UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN BRODER,

Plaintiff,

vs

Case No. 03 75106
Honorable Gerald E. Rosen

CRAIG HUTCHINSON, its medical director, and AUBERTRO ANTONINI, and BENCY MATHAI, and employees of the Michigan Department of Corrections, namely: PATRICIA L. CARUSO, Director, GEORGE PRAMSTALLER, Medical Director, HENRY GRAYSON, former warden, and JAN EPPS, Regional Medical Director in their individual and official capacities,

Defendants.

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MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT
BY DEFENDANTS, BENCY MATHAI, M.D. AND CRAIG HUTCHINSON, M.D.

NOW COME Defendants, Bency Mathai, M.D. and Craig Hutchinson, M.D., by and through their attorneys, Chapman and Associates, P.C., and for their Motion to Dismiss and/or for Summary Judgment, pursuant to FRCP 12(b)(6) and/or FRCP 56, state as follows:

1. Plaintiff filed the present action on or about December 24, 2003 alleging deliberate indifference to a serious medical need pursuant to 42 USC 1983 against all Defendants.

2. Plaintiff also has a State claim for medical malpractice against Defendant, Bency Mathai, M.D., only.

3. Plaintiff's Complaint concerns medical treatment and care provided by Defendants concerning the diagnosis and treatment of Plaintiff's laryngeal cancer.

4. Defendants were never deliberately indifferent to Plaintiff's serious medical needs, therefore, Plaintiff's claims pursuant to 42 USC 1983 must be dismissed pursuant to FRCP 56.

5. Defendant, Dr. Hutchinson, did not have any personal involvement with Plaintiff, therefore, Plaintiff's claim against him pursuant to 42 USC 1983 should be dismissed pursuant to FRCP 56.

6. In the event that Plaintiff's constitutional claims against Defendants are dismissed, the Court should decline to retain supplemental jurisdiction concerning Plaintiff's remaining medical malpractice claim.

7. Should the Court retain supplemental jurisdiction over Plaintiff's medical malpractice claim, Plaintiff's medical malpractice claim must be dismissed pursuant to FRCP 12(b)(6) for the following reasons:

a. Plaintiff failed to file an Affidavit of Merit with his Complaint as required by MCL 600.2912d;

b. Plaintiff's Affidavit of Merit does not comply with MCL 600.2912d(4) as required by Mouradian and Pornpitchit;

c. Plaintiff's Notice of Intent does not comply with MCL 600.2912b as required by Mecosta;

8. Dr. Mathai is also entitled to summary judgment and/or partial summary judgment of Plaintiff's medical malpractice claim pursuant to FRCP 56 because Plaintiff's own expert in internal medicine admitted during his deposition that there was no delay by Dr. Mathai as alleged in Plaintiff's Complaint.

9. Defendants rely on the facts and arguments set forth in their attached supporting brief as if more fully restated herein.

10. Pursuant to Local Rule 7.1 Defendants have sought concurrence for dismissal of Plaintiff's Complaint on numerous occasions and same has been denied.

WHEREFORE, Defendants, Bency Mathai, M.D. and Craig Hutchinson, M.D., pray that this Honorable Court shall dismiss the present case with prejudice for the reasons stated herein.

Respectfully submitted,
CHAPMAN AND ASSOCIATES, P.C.

Dated: November 30, 2006

s/Brian J. Richtarcik
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BRIEF IN SUPPORT OF
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT
BY DEFENDANTS, BENCY MATHAI, M.D. AND CRAIG HUTCHINSON, M.D.

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STATEMENT OF ISSUES PRESENTED

WHETHER DEFENDANT DR. HUTCHINSON IS ENTITLED TO SUMMARY JUDGMENT BECAUSE HE DID NOT HAVE PERSONAL INVOLVEMENT.

Defendant CMS Answers: Yes
Plaintiff Answers: No

WHETHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF DOES NOT MEET THE SUBJECTIVE ELEMENT OF A DELIBERATE INDIFFERENCE CLAIM AND MERELY ALLEGES A DIFFERENCE OF MEDICAL OPINION

Defendants Answers: Yes
Plaintiff Answers: No

WHETHER PLAINTIFF'S NOTICE OF INTENT FAILS TO CONFORM TO MCL 600.2912b.

Defendants Answers: Yes
Plaintiff Answers: No

WHETHER PLAINTIFF'S AFFIDAVIT OF MERIT FAILS TO CONFORM TO MCL 600.2912d.

Defendants Answers: Yes
Plaintiff Answers: No

WHETHER PLAINTIFF'S MEDICAL MALPRACTICE CLAIM MUST BE DISMISSED WITH PREJUDICE BECAUSE THE STATUTE OF LIMITATIONS ARE EXPIRED.

Defendants Answers: Yes
Plaintiff Answers: No

WHETHER PLAINTIFF'S MEDICAL MALPRACTICE CLAIM MUST BE DISMISSED PURSUANT TO FRCP 56.

Defendants Answers: Yes
Plaintiff Answers: No

CONTROLLING AUTHORITY FOR RELIEF SOUGHT

In order to state a claim under 42 U.S.C. §1983 Plaintiff must allege facts which demonstrate deprivation or violation of a federally protected right, privilege, or immunity. Gomez v. Toledo, 446 U.S. 635 (1980). A claim made by a convicted prisoner that his Constitutional right to medical treatment was violated is analyzed under the Eighth Amendment. *See* Estelle v. Gamble, 429 U.S. 97 (1976). To state a §1983 claim for a violation of a prisoner's Eighth Amendment rights due to inadequate medical care, the prisoner must allege facts evidencing a deliberate indifference to serious medical needs. Wilson v. Seiter, 501 U.S. 294, 297 (1991); Estelle, 429 U.S. 97.

Plaintiff must allege personal involvement by Defendant, which is required pursuant to 42 U.S.C. §1983, and liability in a §1983 claim cannot be based on a theory of respondeat superior. Monell v. Dep't of Social Services of New York City, 436 US 658, 98 S Ct 2018 (1978). A Plaintiff seeking to impose liability upon a municipality, or as in the present case a private corporation, under §1983 must prove that constitutional harm suffered was a result of official policy or custom of the political subdivision. Brown v. Costello, 905 F.Supp. 65 (N.D. N.Y., 1995).

To succeed on a claim of deliberate indifference, Plaintiff must satisfy two elements, an objective one, and a subjective one. He must show he had a serious medical need, and he must show that Defendant, being aware of that need, acted with deliberate indifference to it. Wilson v. Seiter, 501 U.S. 294, 300 (1991); Williams v. Mehra, 186 F.3rd 685, 691 (6th Cir. 1999).

Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. Estelle, 429 U.S. at 105-106. Differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis or treatment are not enough to state a deliberate indifference claim. West Lake v. Lucas, 537 F.2d 857 (6th Cir. 1976).

FACTS

A. Substantive History.

The Plaintiff, Steven Broder (#226094), is a prisoner incarcerated by the Michigan Department of Corrections ("MDOC") at the Parnall Correctional Facility in Jackson, Michigan since 1994. In May 2001, Plaintiff's primary care physician at the Parnall Facility was Defendant, Bency Mathai, M.D.[1] Dr. Mathai became licensed as a physician in Michigan in 1997, and she is board certified in Internal Medicine.

On May 4, 2001, Plaintiff complained to Dr. Mathai for the first time about a "sore throat," "now recovering." She observed his vitals were stable, his weight was 161, his lungs clear, and throat normal. She instructed Plaintiff to use "warm gargles" on his throat twice daily ("BID") and to return to the clinic in 1 month to recheck his condition. (Exhibit A, p. 58). She also ordered Plaintiff to receive Drixoral for his sore throat. (Exhibit A, p. 318). Plaintiff did not return to the clinic in 1 month as ordered.

On May 31, 2001, nursing staff responded to a kite from Plaintiff and delivered him a 30 day supply of Motrin tablets. (Exhibit A, pp. 58, 318). On June 26, 2001, nursing staff provided Plaintiff with another 30 day supply of Motrin. (Exhibit A, pp. 57, 318). No complaints from Plaintiff were observed. Dr. Mathai was not consulted or informed by the nursing staff.

On July 11, 2001, Plaintiff received his annual health screening by Don Smith, RN, who observed Plaintiff's weight decreased while he was on a kosher diet, but he regained 8 pounds in 2 weeks after he returned to a regular diet. Plaintiff "...had cold/sinus x 2-3 weeks with cough."

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[1] Dr. Mathai is an independent contractor for Correctional Medical Services, Inc. ("CMS"). CMS contracted with the State of Michigan to provide certain onsite health care services, and certain offsite specialty medical services, to prisoners incarcerated by the MDOC.

(Exhibit A, p. 57). Dr. Mathai was not consulted or informed.

Dr. Mathai examined Plaintiff on August 20, 2001, with the Health Unit Manager, Pat Barrett, present. Plaintiff's weight was 150 pounds, and he complained of a sore throat for the past 2 weeks, but he denied any other complaints. There was no cough, fever, or bleeding. Dr. Mathai observed Plaintiff's throat was congested, but there were no lymph nodes. A rectal exam was conducted and was negative. A slight increase in blood pressure was observed, therefore, Dr. Mathai ordered Plaintiff's blood pressure to be monitored. She also ordered a CBC panel and "CXR" (chest x-ray), and for Plaintiff to return to the clinic in 2 months. (Exhibit A, p. 56). Dr. Mathai wrote orders for Plaintiff to receive a CBC panel, blood pressure monitoring for 2 weeks, and "Drixoral 1 tab po bid x 2wks." (Exhibit A, p. 321).

Nursing staff monitored Plaintiff's blood pressure as ordered, and observed on each occasion that Plaintiff had an "asymptomatic sore throat." (Exhibit A, p. 55). On August 29, 2001, Dr. Mathai observed Plaintiff's CBC panel results. (Exhibit A, p. 235). She observed an increase in Plaintiff's white blood cell count "with no left shift," and ordered a repeat CBC. (Exhibit A, p. 55).

On September 4, 2001, Plaintiff was examined in sick call by Connie Ives, RN in response to a "kite" by Plaintiff. Plaintiff informed her "I'm not sure if I still have a sore throat when I wake up." The nurse observed Plaintiff's throat was not red or swollen, and that Plaintiff was a "smoker for many years." There was no cervical lymph node swelling. Plaintiff did not complain of difficulty swallowing. The nurse characterized Plaintiff as a "post nasal drip irritated throat smoker." Plaintiff was given ASA in hot water to gargle 3 times daily, and instructed to issue a kite if his symptoms increased. (Exhibit A, p. 54). Dr. Mathai was not consulted or informed.

On September 11, 2001, Dr. Mathai reviewed Plaintiff's chart, observed the progress note

from September 4th, and reviewed Plaintiff's CBC results. Plaintiff's WBC was 19.6, which Dr. Mathai considered normal. Plaintiff was "clinically asymptomatic." Dr. Mathai planned to reassess Plaintiff in 1 month. (Exhibit A, p. 54).

Dr. Mathai was on a vacation leave from October 1, 2001 through October 21, 2001. Audberto Antonini, M.D. covered for her on October 12, 2001. He observed Plaintiff's weight was 144 pounds. Plaintiff stated he lost 20 pounds in spite of eating well, and he experienced "progressive dysphagia [difficulty swallowing] since April, sore throat and hoarseness." (Exhibit A, p. 52). Dr. Antonini suspected Plaintiff may have "laryngeal or esophageal malignancy." (Exhibit A, p. 53). He suspected laryngeal cancer primarily due to the following reasons: Plaintiff's complaint of progressive dysphagia since April; sore throat and hoarseness since April "treated several times before"; and Plaintiff's own subjective observation that he was "**starting** to observe that he is progressively having difficulty to swallow").[2] (Exhibit A, p. 52-53; Exhibit B, pp. 14-15). Therefore, he ordered Plaintiff to receive an ENT and GI specialty consultation, and return to the clinic in 4 weeks. (Exhibit A, pp. 53, 317). Dr. Antonini submitted an authorization request to CMS the same day requesting the ENT and GI consult. (Exhibit A, pp. 199, 202). The request for the ENT consultation was approved by CMS on November 2, 2001, and scheduled to occur on November 13, 2001 with Ronald Kornak, M.D. offsite at Duane Waters Hospital. (Exhibit A, p. 200). Dr. Antonini had no further contact with Plaintiff. On November 1, 2001, Dr. Mathai reviewed Plaintiff's chart and observed "Pt. currently being evaluated for wt. loss." (Exhibit A, p. 51).

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[2] There is no indication that prior to October 12, 2001, Plaintiff had dysphagia or hoarseness, or that his sore throat was continuous. (Exhibit A, pp. 52-58).

Plaintiff was seen as scheduled at the ENT clinic by Dr. Kornak (otolarygologist) on November 13, 2001. He observed Plaintiff had a history of "chronic hoarseness" as well as "dysphagia and a weight loss of about 20 pounds over six months." (Exhibit A, p. 180). He did not observe "anything at the glottic introitus causing dysphagia." (Exhibit A, p. 180). The neck palpation was also negative, "but the larynx revealed lesions on both cords causing his hoarseness." (Exhibit A, p. 180). Dr. Kornak could not rule out cancer and therefore recommended a microlaryngoscopy with vocal cord stripping at Foote Hospital in 2-3 weeks. (Exhibit A, p. 195).

On November 14, 2001, Dr. Mathai reviewed Dr. Kornak's report, and submitted a request for authorization by CMS for the microlaryngoscopy and vocal cord stripping procedures to the MDOC patient services liaison. (Exhibit A, p. 193). The MDOC faxed the request to CMS on November 16, 2001. (Exhibit A, p. 193). On November 29, 2001, Dr. Mathai completed an "Offsite Specialty Referral 30 Day Follow-Up Form." (Exhibit A, p. 48). Upon inquiry, Dr. Mathai was informed that authorization of the procedures recommended by Dr. Kornak was in the process of being reviewed. Therefore, Dr. Mathai answered "yes" to a question on the form, "Is it acceptable to continue to wait completion of offsite?" Based on her inquiry, she believed the procedures would be scheduled shortly. (Exhibit C, p. 87-90).

CMS approved the procedure on December 5, 2001, and faxed the authorization to the MDOC's Patient Services on December 7, 2001 to schedule the procedure. Patient Services scheduled Plaintiff to receive the microlaryngoscopy and vocal cord stripping on January 11, 2002. (Exhibit A, pp. 193, 194).

On January 2, 2002, Dr. Mathai followed up on the status of Plaintiff's microlaryngoscopy and vocal cord stripping by completing a second "Referral 30 Day Follow-Up Form." (Exhibit A,

p. 47). Dr. Mathai observed that the procedures were scheduled to be completed by Dr. Kornak on 1/11/02, therefore, again she answered "yes" to the question "Is it acceptable to continue to wait completion of offsite?" (Exhibit A, p. 47; Exhibit C, p. 107). Dr. Kornak testified during his deposition that under the circumstances the microlaryngoscopy and vocal cord stripping procedures were scheduled within a reasonable amount of time after his November 11, 2001 examination. (Exhibit C, p. 20-21). Further, he testified that even if the procedures were scheduled and/or completed earlier, it would have made no difference to the nature of Plaintiff's subsequent treatment and/or prognosis. (Exhibit D, p. 21, 22, 34).

Dr. Kornak completed the microlaryngoscopy and vocal cord stripping on January 11, 2002 as scheduled. In his Operative Report[3], Dr. Kornak observed "lesions were on both true vocal cords and limited to the true vocal cords." (Exhibit A, p. 468). Portions of the lesions were stripped off both vocal cords and sent to the pathology lab for examination. (Exhibit A, p. 468; Exhibit D, p. 24). On January 11, 2002, Dr. Kornak was unable to diagnose whether Plaintiff had laryngeal cancer until he received the biopsy results from the pathology lab. (Exhibit D, p. 25, 27). He recommended Plaintiff to rest his voice for 10 days, and return to the ENT clinic in 2 weeks to discuss the biopsy results. (Exhibit A, p. 192). Dr. Mathai reviewed Dr. Kornak's recommendations promptly on January 16, 2002. (Exhibit A, p. 192).

Plaintiff returned to see Dr. Kornak for his 2 week follow-up appointment as recommended on January 22, 2002. On this date Dr. Kornak reviewed the biopsy pathology report with Plaintiff. (Exhibit A, p. 228; Exhibit D, p. 28-29). The report diagnosed Plaintiff with "invasive and in-situ

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[3] While this report concerns the microlaryngoscopy and vocal cord stripping procedures on January 11, 2002, the admission date and report date inaccurately state they occurred in February 2002. Dr. Kornak testified he does not recall why the report was not prepared immediately. (Exhibit D, p. 22-23).

moderately differentiated keratinizing squamous carcinoma." (Exhibit A, p. 228). This is the first date on which Plaintiff's cancer was diagnosed. (Exhibit D, p. 27). Dr. Kornak did not perform any staging of the cancer, and was unaware at what stage Plaintiff's laryngeal cancer was at on January 22, 2002. (Exhibit D, p. 25, 29). Dr. Kornak completed a Special Consult Report requesting Plaintiff to receive a referral to the Radiation Oncology Department at Foote Hospital "ASAP." (Exhibit A, p. 191). Dr. Kornak expected that the radiation oncologist would stage Plaintiff's cancer by performing a CT scan and possibly an MRI, as well as recommend a course of radiation and possibly chemotherapy treatment. (Exhibit D, p. 25, 30). Dr. Kornak required no further follow-up with Plaintiff until after he received his cancer treatment. (Exhibit A, p. 181). Plaintiff never complained of pain to Dr. Kornak. (Exhibit D, p. 31-32). The same date, Dr. Mathai entered a progress note acknowledging Plaintiff received his follow-up ENT visit with Dr. Kornak. (Exhibit A, p. 45). Plaintiff's radiation oncology consultation requested by Dr. Kornak was approved by CMS the same day as well, and scheduled to occur on February 5, 2002. (Exhibit A, p. 190).

Dr. Mathai examined Plaintiff on January 30, 2002. She again reviewed the recent recommendations by Dr. Kornak, and verified with Patient Services that the radiation oncology consult was scheduled to occur in the next week. Dr. Mathai called Patient Services for the MDOC and left a message for them to schedule the radiation oncology appointment. (Exhibit C, p. 108. lines 18, p. 109, line 6). Plaintiff complained of "dysphagia and throat pain at night" and Dr. Mathai ordered Ultram pain medication for same. (Exhibit A, pp. 45, 315, 316). On February 5, 2002, Plaintiff received his offsite specialty consultation with the radiation oncology clinic as scheduled. The consultation was performed by James Hayman, M.D., who was covering for Christine Tsien, M.D. (both are radiation oncologists at U of M Hospital). Dr. Kornak's Operative Report

concerning the January 11, 2002 microlaryngoscopy was not available, so Dr. Hayman was unaware if Plaintiff's cancer was in Stage I or more advanced, and that his assumption it was Stage I was his "best guess" based on the information available to him. (Exhibit A, pp. 465-466 ; Exhibit E, p.20, lines 5-16). Dr. Hayman's report states, "Assuming the patient in fact has stage I larynx cancer, we would recommend treatment with radiation therapy to be given with curative intent". [emphasis added]. The consultation report states, "arrangements will be made for patient to return for treatment planning and to begin treatment soon". Dr. Hayman wrote, "recommend treatment with radiation (7 wks M-F) - will be calling with appt of simulation initiation of treatment".[4] Dr. Hayman also completed a Specialty Consult Report the same date. (Exhibit A, p. 174). Dr. Hayman marked the recommendations as non-urgent, and requested a follow-up visit in 2 weeks. Dr. Hayman did not order a CT scan or an MRI to initiate staging of the cancer, because he believed it would be done as part of Mr. Broder's treatment planing with the Radiation Oncology Department. (Exhibit E, p. 20, line 25 to p. 21, lines 1-23). Dr. Mathai reviewed Dr. Hayman's Specialty Consult Report on 2/8/02, and submitted it to the MDOC who faxed it to CMS on 2/11/02. (Exhibit A, p. 173). CMS authorized the requested recommendations of Dr. Hayman on 2/12/02, and faxed the authorization back to the MDOC Patient Services to schedule the procedures on 2/19/02. Patient Services scheduled the simulation for treatment to occur on 3/12/02, and the radiation therapy to begin at Foote Hospital on 3/19/02. (Exhibit A, p. 173).

On 2/13/02, Dr. Tsien reviewed Dr. Hayman's report, observed that cancer staging had not been initiated by Dr. Hayman, and immediately recommended a "CT scan of head and neck ASAP". (Exhibit A, p. 188, 189). The recommendation is cc'd to Dr. Kornak. She observes the patient has

[4] Simulation of treatment is required to be performed prior to initiating cancer treatment. (Exhibit F, p. 10-11; Exhibit E, p. 10-13).

"stage I larynx cancer". There is no indication a request for authorization for the CT was ever properly submitted to CMS, or that the report was received and reviewed by Dr. Mathai.

Dr. Mathai examined Plaintiff on 2/22/02, during which time she was unable to examine Plaintiff's chart because it was out on an FOIA request [requested by Plaintiff by letter on January 24, 2002 (Exhibit A, p. 284; Exhibit C, p. 108-109)][5]. Dr. Mathai observed continued dysphagia, and primarily addressed Plaintiff's dietary concerns. (Exhibit A, p. 45). Plaintiff's simulation of treatment and radiation treatment were scheduled to begin on March 12, 2002 and March 19, 2002, respectively. (Exhibit C, p. 109). This is the last time Plaintiff was seen by Dr. Mathai prior to her maternity leave beginning 3/9/02 to 5/15/02. (Exhibit C, p. 106-107).

On 3/8/02, Marcella Clark, M.D., covering for Dr. Mathai, reviewed the chart and observed Dr. Tsien's request for a CT scan. Dr. Clark requested an "urgent" CT scan of Plaintiff's head and neck concerning the "newly diagnosed larynx cancer". (Exhibit A, p. 172). CMS approved the request on 3/13/02, and faxed the authorization to MDOC Patient Services on 3/14/02 for scheduling. Patient Services scheduled the head and neck CT for 4/1/02. (Exhibit A, p. 170). However, the simulation recommended by Dr. Hayman was completed as scheduled by Dr. Tsien on 3/12/02, at which time the CT was also completed. (Exhibit A, p. 169). The CT was reviewed by Dr. Michael Shanks, M.D. (radiologist). Dr. Shanks observed "tumor appears to involve the larynx on the left with extension into the epiglottis". (Exhibit A, pp. 240, 241). The CT indicates for the first time that Plaintiff's cancer was more advanced than originally assumed by Dr. Hayman on February 5, 2002, since it extended into the epiglottis. Dr. Shanks recommended a "diagnostic MRI could be performed as needed". (Exhibit A, p. 241). The report was sent to Dr. Tsien.

[5] The fact that Plaintiff's chart was unavailable also likely explains why Dr. Tsien's request for a CT was not reviewed by Dr. Mathai.

On 3/18/02, Dr. Tsien reviewed Plaintiff's CT and observed the CT report and noted the larynx cancer extended to the "eppiglotic/parapharyngeal" region. Therefore, she submitted a specialty consult report requesting a head and neck MRI on an urgent basis, as recommended in the CT report. (Exhibit A, pp. 167, 168; Exhibit F, p. 27, lines 1-23). On 3/21/02, Dr. Tsien's consult report was reviewed by MSP Dr. Bey. Dr. Bey prepared and faxed a CMS Authorization Request for the MRI requested by Dr. Tsien. CMS authorized the MRI the same day "ASAP" and faxed the authorization to the MDOC Patient Services who scheduled the MRI for 3/27/02. (Exhibit A, p. 166). Dr. Bey also submitted a Specialty Consult Report requesting radiation treatment be postponed and re-scheduled after the MRI results were reviewed.[6] Plaintiff received the MRI as scheduled.

On 3/25/02, Dr. Bey requested that Plaintiff receive chemotherapy for his laryngeal cancer within 2 weeks. The request was reviewed by CMS on 3/26/02, and Plaintiff was authorized to be seen at the cancer clinic on 3/28/02. (Exhibit A, p. 182, 183). On 3/27/02, Plaintiff's MRI was completed as scheduled. (Exhibit A, p. 184). The results were not read yet.

Plaintiff's was seen by John Axelson, M.D. at the cancer clinic on 3/28/02, as scheduled. Dr. Axelson is board certified in the medical specialty of Hematology. Dr. Axelson noted Plaintiff's cancer was previously diagnosed as stage I, however, recommended radiation therapy was not begun due to Dr. Shanks observations from the head and neck CT. (Exhibit A, p. 157). He observed Dr. Tsien followed up by ordering an MRI. Dr. Axelson placed a call to Dr. Tsien and Dr. Kornak "for more rapid follow-up". Dr. Axelson recommended follow-up with Dr. Kornak by 4/2/02, which he

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[6] The MRI was needed for staging. If the MRI indicated Stage III cancer, chemotherapy is required in addition to radiation treatment.

faxed to CMS on 3/28/02. On 3/29/02, CMS authorized a consult with Dr. Kornak "ASAP". The consult was scheduled for 4/2/02 as recommended by Dr. Axelson. (Exhibit A, p. 156).

On 4/1/02, the MRI report was completed and reviewed by Dr. Tsien. (Exhibit A, pp. 498, 499). Dr. Tsien diagnosed Plaintiff with "Stage III T2N1 squamous cell carcinoma of the left true vocal cord extending into the supraglottis". Chemotherapy and radiation therapy were recommended. (Exhibit A, pp. 176, 177). Dr. Axelson testified within a reasonable degree of medical probability that in January 2002, Plaintiff's cancer was advanced at Stage III, and never at Stage I. (Exhibit G, p. 44, lines 7-13).

On 4/2/02, Plaintiff was hospitalized, and chemotherapy and radiation therapy were begun. (Exhibit A, pp. 323, 390, 476, 480, 482, 483). Dr. Mathai returned from maternity leave after 5/15/02, at which time Plaintiff continued to receive his radiation treatment. She first saw Plaintiff after her return on 5/20/02. She observed Plaintiff still had dysphagia, was not taking his Ultram as prescribed, but he was not in any pain. (Exhibit A, p. 33). Plaintiff continued his radiation treatment, and she recommended follow-up in 1 month.

Plaintiff completed his radiation treatment on 5/23/02. (Exhibit A, p. 122). Plaintiff was authorized and received continued follow-up with oncology by Dr. Tsien. (Exhibit A, p. 116). His radiation therapy was restarted by Dr. Tsien on 6/6/02. (Exhibit A, p. 108). On 6/10/02, Dr. Heizel (radiologist) observed the tumor was diminished by approximately 50%. (Exhibit A, p. 346). On 6/13/02, Dr. Kornak performed a microlayngoscopy and biopsy of arachnoid and right false cord. No evidence of a tumor was found. (Exhibit A, p. 112). On July 22, 2002, Plaintiff's radiation treatment was completed, and Dr. Tsien observed Plaintiff was free of cancer and "in stable condition with no evidence of recurrent disease." (Exhibit A, pp. 95, 96). On August 27, 2002,

Plaintiff received a 2 month routine follow-up with Dr. Kornak at the ENT clinic. Dr. Kornak recommended another follow-up in 2 months. (Exhibit A, p. 85). By September 30, 2002, Plaintiff's sore throat was completely resolved. (Exhibit A, p. 19).

Plaintiff's cancer treatment was completed successfully. Plaintiff's cancer went into complete remission. Plaintiff was last seen by Dr. Kornak in early May, 2006. It has been 4½ years since Plaintiff's cancer was treated, and it is in complete remission. Plaintiff's expert testified that at the present time the chance that Plaintiff's cancer will remain in remission is 99.9%.

Plaintiff's expert oncologist, Carol Bradford, M.D., testified that more likely than not Plaintiff "is cured from his larynx cancer." (Exhibit H, p. 51-52).

B. Procedural History.

Plaintiff mailed his Notice of Intent (NOI) to file a medical malpractice action to Defendants on or about April 29, 2003, pursuant to MCL 600.2912b. (Exhibit I). After the statutory waiting period required by MCL 600.2912b, Plaintiff filed his original Complaint, in part against Bency Mathai, M.D., Aubertro Antonini, M.D., and Correctional Medical Services, Inc., on December 24, 2003. (Exhibit J). The Complaint alleged deliberate indifference to a serious medical need pursuant to 42 USC 1983 against these Defendants, as well as a State claim for medical malpractice. Plaintiff's Complaint was accompanied by two Affidavits of Merit, required by MCL 600.2912d, signed by Brent Williams, M.D. (Board certified in internal medicine), and by Carol Bradford, M.D. (Board certified in oncology). (Exhibit K).

On September 22, 2004, the Court summarily dismissed CMS with prejudice, determining that CMS is entitled to Eleventh Amendment immunity. On October 4, 2004, Plaintiff filed a Motion to Amend the Complaint, and add Craig Hutchinson, M.D. as a Defendant. Dr. Hutchinson

is the medical director for CMS in Michigan. The Court entered an Order granting Plaintiff's Motion to Amend on October 20, 2004. Almost two months later, Plaintiff filed his First Amended Complaint on or about December 10, 2004. (Exhibit L). An Affidavit of Merit pursuant to MCL 600.2912d was **not** filed with the Amended Complaint, and the Amended Complaint did **not** make any reference to an Affidavit of Merit. The Amended Complaint alleges deliberate indifference to a serious medical need in violation of 42 USC 1983 against Dr. Mathai, Dr. Antonini, and Dr. Hutchinson, and medical malpractice against Dr. Mathai and Dr. Antonini, only.

Defendants, Dr. Hutchinson, Dr. Antonini, and Dr. Mathai, filed their Answer, Affidavit of Meritorious Defense pursuant to MCL 600.2912e, and Affirmative Defenses, on December 30, 2004. The Affirmative Defenses allege, at paragraph 22, "Plaintiff has not filed an affidavit of merit with the amended complaint in the manner required by MCL 600.2912b." (Exhibit M).

Plaintiff stipulated to dismiss Dr. Antonini with prejudice at the end of September 2006, and an Order of Dismissal is pending. The parties completed all expert depositions prior to the end of October 2006. Defendants, Dr. Mathai and Dr. Hutchinson, now move for dismissal of the remaining claims against them.

STANDARD OF REVIEW

1. Dismissal under Rule 12(b)(6).

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a Court must accept all well-pleaded allegations as true and construe them in the light most favorable to Plaintiff. See Zinermon v. Burch, 494 U.S. 113, 117 (1990); Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969); Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976). A Complaint will not be dismissed for failure to

state a claim unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 54-46 (1957). It is also well established, however, that conclusory, unsupported allegations of constitutional deprivation do not state a claim. See Ana Leon T. v. Federal Reserve Bank, 823 F.2d 928, 930 (6th Cir.)("[T]he allegations must be more than mere conclusions, or they will not be sufficient to state a civil rights claim."), cert denied, 484 U.S. 945 (1987); Ross v. Meagan, 638 F.2d 646, 650 (3d Cir. 1981)(**"[T]his court has consistently demanded that a civil rights complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs."**).

Finally, a Court may decide a Motion to Dismiss only on the basis of the pleadings. Song v. City of Elyria, Ohio, 985 F.2d 840, 842 (6th Cir. 1993). Dismissal is appropriate if the Complaint fails to set forth an allegation of a required element of a claim. See Craighead v. E.F. Hutton & Co., 899 F.3d 485, 489-90 (6th Cir. 1990). The Court may treat the Motion to Dismiss as one for summary judgment, however, if "matters outside the pleading are presented to and not excluded by the court." Fed. R. Civ. P. 12(b).

2. Summary Judgment Under Rule 56.

Under Fed. R. Civ. P. 56, summary judgment is to be entered if the moving party demonstrates there is no genuine issue as to any material fact. The Supreme Court has interpreted this to mean that summary judgment should be entered if the evidence is such that a reasonable jury could find only for the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party has "the burden of showing the absence of a genuine issue as to any material fact."

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). See also Lenz v. Erdmann Corp., 773 F.2d 62 (6th Cir. 1985). In resolving a summary judgment motion, the Court must view the evidence in the light most favorable to the non-moving party. See Duchon v. Cajon Co., 791 F.2d 43, 46 (6th Cir. 1986); Bouldis v. United States Suzuki Motor Corp., 711 F.2d 1319 (6th Cir. 1983). But as the Supreme Court wrote in Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986):

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

A party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion and if, after sufficient time for discovery, the opposing party is unable to demonstrate that he or she can do so under applicable criteria, summary judgment is appropriate. Street v. J.C. Bradford & Co., 886 F.2d 1472, Fed. Sec. L. Rep. P 94,768 (6th Cir.,Tenn. 1989).

ARGUMENTS

ARGUMENT I:

Defendants Mathai And Hutchinson Were Not Deliberately Indifferent To Plaintiff's Serious Medical Needs, Therefore, Plaintiff's Claim Pursuant To 42 USC 1983 Must Be Dismissed Pursuant To FRCP 56.

A. There Was No Personal Involvement By Dr. Hutchinson.

Dr. Hutchinson testified that he never provided medical treatment to Plaintiff, nor was he aware of Plaintiff. Plaintiff seeks to allege deliberate indifference against Dr. Hutchinson because of his position as Medical Director for CMS in Michigan. The elements of a claim of deliberate indifference require Plaintiff to show he had a serious medical need, and that defendant, being aware of that need, acted with deliberate indifference to it. Wilson v. Seiter, 501 U.S. 294, 300 (1991). An individual cannot be liable for deliberate indifference if they had no personal involvement with the Plaintiff or any interaction with regards to the Plaintiffs' claims.

Further, a person cannot be held vicariously liable under 42 U.S.C. §1983 for the conduct of its agents under the doctrine of "respondeat superior." Price v. Parks-Belk, Inc., 72 F.R.D. 84 (D.C. Tenn. 1976); Moore v. Buckles, 404 F.Supp. 1382, 1384(3) (D.C. Tenn. 1975). There is no supervisory liability under 42 USC 1983 absent personal involvement. Personal involvement of the Defendant is required. Id. Therefore, in the present case, Dr. Hutchinson may not be found vicariously liable for the actions of Dr. Mathai or any other defendant.

Plaintiff's complaint alleges at paragraph 10 that Dr. Hutchinson "helps to formulate and implement the customs, policies, practices and procedures, and staff training related to medical care in MDOC facilities." (Exhibit L) Further, paragraphs 91, 92, 99, and 104, among others in the First Amended Complaint suggest that Defendants, including Dr. Hutchinson, are somehow liable to Plaintiff for alleged constitutional violations because Dr. Hutchinson implemented and/or failed to implement policies, practices, and/or procedures that were deliberately indifferent to Plaintiff's serious medical needs. Plaintiff's boiler plate attempt to extract liability against Dr. Hutchinson must fail since Plaintiff has never identified any official policy or procedure officially adopted by Dr. Hutchinson or any one else and relied on by one or more persons that resulted in harm to

Plaintiff.

To establish liability against Dr. Hutchinson, as medical director for CMS, Plaintiff must identify the unconstitutional policy, connect the policy to Dr. Hutchinson and his employer CMS itself, and show that the particular injury was incurred because of the execution of that policy. Garner v. Memphis Police Dept., 8 F.3d 358, 364 (6th Cir. 1993) A plaintiff seeking to impose liability for an unconstitutional policy, practice or procedure must prove that constitutional harm suffered was a result of official policy or custom of a political subdivision. Brown v. Costello, 905 F.Supp. 65 (N.D.N.Y., 1995).

In the present case, Plaintiff has failed to show any specific policy of Dr. Hutchinson on behalf of himself or CMS that deprived Plaintiff of a constitutional right, or in deliberate indifference to a serious medical need. CMS and the MDOC work in conjunction with each other to ensure that medical diagnosis and recommended medical care, treatment, and specialty consults are achieved in a timely manner. In the present case, Plaintiff's history itself demonstrates that the system is in place and works. On each instance where Mr. Broder was referred for a specialty consult, a request was sent to CMS for the offsite appointment in a timely manner, the request was scheduled, and the consultation completed. (See Exhibit N, concerning the consultations at issue in this case.) Dr. Hutchinson entitled to summary judgment because Plaintiff has failed to show any personal involvement by Dr. Hutchinson, and or the existence of an unconstitutional policy, practice, or procedure officially adopted and implemented by him on behalf of CMS at issue in this case.

B. Dr. Mathai Was Not Deliberately Indifferent.

The two essential elements for a claim under 42 U.S.C. §1983 are (1) deprivation or violation of a federally protected right, privilege, or immunity and (2) the fact that the action of the defendant in violating the federally protected right was taken under color of state law. Gomez v. Toledo, 446 U.S. 635 (1980); United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31, 33 (6th Cir. 1992). In the present matter, Plaintiff's Complaint fails to allege sufficient facts to satisfy the first element.

A claim made by a convicted prisoner that his constitutional right to medical treatment was violated is analyzed under the Eighth Amendment. *See* Estelle v. Gamble, 429 U.S. 97 (1976). To state a §1983 claim for a violation of a prisoner's Eighth Amendment rights due to inadequate medical care, the prisoner must allege facts evidencing a deliberate indifference to serious medical needs. Wilson v. Seiter, 501 U.S. 294, 297 (1991); Estelle, 429 U.S. 97.

To succeed on a claim of deliberate indifference, plaintiff must satisfy two elements, an objective one, and a subjective one. He must show he had a serious medical need, and he must show that defendant, being aware of that need, acted with deliberate indifference to it. Wilson v. Seiter, 501 U.S. 294, 300 (1991); Williams v. Mehra, 186 F.3rd 685, 691 (6th Cir. 1999).

In Farmer v. Brennen, 511 U.S. 825 (1994), the Supreme Court explained the meaning of "deliberate indifference":

> [A] prison official cannot be found liable under the Eighth Amendment or denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference . . . Eighth Amendment suit against prison officials must satisfy a "subjective" requirement.

511 U.S. at 836-37. (emphasis supplied). To satisfy the subjective component, a prisoner must show

the defendant prison official had "a sufficiently culpable state of mind." Id. "Deliberate indifference" describes a "state of mind more blameworthy than negligence." Id., at 835. A Prison official can be found to have been deliberately indifferent only if shown to have been actually aware of conditions that posed a substantial risk of serious harm to a prisoner, and to have acted with conscious disregard for that risk. Id. at 837; Sanderfer v. Nichols, 62 F.2d 151, 154 (6th Cir. 1995); Brooks v. Celeste, 39 F.3d 125, 128 (6th Cir. 1994). The court in Sanderfer also found that deliberate indifference is the equivalent of "criminal recklessness, which requires a subjective showing that the defendant was aware of the risk of harm." Id.

"Deliberate indifference" has been variously defined by the federal courts that have considered prisoners' Eighth Amendment claims, but all agree that it is more than mere negligence and less than actual intent. See also Gibson v. Foltz, 963 F.2d 851, 853 (6th Cir. 1992)("Obduracy or wantonness, not inadvertence or good faith error, characterizes deliberate indifference"). Accordingly, even "gross negligence" by prison officials is insufficient to support a deliberate indifference claim. Ribble v. Lucky, 817 F. Supp. 653, 655 (E.D. Mich. 1993).

The Supreme Court in Estelle stated, **a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim under the Eighth Amendment**. Estelle, 429 at 105-106. **Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. Id.** The courts typically do not intervene in questions of medical judgment. Hicks v. Frey, 992 F. 2d 1450, 1455 (6th Cir. 1993). Plaintiff's claim for deliberate indifference under the Eighth Amendment does not allow him to allege a difference in opinion regarding his medical care. The court in West Lake v. Lucas, 537 F.2d 857 (6th Cir. 1976) found, differences in judgment between an inmate and prison medical personnel

regarding appropriate medical diagnosis or treatment are not enough to state a deliberate indifference claim. Id. In the present case, Plaintiff's claims amount to nothing more than a difference in medical opinion that his diagnosis of laryngeal cancer should have occurred sooner, his specialty consultations completed sooner, and his cancer treatment initiated sooner, more. Plaintiff's attempt to allege a claim of medical malpractice simply does not also rise to the level of deliberate indifference.

The courts typically do not intervene in questions of medical judgment. Youngberg v. Romeo, 457 U.S. 307, 321 (1982). "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." Westlake v. Lucas, 537 F.2d 857, 860 n. 5 (6th Cir.1976).

Differences in medical opinion between a prisoner and the medical providers regarding the appropriate diagnosis or treatment is not enough to show deliberate indifference. *See,* Sanderfer v. Nichols, 62 F.3d 151,154-155 (6th Cir. 1999), Gabehart v. Chapleau, 1997 WL 160322 at *2 (6th Cir. 1997) (Exhibit G), and Ward. v Smith, 1996 WL 627724, *1 (6th Cir. 1996) (Exhibit H). At most, Plaintiff's complaints and allegations arise to a difference of medical opinion with his medical providers.

Plaintiff is unable to satisfy the subjective component of his deliberate indifference claim. There is not evidence that Dr. Mathai, being aware of Mr. Broder's laryngeal cancer, acted with deliberate indifference to its diagnosis, need for specialty consultations, and/or treatment. The facts set forth in detail above clearly demonstrate that at all corners Plaintiff received reasonable medical care and treatment. Plaintiff's expert witness in internal medicine, Brent Williams, M.D., testified

specifically concerning his opinions about Dr. Mathai,

> "I don't think she intentionally withheld treatment in the sense of an explicit decision to withhold treatment she felt was indicated, she didn't do that." (Exhibit O, p. 16, lines 12-14)
>
> "...she [Dr. Mathai] didn't make an explicit decision to bring harm to Mr. Broder." (Exhibit O, p. 16, lines 17-18)

Dr. Mathai did not act to intentionally delay Plaintiff's medical care and treatment for laryngeal cancer. Plaintiff received excellent care, and is now cured, end of story. Plaintiff's claim against Dr. Mathai for deliberate indifference to his serious medical needs must be dismissed pursuant to FRCP 56.

ARGUMENT II:
Plaintiff Fails To State A Claim Against Defendants Mathai And/Or Hutchinson For Negligence, Gross Negligence, "Reckless Indifference, " And/Or Willful And Wanton Misconduct, Upon Which Relief May Be Granted

A. Plaintiff's Claim Sounds In Medical Malpractice, Not Ordinary Negligence Or Gross Negligence.

Count II of Plaintiff's First Amended Complaint, alleges in part a claim for "Gross Negligence." (Exhibit L, para. 97-101). Additionally, Count III alleges a claim for Ordinary Negligence, in addition to a claim for Medical Malpractice. (Exhibit L, para. 102-125). Plaintiff's claims for Ordinary Negligence and Gross Negligence do not state claims upon which relief may be granted, and must be dismissed pursuant to FRCP 12(b)(6). The nature and substance of Plaintiff's claim for negligence and gross negligence in essence constitutes a claim for medical malpractice, only.

Michigan case law requires that the nature and origin of a claim controls. Borman's Inc. v.

Lake State Dev. Co., 60 Mich App 175, 187, 230 NW2d 363 (1975). Michigan case law establishes that "[t]he key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship." Dorris v. Detroit Osteopathic Hosp Corp., 460 Mich 26, 46, 594 NW2d 455 (1999), Simmons v. Apex Drug Stores, 201 Mich App 250, 506 NW2d 562 (1993).

Regardless of whether the particular error in question here involved the exercise of (or failure to exercise) "professional judgment," the duty not to commit that error in the first place arose only because of the unique nature of the alleged professional, physician-patient relationship between Dr. Mathai, Dr. Hutchinson and Plaintiff. Thus, Plaintiff's allegations of Gross Negligence in Count II and Ordinary Negligence in Count III of the Amended Complaint against Dr. Mathai and Dr. Hutchinson sound only in medical malpractice.

In Bryant v. Oakpointe Villa Nursing Centre, 471 Mich 411, 684 NW2d 864 (2004), the Michigan Supreme Court articulated a two part test for determining whether a claim sounds in medical negligence: a Court must decide "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." Id. at 422. Regarding whether the claim raises questions of medical judgment requiring expert testimony, the Court stated:

> If the reasonableness of the health care professional's action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved.

A Complaint cannot avoid the application of the procedural requirements of a malpractice

action by couching its cause of action in terms or ordinary negligence [or deliberate indifference to a serious medical need]. Dorris, 46.

In the present case, the origin and nature of Plaintiff's claims concern the professional physician-patient relationship, care, and duties between Dr. Mathai, Dr. Hutchinson, and Plaintiff. Therefore, the only negligence claim they have, if any, would be for medical malpractice. The claims alleging Ordinary Negligence and Gross Negligence must be dismissed for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. Proc. 12(b)(6).

B. There Is No Independent Claim For "Reckless Indifference" or "Willful And Unwanton Misconduct" Separate From Plaintiff's Deliberate Indifference Claim Upon Which Relief May Be Granted.

Count II of Plaintiff's First Amended Complaint (Exhibit L, para. 97-101) alleges in part a purported claim for "Reckless Indifference, And Willful And Wanton Misconduct." There is no recognized independent claim "reckless indifference" and/or "willful and wanton misconduct" separate and distinct from Plaintiff's deliberate indifference claim. The Supreme Court has stated that punitive damages are appropriate under 42 U.S.C. § 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." [Emphasis added]. Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983). In the present case, Plaintiff's claim for reckless indifference and/or willful and unwanton misconduct constitute a required element of Count I alleging deliberate indifference, in order for Plaintiff to request punitive damages for deliberate indifference to a serious medical need. Therefore, in the event the Court dismisses Count I, Plaintiff's claims for "reckless indifference" and/or "willful and wanton misconduct" must also be

dismissed for the same reasons as stated in Argument I above.

ARGUMENT III
Plaintiff's Amended Complaint Fails To State A Claim For Medical Malpractice Upon Which Relief May Be Granted And Must Be Dismissed Pursuant To FRCP 12(b)(6).

A. Plaintiff Did Not File An Affidavit Of Merit.

Plaintiff's claim for Medical Malpractice in Count III of his First Amended Complaint (Exhibit L, para. 102-125) must be dismissed pursuant to FRCP 12(B)(6) because Plaintiff did not file an Affidavit of Merit as required by MCL 600.2912d.

Under Michigan law, a medical malpractice Plaintiff must file, with the Complaint, an Affidavit of Merit. Specifically, MCL 600.2912d provides in pertinent part:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

MCL 600.2912d. MCL 600.2912d(1) unequivocally provides that the Affidavit of Merit be filed with the Complaint. Scarsella v Pollak, 461 Mich. 547, 550; 607 N.W.2d 711 (2000); Barlett v North Ottawa Community Hosp, 244 Mich. App. 685, 691; 625 N.W.2d 470 (2001); Nippa v. Botsford Gen. Hosp., 251 Mich. App. 664, 675, 651 NW2d 103 (2002), on remand affirmed by Nippa v. Botsford Gen. Hosp., 257 Mich. App. 387, 668 N.W.2d 628 (2003).

Applying Michigan substantive law, federal district courts in Michigan also recognize and apply the Affidavit of Merit requirements in actions alleging medical malpractice. For example, in DeMann v. Ottawa County Sheriff's Division, 2001 U.S. Dist. LEXIS 19260 (W.D. Mich, 2001),

the District Court for the Western District of Michigan evaluated the Affidavit of Merit requirement of MCL 600.2912d in the context of federal court proceedings. In evaluating Plaintiff's medical malpractice allegation, the DeMann Court first noted that Michigan statutory law requires an Affidavit of Merit be filed with a medical malpractice Complaint. DeMann, Id. at p. 8. Next, the Court noted that the DeMann Plaintiff failed to attach an Affidavit of Merit to the Amended Complaint wherein he alleged medical malpractice. DeMann, Id. at p. 10. The Court observed that the statutory requirements for an Affidavit of Merit were "enacted by the state legislature as part of a comprehensive tort reform package in 1993." DeMann, Id. at pp. 8, 9. Additionally, the DeMann Court observed:

> Under the rule of Hanna v. Plumer, 380 U.S. 460, 14 L. Ed. 2d 8, 85 S.Ct. 1136 (1965), such procedures must be followed by the federal district court in adjudicating a state-law tort claim. Such statutes embody important state policies that are "intimately bound up" with the rights and obligations of the parties and are not merely procedural. (citations omitted). Id.

Based on its observation that a district court must follow Michigan's statutory law requiring an Affidavit of Merit be filed with a medical malpractice Complaint, the DeMann Court held that Plaintiff's Complaint must be dismissed without prejudice for failure to provide the required Affidavit. Id.

Similar to the result in DeMann, the District Court for the Eastern District of Michigan also applied MCL 600.2912d's affidavit or merit requirement in Judd v. Heartland Health Care Center, 2001 U.S. Dist. LEXIS 21747 (E.D. Mich, 2001). In Judd, the Plaintiff alleged the Defendant health care facility was inadequately staffed and that her medical needs were not timely responded to. Id. at p. 1. As a result, Plaintiff alleged she was forced to lie in her own urine, such that the integrity of an earlier hip surgery wound became compromised. Id. at p. 2.

In evaluating Plaintiff's claim, the Court noted that while Plaintiff alleged negligence, her allegations actually sounded in medical malpractice. Id. at pp. 7, 8. Next, the Court recognized that Michigan statutory law imposes a requirement on medical malpractice Plaintiffs that they file with their Complaint an Affidavit of Merit. Id. at pp. 4, 5. Accordingly, because the Plaintiff failed to file an Affidavit of Merit with her Complaint, as required under MCL 600.2912d, the Judd Court held that Plaintiff's Complaint must be dismissed. Id. at p. 8. Finally, the Judd Court determined that because the statute of limitations had expired for Plaintiff's claim, the claim must be dismissed with prejudice. Id. at p. 9.

As Demann and Judd make clear, MCL 600.2919d requires an Affidavit of Merit be filed with a medical malpractice Complaint, and Michigan federal district courts recognize and apply MCL 600.2912d when hearing medical malpractice claims. Id. Extending these observations, Michigan case law also requires an Affidavit of Merit be filed with an *Amended* Complaint. Nippa v. Botsford Gen. Hosp., 251 Mich. App. 664; 651 N.W.2d 103 (2003) (Vacated by, Remanded by: Nippa v. Botsford Gen. Hosp., 468 Mich. 882, 661 N.W.2d 231; Affirmed by: Nippa v. Botsford Gen. Hosp., 257 Mich. App. 387, 668 N.W.2d 628). Both the Plaintiff's Affidavit of Merit required by MCL 600.2912d, and the Defendant's Affidavit of Meritorious Defense required by MCL 600.2912e, are part of the pleadings. Id. When a party fails to file their Affidavit required by MCL 600.2912d and/or MCL 600.2912e with the Complaint and/or Answer, such action results in a failure to plead. Id. See also Kowalski v Fiutowski, 247 Mich. App. 156, 163; 635 N.W.2d 502 (2001). It has been consistently held that even the filing of a timely but non-conforming Affidavit of Merit pursuant to MCL 600.2912d is insufficient to commence a medical malpractice lawsuit and thus does not toll the limitations period, which continues to run. Geralds v Munson Healthcare, 259

Mich. App. 225, 240; 673 N.W.2d 792 (2003); Mouradian v Goldberg, 256 Mich. App. 566, 572-575; 664 N.W.2d 805 (2003), Newsome v. Bono, 2006 Mich. App. LEXIS 3305, 1-2 (November 14, 2006).

In Nippa, the Plaintiff filed a Complaint with an Affidavit of Merit pursuant to MCL 600.2912d. Plaintiff then filed a First Amended Complaint, and a Second Amended Complaint almost two months later. The Amended Complaints did not refer to the previously filed Affidavit of Merit, nor was an Affidavit of Merit filed with the Amended Complaints. The Michigan Court of Appeals held, once Plaintiff filed the First and Second Amended Complaints, these amended pleadings superseded the original Complaint. MCR 2.118(A)(4); Grzesick v Cepela, 237 Mich. App. 554, 562; 603 N.W.2d 809 (1999).

> " § 838. An amended pleading that is complete in itself and does not refer to or adopt a former pleading as a part of it supersedes or supplants the former pleading, and the prior pleading is considered abandoned and withdrawn. The purpose of this rule [is] to ensure that the court and the opposing parties will be aware of the points at issue.
>
> " § 839. The original pleading is abandoned and withdrawn by an amendment thereto, and is no longer a part of the pleader's averments. The plaintiff cannot avail himself or herself of the allegations contained in the superseded pleading, unless they are set out or referred to in the amended pleading. This rule applies not only to factual allegations but also to theories of recovery." [Id., quoting 61B Am Jur 2d, Pleading, pp 92-93.]

Therefore, the Plaintiff's Complaint was properly dismissed for failing to state a claim upon which relief may be granted.

Understanding that Michigan law requires an Affidavit of Merit be filed with a medical malpractice Complaint, and that federal courts in Michigan have recognized and applied this requirement, federal courts in Michigan must also apply the Michigan precedent requiring that

Amended Complaints be filed with an Affidavit of Merit. Further, because federal courts recognize that filing a medical malpractice Complaint in the absence of an Affidavit of Merit is grounds for dismissal, the Courts likewise must recognize that failure to file an Affidavit of Merit with an Amended Complaint is also grounds for dismissal. Such a result stems from consistent application of Michigan medical malpractice law in Michigan Federal courts, and is consistent with the observations of the Michigan Court of Appeals. Nippa, supra.

In the present case, Plaintiff did not file an Affidavit of Merit with the First Amended Complaint, nor adopt by reference any previously filed Affidavit of Merit. Defendants timely objected to this error in paragraph 22 of the affirmative defenses. (Exhibit M). Plaintiff's Complaint, filed without the Affidavit of Merit required by MCL 600.2912d, did not toll the limitations period because "'in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit.'" Scarsella, supra at 549. Mouradian v. Goldberg, supra at 571. Therefore, in the present case, Plaintiff's medical malpractice claim must be dismissed with prejudice pursuant to FRCP 12(b)(6)

B. Plaintiff's Notice of Intent Failure Does Not Comply With MCL 600.2912d.

Plaintiff mailed his Notice of Intent addressed to seventeen (17) different individual physicians, nurses, or other persons or entities alleged to be Plaintiff's medical providers. The NOI is defective and does not comply with MCL 600.2912b and, therefore, Plaintiff's medical malpractice claim must be dismissed pursuant to FRCP 12(b)(6).

Under MCL 600.2912b a person may not bring suit against a health professional or health facility without first providing written Notice of Intent to file suit. Such written notice must be given not less than 182 days before the suit is filed. Additionally, MCL 600.2912b(4) sets forth

several elements that the notice must contain to be deemed sufficient notice. MCL 600.2912b(4) provides:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
> (b) The applicable standard of practice or care alleged by the claimant.
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

Under Michigan law, Plaintiffs bear the burden of complying with the NOI requirements imposed by MCL 600.2912b. Gulley-Reeves v. Baciewicz, 260 Mich.App. 478, 679 N.W.2d 98 (2004); Roberts v. Atkins, 470 Mich. 679, 648 NW2d 711 (2004). Further, Michigan law does not require Defendants to challenge any deficiencies in the NOI prior to a Complaint being filed. Id.

In Roberts, the Michigan Supreme Court reviewed the requirements of MCL 600.2912b as to Notices of Intent. Id. The Court stated:

> Under *MCL 600.2912b(4)*, a medical malpractice claimant is required to provide potential defendants with notice that includes a "statement" of each of the statutorily enumerated categories of information. Although it is reasonable to expect that some of the particulars of the information supplied by the claimant will evolve as discovery and litigation proceed, the claimant is required to make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings. The information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them. This is not an onerous task: all the claimant must do is specify what it is that she is *claiming* under each of the enumerated categories in *§ 2912b(4)*. Id.

In Roberts, the Michigan Supreme Court interpreted the requirements of MCL 600.2912b while reviewing Notices of Intent which failed to provide the mandatory elements delineated in MCL 600.2912b. Id. The Roberts Court held that the Plaintiff failed to comply with MCL 600.2912b because her Notices of Intent were missing several statutorily mandated elements,

including "(1) a statement of the particular standard of practice or care applicable to each of the various defendants" and "(2) statements regarding the manner in which it was claimed that defendants breached the alleged standards of practice or care" Id. Thus, the Michigan Supreme Court's plain language in Roberts made clear that Plaintiffs NOI must indicate the standard of care applicable to **each** Defendant, and the manner in which the Defendants breached the standard. Roberts v. Atkins, 470 Mich. 679 (2004).

After concluding that Plaintiff's Notices of Intent were insufficient under MCL 600.2912b, the Roberts Court noted "it is plaintiff's burden to establish compliance with §2912b and, in turn to establish entitlement to application of the notice tolling provision, §5856(d)." Id. Accordingly, the Roberts Court noted that because the Plaintiff did not meet the requirements of MCL 600.2912b, "the statute of limitations was not tolled during the notice period" Id.

In the present matter, Plaintiff's NOI is deficient on the same basis the Notices of Intent were deficient in Roberts. Accordingly, Plaintiff has not complied with 2912b and this action must be dismissed for several reasons. First, Plaintiff, in this case, has failed to identify a specific standard of practice or care applicable to each of the 17 different persons concerned in the NOI, including but not limited to, Dr. Mathai, Dr. Antonini, Dr. Bey, Dr. Axelson, Dr. Hutchinson, or any other person. Further, while Plaintiff's NOI contains a section titled "The Applicable Standard of Care or Practice," Plaintiff never plainly states the applicable standard. (See Exhibit I). In fact, rather than delineate the standard of care as to each Defendant, Plaintiff's NOI simply states actions that Plaintiff alleges should have occurred, and the time frame within which such actions allegedly should have occurred. (See Exhibit I). For example, Plaintiff's NOI alleges the following, in pertinent part, as the standard of care:

> "Investigation and diagnosis of invasive squamous cell carcinoma of the larynx should have happened 4-8 weeks following July 11, 2001, when Mr. Broder presented with refractory sore throat for several months...In any event, the time lapses...are outside the standard of care.
>
> Radiation or other curative treatment should have commenced within 3-6 weeks of initial diagnosis...

> Following treatment, Mr. Broder should have been continuously monitored for recurrences of the primary tumor...
>
> Mr. Broder should have received treatment to prevent tooth decay...
>
> Mr. Broder should have received follow-up care to replace the un-anchored partial denture..."

(See Exhibit I). As is clear from the above language, Plaintiff's NOI is clear in its allegation that certain actions should have occurred, yet it fails to state a cohesive standard of care, or specifically who the purported standard of care applies to.

Plaintiff's NOI wholly fails to state the particular standard of practice or care *applicable to each Defendant*, as required by the Michigan Supreme Court in Roberts. Id. Further, because Plaintiff's NOI fails to state a cohesive standard of care, and instead only lists actions that allegedly should have occurred, it is impossible for Defendants to discern which elements of the alleged standard apply to which Defendant(s). For example, Plaintiff's alleged standard of care does not indicate whether Dr. Mathai should have investigated carcinoma of the larynx four to eight weeks after July 11, 2001. Additionally, the NOI fails to specify whether the commencement of radiation within three to six weeks is a standard that applies to Dr. Mathai or someone else. Likewise, it is unintelligible from Plaintiff's NOI whether continuous monitoring and provision of dental care is the standard applicable to Dr. Mathai or someone else. Because Plaintiff's NOI fails to state the particular standard of practice or care *applicable to each Defendant*, Plaintiff's NOI is insufficient under Roberts. Id.

Second, Plaintiff's NOI is insufficient under MCL 600.2912b (4)(c) as it fails to state "the manner in which it is claimed that the applicable standard of practice or care was breached." In fact, while Plaintiff's NOI is organized into sections that correspond to the subsections of MCL 600.2912b(4), Plaintiff wholly omits discussion of MCL 600.2912b(4)(c) and its requirement that a NOI contain a "statement" of the manner in which it is claimed the applicable standard of care was breached. MCL 600.2912b(4)(c). While Plaintiff's Notice generally alleges that a number of actions should have been completed in treating Plaintiff, the NOI does not indicate the manner in

which any specific Defendant allegedly breached the standard of care. For example, the Notice of Intent's 'standard of care section' never individually references Defendants. Additionally, the Notice's 'standard of care' section never alleges that any given physician Defendant's failure to complete any of the specified actions comprised a breach of the standard of care. (See Exhibit I).

In Roberts, the Michigan Supreme Court evaluated a NOI in which the Plaintiff described the manner in which Defendant breached the standard of care under MCL 600.2912b(4)(c) simply by referring the reader to "see paragraph 2 above," in Plaintiff's NOI. Id. at p. 679. As the Court noted, "paragraph 2 above" referenced Plaintiff's statement of the applicable standard of care. Id. In evaluating the sufficiency of Plaintiff's statement under MCL 600.2912b(4)(c), the Roberts Court noted the statement was a "circular and unresponsive assertion" that was "not minimally compliant with the statutory mandate that plaintiff provide a statement of the manner in which defendants breached the applicable standard of care" Id. at p. 696. Accordingly, the Roberts Court concluded Plaintiff's NOI did not comply with the statutory requirements for Notices of Intent under MCL 600.2912b(4)(c).

In the present matter, Plaintiff's NOI wholly fails to address the manner in which Defendant's breached the applicable standard of care. Instead, Plaintiff's NOI merely lists a number of actions which Plaintiff alleges should have been undertaken, and a time frame in which they allegedly should have been completed. (See Exhibit I). However, Plaintiff's NOI never specifically alleges that the standard of care required any individual Defendant physician to take any of the specific actions alleged. Thus, Plaintiff's NOI, like the Plaintiff's in Roberts, fails to comply with MCL 600.2912b(4)(c).

Because Plaintiff did not fulfill his obligation under § 2912b to set forth either the standard of care or the breach of that standard of care in order to put Defendants, Dr. Mathai or any other Defendant, properly on notice of his claims, the statute of limitations was not tolled during the notice period. Id. at p. 702. Therefore, Plaintiff's medical malpractice claim must be dismissed with prejudice.

C. Plaintiff's Affidavits Of Merit Fail To Set Forth The Required Elements In Order To Certify The Merit Of Plaintiff's Claims.

Plaintiff's Affidavit of Merit by Brent Williams, M.D., filed with the original Complaint, does not conform to the requirements of MCL 600.2912d and, therefore, Plaintiff's medical malpractice claim must be dismissed pursuant to FRCP 12(b)(6). The Affidavit concerns 6 physicians[7] and one medical provider vicariously [8], yet it fails to refer to any of these persons specifically, or to identify the medical standard of care applicable to each Defendant, the manner in which each breached the standard of care, and/or the actions each Defendant was required to take to comply with the standard of care

Under MCL 600.2912d a Plaintiff alleging medical malpractice must file with his Complaint an Affidavit of Merit signed by a health professional who is believed to meet the requirements for an expert witness under MCL 600.2169. MCL 600.2912d (1). Additionally, MCL 600.2912d(1) sets forth several elements that the Affidavit of Merit must contain to properly certify Plaintiff's claims. Specifically, MCL 600.2912d(1) provides a Plaintiff's Affidavit of Merit "shall contain a statement of each of the following:":

(a) The applicable standard of practice or care.
(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. MCL 600.2912d(1)(a)-(d).

As the plain language of MCL 600.2912d makes clear, the content of Affidavits of Merit is statutorily prescribed. Thus, when a Plaintiff files an Affidavit that does not comply with the

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[7] Aubertro Antonini, M.D., John Axelson, M.D., Malcom Trimble, M.D., Dr. Bey, Bency Mathai, M.D., and Ray H. Clark, M.D.

[8] CMS.

requirements of MCL 600.29212d, the Plaintiff technically fails to complete the filing of his Complaint. Such a failure subjects the action to dismissal pursuant to MCR 2.116(C)(7). Mouradian, supra at p. 573. An Affidavit that does not contain statements concerning a claim that a Plaintiff wishes to assert at trial is "grossly nonconforming" with respect to that claim, and the claim therefore cannot be asserted at trial. Mouradian, supra at pp. 573-574. An Affidavit of Merit that does not conform to the statutory requirements does not satisfy the statutory filing requirements and does not support the filing of a Complaint that tolls the running of the statute of limitations. Geralds, supra at pp. 235-240; Mouradian, supra at pp. 573-574.

Plaintiff's attached Affidavits of Merit by Brent Williams, M.D. and Dr. Carol Bradford, M.D. (See Exhibit K)[9]. Plaintiff's Affidavits of Merit do not set forth the required element of the standard of care. Instead, each Affidavit lists several actions that the Affiants contend "a reasonable general practitioner, internist, or health care provider" would have done (Exhibit K). As is clear from this language, the Affidavits of Merit completely fail to indicate any specific physician to whom Plaintiff is directing his claims. Rather, to the extent the Affidavits allege a standard of care, they appear to allege that the same standard applies equally to a general practitioner, an internist, or any health care provider. Clearly such language leaves open the absurd result that a wide range of health care providers–such as a surgeon, a nurse, a pharmacist, a laboratory technician, or a nurse's aid–are all properly held to the same standard of care. Obviously, such result is legally untrue, and this reality exposes the fact Plaintiff's Affidavits are simply lists of potential interventions that could be performed in treating a patient, not a cohesive standard of care

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[9] Pursuant to MCL 600.2916, only the affidavit of Dr. Williams is relevant to this case and Dr. Mathai since both he and Dr. Mathai are board certified in the same medical profession, internal medicine. Dr. Bradford does not spend the majority of her practice in the specialty of internal medicine, therefore, she is not qualified to testify concerning the applicable standard of care.

delineating the proper practice as to any specific health care provider or Defendant. Accordingly, Plaintiff's Affidavits of Merit fail to certify Plaintiff's claims.

In failing to file an Affidavit which complies with the requirements for MCL 600.2912d, Plaintiff did not technically complete the filing of his Complaint. Therefore, Plaintiff's Complaint should be dismissed pursuant to FRCP 12(b)(6) because Plaintiff failed to commence his action prior to the expiration of the two year statute of limitations. Mouradian v. Goldberg, 256 Mich. App. 566, 573 (Mich. Ct. App., 2003)

D. Plaintiff's NOI And/Or Affidavit Of Merit Fail To Sufficiently Specify The Element Of Proximate Cause Pursuant To MCL 600.2912b(4) And/Or MCL 600.2912d(1)(d).

In pertinent part, MCL 600.2912d(1)(d) requires, "...The affidavit of merit shall... contain a statement of each of the following: ...(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." With respect to proximate cause, Dr. Williams' Affidavit simply states,

> Mr. Broder suffered the following injuries as the proximate result of the acts and omissions that were outside the standard of care:
>
> a. Long-term sore throat, weight loss, loss of voice, and difficulty swallowing for months longer than was necessary;
>
> b. Progression of his cancer from Stage I to Stage III T2N1, lowering his statistical life expectancy;
>
> c. Three courses of chemotherapy with all attendant side effects, including the insertion of a PEG tube and subsequent infection, as well as possible long-term dental problems, all of which were avoidable because Stage I laryngeal cancer is treatable by radiation alone;
>
> c. Physical pain and suffering, mental anxiety, and emotional anguish because of the complications and side effects of the additional treatments needed to remedy his Stage III laryngeal cancer and because of the uncertainty caused by the delays in diagnosis, treatment, follow-up, and the increased risk of occurrence.

In Bailey v. Pornpichit, 2006 Mich App Lexis 2459 (unpublished) (Exhibit P) on August 8,

2006, the Court of Appeals recently held that such language contained in an Affidavit of Merit is insufficient to satisfy the requirements of MCL 600.2912d(1)(d). In Bailey the Court of Appeals looked to the Supreme Court's decision in Roberts, supra at pp. 699-700 n 16. In Roberts, the Supreme Court held that a NOI submitted under MCL 600.2912b was insufficient because, among other things, the Notice failed to state the manner in which the Defendants' alleged breach of the standard of care proximately caused the injury:

> Plaintiff's notices of intent state that "as a result of [defendants'] negligence . . ., [plaintiff] is now unable to have any children." At first blush, this may appear to satisfy the proximate causation requirement of § 2912b(4)(e). However, it is not sufficient under this provision to merely state that defendants' alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the manner in which it is alleged that the breach was a proximate cause of the injury. Id.

In the present case, Plaintiff's NOI clearly fails to satisfy the requirements of MCL 600.2912b(4)(e) because it does not contain a statement as to the manner in which it is alleged that the breach was a proximate cause of Plaintiff's injury, as required by Roberts. Id.

In Bailey, the Defendants moved for summary disposition arguing that Plaintiff's Affidavit of Merit failed to comply with the requirements of MCL 600.2912d because it did not sufficiently specify the required element of proximate cause and, therefore, Plaintiff did not properly commence her action. With respect to proximate cause, the Affidavit of Merit simply stated, "That as a result of the Dr.'s failure to comply with the applicable standard of care, as outlined above, Christal Bailey was delivered stillborn." The Court of Appeals held Plaintiff's Affidavit of Merit did not comply with MCL 600.2912d(1)(d). The court reasoned as follows:

> The mere correlation between alleged malpractice and an injury is insufficient to show proximate cause. Craig v Oakwood Hosp, 471 Mich. 67, 86-88; 684 N.W.2d 296 (2004). Proximate cause is a legal term of art that incorporates both

> cause in fact and legal (proximate) cause. Id. at 86. The cause in fact element generally requires showing that but for the defendant's actions, the plaintiff's injury would not have occurred. Id. at 86-87. Legal (proximate) cause normally involves examining the **foreseeability** of consequences and whether a defendant should be held legally responsible for such consequences. Id. at 87.
>
> In this case, plaintiff's affidavit describing the matter of proximate cause simply states "[t]hat as a direct result of Dr. [Sethavarangura's] failure to comply with the applicable standard of care, as outlined above, Christal Bailey was delivered stillborn." The standard of care "outlined above" consisted of performing tests. Presumably, if defendant had performed the tests and learned of Christal Bailey's fetal distress, then defendant possibly could have done something to save her. But the affidavit does not describe the manner in which defendant's failure to perform the tests factually and **foreseeably** caused Christal Bailey to be stillborn. It is possible that, even had defendant performed the tests, Christal Bailey still could have been stillborn. Therefore, we find that plaintiff's affidavit of merit was insufficient to satisfy MCL 600.2912d(1)(d). [emphasis added]

The statement of proximate cause in the Affidavit of Merit in Bailey is factually similar to the Affidavit of Merit in the present case. In the present case, like in Bailey, presumably Plaintiff alleges that if Defendant monitored Plaintiff closer his tests and treatment would have been completed sooner. But similar to Bailey, the Affidavit in the present case does not describe the manner in which Defendant's alleged failure to monitor Plaintiff"factually and **forseeably**" caused Plaintiff "to suffer prolonged as alleged. It is possible that, even had Defendant monitored Plaintiff closer, Plaintiff's testing and treatment would not have occurred sooner in light of the opinions and schedules of the various consulting specialists utilized, and the nature of Plaintiff's cancer.

Further, there is no evidence Plaintiff's cancer ever progressed from Stage I to III as alleged by Plaintiff, or that more invasive treatment was required as a result of any alleged delay. Plaintiff has not complied with the forseeability requirement of MCL 600.2912a(2), which states,

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an

opportunity to achieve a better result unless the opportunity was greater than 50%

Under MCL § 600.2912a(2) a medical malpractice Plaintiff has the burden of proving that the Plaintiff's opportunity to achieve a better result was greater than 50 percent, which is calculated by subtracting the chance a better result after treatment from the chance for survival or a better result before treatment. Ensink v Mecosta County Gen. Hosp., 262 Mich App 518, 687 NW2d 143 (2004), later proceeding 262 Mich App 801, 687 NW2d 901 (2004). In the present case, Plaintiff was cured of his cancer. There is no evidence that his opportunity to achieve a better result was decreased by greater than 50% as a result of Dr. Mathai's alleged medical malpractice.

Under the present circumstances, the Court must find that Plaintiff's Affidavit of Merit is insufficient to satisfy MCL 600.2912d(1)(d), consistent with the Court of Appeals' decision in Bailey and the authority stated therein. Therefore, Plaintiff has failed to state a claim for medical malpractice, and the claim must be dismissed pursuant to FRCP 12(b)(6) and/or FRCP 56.

ARGUMENT IV:

Defendant Dr. Mathai Is Entitled To Summary Judgment Concerning Plaintiff's Medical Malpractice Claim Pursuant To FRCP 56 Because Plaintiff's Experts Admit There Was No Delay By Dr. Mathai.

Plaintiff's allegations that Dr. Mathai may have breached the medical standard of care in delaying the diagnosis of Plaintiff's laryngeal cancer are without any factual support. Plaintiff's expert, Dr. Williams, testified Dr. Mathai should have diagnosed the cancer as of August 1, 2001. (Exhibit O, p. 39, line 23 to p. 40, line 1) That is because as of that date Plaintiffs allege Dr. Mathai

was aware that since March 2001 Dr. Mathai was aware Plaintiff has a persistent sore throat, progressive dysphagia, and persistent weight loss. However, Dr. Williams admitted during his testimony there is no evidence of these symptoms during the time period in question, between March through August 2001. There is no evidence that a letter from Plaintiff concerning his symptoms was ever received by Dr. Mathai. (Exhibit O, p. 41, lines 2 to p. 42, line 1) Dr. Williams testified the only evidence in the chart of persistent symptoms was Dr. Antonini's progress note concerning his October 12, 2001 examination. (Exhibit O, p. 42, lines 5-12) Dr. Williams testified: Plaintiff's sore throats were intermittent. (Exhibit O, p. 42, line 23 to p. 43, line 6); and his weight loss in the chart was intermittent. (Exhibit O, p. 43, line 7 to p. 44, line 7) Dr. Williams admitted there is no evidence Dr. Mathai ever received from Plaintiff the same complete history as Dr. Antonini received on October 12, 2001 when laryngeal cancer was first suspected. (Exhibit O, p. 52, lines 15-18). Given the lack of information observed by Dr. Mathai concerning the conditions required to diagnose Plaintiff's laryngeal cancer, Plaintiff's claim that Dr. Mathai did not timely diagnose or suspect Plaintiff's laryngeal cancer must be dismissed. (refer to Exhibit O, pp. 30 to 53)

Plaintiff's claim that Dr. Mathai committed medical malpractice because she allegedly did nothing to facilitate the care and treatment of Plaintiff's cancer once it was suspected on October 12, 2001, must also be dismissed since it is unsupported by the evidence according to Dr. Williams. Specifically, Dr. Williams testified Dr. Mathai was not responsible for Mr. Broder's care from October 1, 2001 through October 21, 2001 while she was away on vacation. (Exhibit O, p. 45, lines 1-10) Similarly, he also testified Dr. Mathai was not responsible for Plaintiff while on maternity leave from March 9, 2002, through May 15, 2002. (Exhibit O, p. 80, lines 7-16) Dr. Williams has no criticisms of Dr. Mathai after she returned from maternity leave. (Exhibit O, p. 80, lines 17-20)

therefore, the only remaining dates at issue concerning Dr. Mathai are between October 21, 2002 through March9, 2002.

During the remaining dates at issue, Dr. Williams testified Dr. Mathai timely followed the recommendations of the treating consulting cancer and oncology specialists. (Exhibit O, p. 54 through 77) Therefore, she did not breach the standard of care by delaying Plaintiff's cancer diagnosis or treatment. Specifically, Dr. Williams testified that between October 12, 2001 and November 13, 2001, Plaintiff was timely referred to ENT specialist, Dr. Kornak. (Exhibit O, p. 56, line 25 to p. 57, line 9) The standard of care entitled Dr. Mathai to rely on the opinions of the specialty consultant, Dr. Kornak. (Exhibit O, p. 61, lines 12-16) Dr. Kornak testified during his deposition that under the circumstances the microlaryngoscopy and vocal cord stripping procedures were scheduled within a reasonable amount of time after his November 11, 2001 examination. (Exhibit C, p. 20-21). Dr. Williams testified, once Plaintiff's microlaryngoscopy and vocal cord stripping were completed January 11, 2002, it was within the standard of care for Dr. Mathai to wait for the pathology report before taking any other action. (Exhibit O, p. 699, line 24 to p. 70, line 3) It was within the standard of care for Dr. Mathai to wait for Mr. Broder to return to Dr. Kornak on January 22, 2002 for followup before taking any other action (Exhibit O, p. 70, lines 21 - p. 71 line 3), for Dr. Mathai to rely on Dr. Kornak's specialty consult referral to radiation oncology (Exhibit O. p. 72, lines 1-9), and for her to wait until completion of the consult on February 5, 2002 before taking any further action. (Exhibit O, p. 73, lines 9-23) Dr. Mathai timely reviewed the radiation oncology consult report on February 8, 2002. (Exhibit O, p. 77, lines 4-8) Plaintiff was scheduled to receive simulation of treatment recommended by the radiation oncologists on March 12, 2002, and to begin radiation treatment on March 19, 2002. In the interim, Dr. Mathai began her maternity

leave on March 9, 2002 and was not responsible for plaintiff thereafter. Dr. Williams testified someone else other than Dr. Mathai was responsible for the timely completion of Plaintiff's radiation therapy. (Exhibit O, p. 77, lines 16-23)

For Plaintiff to meet his burden of proof on his medical malpractice claim, MCL 600.2169 requires expert testimony from Dr. Williams to support Plaintiff's claim that Dr. Mathai breached the medical standard of practice and care to timely diagnose and treat Plaintiff's cancer. As set fort above, Dr. Williams does not support Plaintiff's claim. Dr. Mathai did not breach the applicable medical standard of practice and care under the present circumstances. Therefore, Dr. Mathai should be granted summary judgment concerning Plaintiff's medical malpractice claim pursuant to FRCP 56.

CONCLUSION

Defendants, Dr. Hutchinson and Dr. Mathai are entitled to summary judgment as a matter of law as there are no genuine issues of material fact presented by Plaintiff. When all the evidence is viewed in a light most favorable to the Plaintiff, there remains no genuine issues of material fact, and Defendants are entitled to summary judgment as a matter of law pursuant to FRCP 56.

Defendant, Dr. Hutchinson, may not be found vicariously liable, on a theory of supervisory liability or otherwise, for the alleged actions of CMS, Dr. Mathai or others. Dr. Hutchinson did not have any personal involvement with Plaintiff. Further, Plaintiff can not show any policy, practice, or procedure, officially adopted by Dr. Hutchinson on behalf of himself or CMS and relied on the Defendants, that was deliberately indifferent to Plaintiff's serious medial needs and/or harmed Plaintiff.

Plaintiff failed to satisfy the subjective element of a deliberate indifference claim against Defendants Dr. Hutchinson, and Dr. Mathai as well. Dr. Hutchinson had no personal involvement with Plaintiff's treatment and therefore could not be deliberately indifferent to Plaintiff's condition. Dr. Mathai treated Plaintiff in accordance with his professional medical judgment and not in a criminally reckless manner and therefore did not act with deliberate indifference or reckless disregard.

Plaintiff's claim for medical malpractice must also be dismissed with prejudice. Plaintiff failed to serve a proper Notice of Intent, and failed to file proper Affidavits of Merit with his Complaint or his Amended Complaint. Because Plaintiff's Notice of Intent and Affidavits of Merit were statutorily insufficient, Plaintiff failed to properly commence his claim, and failed to toll the applicable statute of limitations.

Finally, Plaintiff's claim for medical malpractice is unsupported by their only standard of care expert, Brent Williams, M.D.

RELIEF REQUESTED

WHEREFORE, Defendants, Bency Mathai, M.D. and Craig Hutchinson, M.D., pray that this Honorable Court shall dismiss the present case with prejudice for the reasons stated herein.

Respectfully submitted,

CHAPMAN AND ASSOCIATES, P.C.

Dated: November 30, 2006

s/Brian J. Richtarcik
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PROOF OF SERVICE

I hereby certify that on November 30, 2006, I presented the foregoing paper to the Clerk of the Court for filing and uploading to the ECF system, which will send notification of such filing to the attorneys of record listed herein and I hereby certify that I have mailed by US Postal Service the document to the involved non participants.

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