who urged the parents to follow a course of physical therapy, which they failed to do. *Slager*, slip op at 2. The analysis of the *Slager* Court focused on which activity proximately caused or contributed to the crush and laceration. The Court explained:

> We hold that the comparative fault statutes have no application in this case because, as a matter of law and indisputably, defendants were the only parties at fault and there were no other tortfeasors with respect to conduct that was the factual and proximate cause of Chad's finger injuries by way of the occurrence at the daycare center. Any presumed negligence by the parents in regard to Chad's medical treatment after the injuries occurred at the daycare center did not trigger the need to assess their fault for purposes of the comparative fault statutes, given that such negligence was not part of the causal chain in regard to Chad's finger becoming crushed and lacerated in the first place. Rather, any negligent conduct by the parents constituted a subsequent, separate tort that initiated a new causal chain leading to its own set of damages. However, on remand, and under general principles of tort law, plaintiff will have to prove by a preponderance of the evidence that any claimed damages were caused solely by defendants' negligence. [*Id*., slip op at 9-10.]

Applying the *Slager* analysis to the present case, the injury to Mr. Jackson occurred when he was in an automobile collision. Specifically, the first amended complaint address injuries to his cervical spine. The surgery that preceded his death occurred months later, just as the parents' failure to obtain physical therapy services for the minor in *Slager* was separated in time from the initial laceration.

The plaintiffs in this case, like the parents in *Slager*, seek to recover damages arising from the injury occasioned by the motor vehicle accident. The fact that Mr. Jackson subsequently died does not obliterate the distinction between the injury occasioned by defendant's alleged negligent operation of a motor vehicle and any medical negligence that arose

months later from the treatment of that injury. These plaintiffs, like the *Slager* plaintiff, bear the burden of proof regarding which damages were proximally caused by that accident. Consequently, the trial court did not err in striking defendants' notice of nonparty at fault.

We further conclude that even if this notice of nonparty at fault was permitted under the comparative fault statutes, the striking of that notice would have nonetheless been proper. Although a trier of fact may allocate fault to a nonparty, see MCL 600.6304(1)(b), it may not do so unless notice "has been given as provided in this subrule." MCR 2.112(K)(2). Under the subrule, any party "against whom a claim is asserted may give notice of a claim that a nonparty is wholly or partially at fault." MCR 2.112(K)(3)(a). The notice must "set forth the nonparty's name and last known address, or the best identification of the nonparty that is possible, together with a brief statement of the basis for believing the nonparty is at fault." MCR 2.112(K)(3)(b).

In their notice, defendants identified the nonparties at fault as "[u]nknown surgeons, medical staff, and hospitals." This identification was plainly not "the best identification of the nonparty that is possible" under the circumstances. See MCR 2.112(K)(3)(b). In order to even speculate that the medical personnel who participated in Jackson's surgery might have caused his death, defendants had to have had some knowledge about Jackson's surgery. And, because the identification must be the best identification possible, defendants had an obligation to take minimal steps to ascertain the identities of the medical professionals. Indeed, the court rules permit the party filing the notice to file it within 91 days "after the party files its first responsive pleading," and thereafter permit a filing on a showing that the "facts on which the notice is based were not and could not *with reasonable diligence* have been known to the moving party earlier." See MCR 2.112(K)(3)(c) (emphasis added). That is, the subrule contemplates that the party giving notice will exercise reasonable diligence in ascertaining the facts—including the identities of the nonparties who might have been at fault—and gives the party significant time to exercise that diligence. Accordingly, given the relative ease with which defendants could have ascertained the identities of the persons who actually participated in the surgery, we must conclude that defendants did not give the "best identification possible" as to those nonparties.

In addition to the deficient identification, defendants completely failed to state the "basis for believing" that the unknown medical professionals were "at fault." MCR 2.112(K)(3)(b). Defendants merely asserted that the unknown medical professionals were "negligent." However, this is not a valid statement of the basis for believing that the medical professionals were at fault. In order to state the basis for believing that others bear fault, the party filing notice must identify specific acts or omissions that it reasonably believes might have caused the harm at issue. To interpret the rule otherwise would be to invite parties to give notices that are based on nothing more than pure speculation. Consequently, the notice of nonparty at fault did not comply with the requirements of MCR 2.112(K)(3)(b) and the trial court did not err in granting the motion to strike.

Next we must examine whether the trial court erred in limiting discovery of the DMC staff. The DMC has argued that to allow broad discovery would be tantamount to circumventing the notice requirements of MCL 600.2912b. Consequently, the DMC joins plaintiffs, who ask that we affirm the trial court's discovery limitation. Defendants argue that the ruling unfairly impinges their ability to present a defense to the prayer for damages. We agree with defendants. A trial court's decision to limit discovery is reviewed for an abuse of discretion. *In re Hammond*

Estate, 215 Mich App 379, 387; 547 NW2d 36 (1996). The abuse of discretion standard recognizes that so long as the trial court selects any one of many principled outcomes, its ruling will not be disturbed. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). The trial court reasoned that if fault cannot be allocated to the medical providers, the only relevant question for the medical providers is whether the surgical procedure that resulted in death was related to the car accident. The court opined that further discovery would be unnecessary because the conduct of the medical providers would be completely irrelevant to the jury's task. However, such reasoning ignores the fact that plaintiffs chose to file the first and third-party cases together. In the third-party case, plaintiffs bear the burden of proving which damages are attributable to the negligent actions, if any, of EMCEA and Abrams. Thus, issues beyond the limited scope of discovery authorized by the court are relevant to the jury's task.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction. No costs to either party.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Michael J. Kelly