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MICHIGAN SUPREME COURT

March 4, 2009

7/March 2009

#136336

Brian Potter,
Plaintiff-Appellant,

v

Kristyn H. Murry, M.D. and
Huron Valley Radiology, P.C.,
Defendants-Appellees,

and

St. Joseph Mercy Hospital Ann Arbor,
d/b/a Trinity Health-Michigan,
Richard C. Mcleary, M.D.,
Gary Augustyn, M.D.,
Robert Domeier, D.O., and
Emergency Physicians Medical Group, P.C.,
Defendants.

CHIEF JUSTICE KELLY: Good morning. It's a bright sunny morning here in Lansing, and the Court is looking forward to further illumination from counsel on these important cases we have before us today. So with that we'll start with the case of *Potter v Murry*.

MR. GRANZOTTO: Good morning. Mark Granzotto on behalf of the plaintiff-appellant. If there is still some time constraint on the asking of questions in this Court, I waive that since I'm a little bit more interested in what you're interested in than what I have to say.

JUSTICE YOUNG: Okay.

MR. GRANZOTTO: Good.

JUSTICE YOUNG: If we went on your theory, don't you still lose?

MR. GRANZOTTO: I'm sorry?

JUSTICE YOUNG: I'm sorry. If you went on your theory that the P.C. is not one of the entities that is entitled to get the notice, don't you lose?

MR. GRANZOTTO: No.

JUSTICE YOUNG: Don't only the entities that get the notice - aren't only those entities entitled to tolling?

MR. GRANZOTTO: Oh, that's an interesting question.

JUSTICE YOUNG: Isn't it.

MR. GRANZOTTO: Yes.

JUSTICE YOUNG: That's why I asked it.

MR. GRANZOTTO: Okay. The - it's not raised by the briefs, but it's a very, very good question.

JUSTICE YOUNG: Well, I agree with your textual analysis of who's entitled to get the notice, but that very provision is the one that provides tolling -

MR. GRANZOTTO: Yes.

JUSTICE YOUNG: for a statute.

MR. GRANZOTTO: Well, that's correct. I'd have to go back and look at the dates to see if your - if your argument is - or your point is in fact relevant.

JUSTICE YOUNG: Well, let me give you the date. The date of the - the period of limitations for plaintiff's medical malpractice claim would have expired on June 7, 2003. You filed the complaint on November 4, 2003 - outside the statute of limitations.

MR. GRANZOTTO: Okay. Then at least temporally your point is well taken.

JUSTICE YOUNG: Do you have an answer for -

MR. GRANZOTTO: Yes.

JUSTICE YOUNG: if you're not entitled to tolling how -

MR. GRANZOTTO: Yes, because you would have to go back to the text of 5856(c) because 5856(c) does not distinguish between who gets the tolling. 5856(c) just says that if the statute of limitations would run during the time period that the notice of intent is filed, the statute of limitations is tolled. You would have to write into that statute -

JUSTICE YOUNG: No, but you don't - but you're not entitled to the notice. Your client - or the P.C. I'm sorry, not your client - the P.C. is not one of the entities for whom the notice and the tolling -

MR. GRANZOTTO: You're reading into - I mean I don't have 5856 in front of me,

JUSTICE YOUNG: Let me see if I can find it.

MR. GRANZOTTO: but you are reading into it language which simply is not there. What you're suggesting to me is that - and obviously I haven't come completely prepared to respond to this very, very interesting question - but the simple fact is that 5856(c) simply says that the statute of limitations is in fact tolled. It doesn't say the statute of limitations as to defendant X, defendant Y, defendant A. It simply says the statute of limitations is tolled. And on the basis of the text of 5856(c) I would suggest to you that you would have to write into the text of that statute something to come to this differentiation which you're proposing here.

JUSTICE YOUNG: Okay. I mean I'll look at the statute then and see what I can find.

MR. GRANZOTTO: Well, it's nice to start on that.

JUSTICE YOUNG: 5850 - what was it - 58 what?

MR. GRANZOTTO: 5856(c) is in fact obviously the tolling statute that applies to notices of intent. But getting back to the - if I can be - issues that are before the Court this a very unusual case for this particular Court because it happens to be a situation in which this Court has posed one question, and the parties are in agreement as to the answer to that question. The question the Court has posed is obviously whether a professional corporation is in fact a health facility for purposes of 2912(b). I wrote about eighteen pages trying to craft the

arguments based on not only this Court's decision in *Kuznar*, but also various other cases and various other statutes which I think supply the answer to this question. And on page 2 of my opponent's brief, he has conceded the point. I don't have to get anywhere beyond page 2 of the defendant's brief to see his position that in point of fact his client is not a health facility for purposes of 2912(b). I'm obviously willing to explain to you why we are both in agreement on that point. The decision in *Kuznar* is pretty indicative of this issue, although as I've acknowledged in my brief *Kuznar* does not answer all of the questions in light of the fact that it involved 5838(a) which has its own specific incorporation clause to the public health code. But as I've explained in my brief, even without a specific incorporation of the Public Health Code as you had applicable in the *Kuznar* case, the simple fact is that the word health facility does not apply to a professional corporation, physicians, or even in this case an intern or resident's professional corporation. Now the defendant then after conceding what is the question that this Court has raised in this case - the defendant then goes on to make the argument that despite the fact that it is not a health facility for purposes of this act, there is no - there is still a requirement that this notice be mailed to the professional corporation. Well, that argument is completely foreclosed by the very provision of the act that this Court has cited when it granted leave to appeal in this case which is 2912(b)(1) which simply provides that except as otherwise provided a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility with notice. So right in that statute is an indication that this is a medical malpractice action against a health professional or health facility, and it even specifies who must receive that notice. It must be sent to the health professional or health facility. The defendant's entire argument before this Court is therefore somewhat oblivious to the language that the Legislature chose when it adopted 2912(b)(1). I don't know how this could be clearer quite frankly. The simple fact is that this statute is, by my count, twenty-five times in this one statute - 2912(b), lists health professional and health facility. It could not be much clearer it seems to me that the Legislature wanted notices of intent mailed to health professionals or health facilities. The defendant has acknowledged that it is neither one of those two things. As a result, there was no - there's no requirement in the law that this document be sent to the professional corporation to institute this action. And I'm willing to sit down and reserve the rest of my time for rebuttal.

JUSTICE YOUNG: Give me the cite on the tolling provision.

MR. GRANZOTTO: Pardon me?

JUSTICE YOUNG: Give me the cite again.

MR. GRANZOTTO: Yes, MCL 600.5838 - 5856, I am sorry if I misstated. It's 5856(c), I'm sorry if I said 5838.

JUSTICE CORRIGAN: I don't have the language and I can't find it. What would you be tolling it for if it's not for notice process?

MR. GRANZOTTO: Well, what Justice Young has pointed out is something that I -

JUSTICE CORRIGAN: You don't have to file a notice you can just outright sue a P.C. for medical malpractice according to the theory as I understand it now. So why do you need to toll anything at all; you can go straight to the claim.

MR. GRANZOTTO: The reason is - Justice Young has pointed out to me in terms of the timing of this particular case. As you probably know, in most medical malpractice cases because of the lead time to the cases, and the mandatory 182-day tolling period, you really don't have the necessary information together until after a year and a half has passed after the date of the malpractice. Which means that if you mail a notice and you are now in excess of a year and a half after the date of the malpractice, if you mail that notice -

JUSTICE CORRIGAN: I mean isn't the bottom line you don't even need to have a notice anymore?

MR. GRANZOTTO: That's correct with respect to the professional corporation - that's correct.

JUSTICE CORRIGAN: Right. So what are we tolling?

MR. GRANZOTTO: What's happened as Justice Young has just pointed out to me in this case is the plaintiff mailed the notice of intent within - with less than 180 days left on the statute of limitations. The plaintiff is therefore entitled - clearly entitled to tolling under 5856(c) of a 182-day period at least, even Justice Young would acknowledge this, at least with respect to those people to whom the notice was served on.

JUSTICE CORRIGAN: Okay.

MR. GRANZOTTO: Okay. So what happened in this case is the plaintiff did not pick and choose as it's just been pointed out to me. The plaintiff mailed the notice of intent, waited the 182-day mandatory waiting period, and then sued everybody including the professional corporation.

JUSTICE CORRIGAN: Well, what would - you know this might be appropriate and maybe we'll discuss it later for filing a supplemental brief because I don't even follow what you would do if you don't have to file a notice for professional corporations. Do they get automatic tolling because others are entitled to notice?

MR. GRANZOTTO: You would do - you would do one of two things. Either - no, my advice to people who call me, let's put it that way - my advice would be to do one of two things; that is, either mail your notice of intent when there is still in excess of six months left and then you can file the case within the two-year period and you have no problem whatsoever. However, if you are in that period which is beyond the year and a half which means you are going to - you must extend the statute of limitations by tolling - for tolling purposes, you would obviously have to bring the case before the two-year period expires as against the professional corporation if Justice Young's observation proved to be correct. I don't think it is correct in light of the way 5856(c) is written, but that's the simple point.

JUSTICE YOUNG: Well, but again I'm going to get - I've asked the Crier to get 5856, but I thought because there was no applicable notice period under §2912(b), 5856 didn't apply.

MR. GRANZOTTO: But you understand -

JUSTICE YOUNG: I mean - I'm just asking the question.

MR. GRANZOTTO: there's no question in your mind that 5856(c) does in fact apply to parts of this case, correct? You have no question about that.

JUSTICE YOUNG: Well, I mean as to those who received notice -

MR. GRANZOTTO: That's correct, and I'm -

JUSTICE YOUNG: at least those individuals who received notice.

MR. GRANZOTTO: suggesting to you that if 5856(c) applies under the text of 5856(c) you can't pick and choose -

JUSTICE YOUNG: Why can't you?

MR. GRANZOTTO: Well, you can if you rewrite the statute.

JUSTICE YOUNG: No, I'm -

MR. GRANZOTTO: I'm sorry.

JUSTICE YOUNG: Advisably I'm - this is something that I sort of thought of coming out here.

MR. GRANZOTTO: And I didn't, I want you to know.

JUSTICE YOUNG: So I'm trying to work through the concept because it seems to me that if - if you're not subject to the notice period I was trying to figure out how then you are - your theory is that if any party properly is entitled to a notice and therefore subject to tolling, it is tolled as to every party?

MR. GRANZOTTO: Well, perhaps you have now in front of you 5856(c); perhaps we could read it together.

JUSTICE YOUNG: Well, you go on - I'm just asking the question, you can go on with your argument.

MR. GRANZOTTO: I'm actually done with my argument Justice, unless there are other questions.

JUSTICE YOUNG: Okay, I'll look any maybe while your -

MR. GRANZOTTO: Thank you, I'll be back.

JUSTICE YOUNG: Okay, then thanks. That would be helpful.

CHIEF JUSTICE KELLY: Okay, thank you.

MR. RICHTARCIK: Good morning. Brian Richtarcik on behalf of defendant-appellee Huron Valley Radiology P.C. I guess I should start by thanking Justice Young for coming up with this

interesting issue because I wish I had thought of it. You know and I do have -

JUSTICE YOUNG: Let me just read -

MR. RICHTARCIK: I have the statute too; I'll follow along.

JUSTICE YOUNG: Okay. It says "the statute of limitations or repose are tolled for any of the following circumstances" - (C) at the time the notice is given and compliance with the applicable notice period under 2912(b), which is the disputed provision here, does not appear to include P.C.'s unlike hospitals if during that period a claim would be barred by the statute of limitations or repose." That is - the problem I have is if there is no compliance required for giving the notice required under 2912(b) for a particular defendant, how does that defendant then get the entitlement of 5650 - 5856(c)?

MR. RICHTARCIK: And I agree with your honor. I think that

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JUSTICE YOUNG: I'm just asking -

MR. RICHTARCIK: No, but I agree. The caselaw I think is pretty clear that you have to comply with 2912(b) as to each defendant who is entitled to notice and who you're suing for medical malpractice at least to the extent that they're a license health professional or a licensed agency or facility. And so if you had three doctors that you are suing and you sue the A & B - or you sent an NOI to A & B but you didn't send it to C, you only get tolling of - you only have a claim against A & B not C and you'd only get tolling as to A & B not C. I mean I don't know how you can have it one way and not the other. I think essentially - you know one of the arguments that - that the plaintiff could make is that well because you sent notice on the physician and the principal is vicariously liable for the physician well that should be as good to both of them because the principal steps into the agent's shoes, they're considered one and the same, so maybe under those circumstances the NOI to the agent is just as good as an NOI to the principal. But that's precisely my argument in favor of why 2912(b) does apply to P.C.s.

JUSTICE YOUNG: But wait a minute - Oh, go ahead.

MR. RICHTARCIK: I was just gonna say we can see it's fairly universally considered by looking at the various cases

involved that it's understood P.C.s get notice because they're always given notice, and they were even noticed in this case. The *Roberts* case - *Roberts v Atkins* and then additionally you know *Boodt v Borgess* and *Bush*, they each appear to give notice to a P.C. I mean this particular issue has never addressed whether they were ever really entitled to notice, but again I say that the vicarious liability issue requires they get notice and specifically I cited *Nippa*, and not to reiterate my brief, but the one quote they say is "all procedural requirements for - applicable to the principal in the same form and manner as if the agent were named a party". And in that particular case they dealt with an affidavit of merit, and they said you've got to send the affidavit of merit even if you're only just suing the P.C. or just suing an entity. So - and we look at the - there was the *Cox* case and that dealt with the jury instruction, and they just sued the Neo-natal Unit in that case not the nurses, they wanted to - they tried to give a jury instruction just about the unit and they said well no, you're suing the unit only, but it's based on vicarious liability so the instruction has to be as to the agents. The same would apply across the board. I argue in my brief about the seemingly absurd result we would have if the purpose of 2912(b) is to facilitate settlement in some pre-suit discovery to further that purpose, yet for some arbitrary reason the P.C. who's equally as liable as a licensed facility in terms of vicarious liability would be kept out of that process. I can't explain why the statute's written the way it is other than because the health professional should get notice so does the P.C. because they stand in their boots, and they get all the same procedural requirements.

JUSTICE YOUNG: Let me explain to you my - the concern with your alter ego analysis such that the P.C. is entitled to all the procedural safeguards that the parties identified in the notice statute are entitled to. Presumably the Legislature decided who to give the benefit of the protections of an NOI to. I think it's passing strange that professional - medical professional corporations aren't listed along with hospitals and other healthcare facilities, but that's what we're dealing with. Your - the argument that you're making is that notwithstanding we have a list from the Legislature identifying who's entitled and who isn't, you're asking this Court to ignore that and import those procedural protections to a nonlisted party. That, at least to me, is a troubling concept. And in *Cox*, for example, I mean that's a common law issue. Can you proceed against the principal without instructing the jury about you know who the responsible agents are - the principal cannot be liable without the liability of its agent. So that - none of

these cases that you are relying on seem to address, including *Nippa*, seem to address the fact that the Legislature omitted, either intentionally or they just did, P.C.s from the protections. So if you can explain to me why we can import the procedural protections of the medical - med/mal tort reform to an omitted party, I'd be interested in what the logic of that is - how that doesn't violate some notion that the Legislature gets to provide protections and we can't ignore them.

MR. RICHTARCIK: Well, I agree it is somewhat troubling

JUSTICE YOUNG: Very.

MR. RICHTARCIK: the fact that they list two specific - they specifically list, you've just noticed, just like 33 what to 20106 specifically lists who would constitute a health facility or agency. How do we get around that? I mean whether in *Nippa* -

JUSTICE YOUNG: Well, let me - let me - If I may -

MR. RICHTARCIK: Sure.

JUSTICE YOUNG: let me add a - Here are the provisions that apply it seems to me to P.C.s. The 2912 which talks about the - instead of answering you can file an affidavit as a defendant saying you know you're not responsible. The affidavit of merit is applicable explicitly to P.C.s. You know there are a number of these - privileges - the exception to privileges. The expert witness rule apparently applies to P.C.s as a defendant in a med/mal. So there are a number of provisions that the Legislature has not excluded the P.C. from. But this one - the NOI provision - is not one of those.

MR. RICHTARCIK: Well, I don't know if it specifically provided that the expert witness rule specifically applies to P.C.s or the licensed health facility.

JUSTICE YOUNG: It applies because it is a defendant in a med/mal case.

MR. RICHTARCIK: Exactly, right.

JUSTICE YOUNG: All right. So it's not excluded from all of the med/mal tort reform, but this one NOI seems to be. So, again, I - just to give the complete picture the Legislature has

selectively applied only portions of the med/mal tort reform to P.C.s. So why do I get to ignore that?

MR. RICHTARCIK: Right. I mean and to define my argument so to speak we'd have to assume that the Legislature somehow didn't think of this particular issue when they wrote it.

JUSTICE YOUNG: And they didn't.

MR. RICHTARCIK: And I understand that. The only thing I can come back to say with that is, again, with respect to *Nippa* -

JUSTICE YOUNG: Maybe they didn't like medical - P.C.s - I don't know.

MR. RICHTARCIK: They thought through the issue of vicarious liability very clearly, and they may that specific statement in that case about the procedural requirements being applicable.

JUSTICE YOUNG: They who - the Legislature?

MR. RICHTARCIK: No, the Court of Appeals affirmed by this Court. There's a -

JUSTICE CORRIGAN: I mean we have the same problem in the Cox case itself it seems to me thinking back on that case where vicarious liability, and that whole problem isn't really grappled with. The Legislature doesn't really grapple with it at all.

MR. RICHTARCIK: It doesn't consider vicarious liability at all.

JUSTICE CORRIGAN: Right.

JUSTICE YOUNG: Well, remember -

MR. RICHTARCIK: It doesn't mention it in the statute.

JUSTICE CORRIGAN: How do we get the power then to go forward and supply holes in a statute where the Legislature didn't choose to include that?

MR. RICHTARCIK: Right. Because under that kind of -

JUSTICE CORRIGAN: And it seems like an excess of power on our part to be able to do that.

JUSTICE YOUNG: Well, Cox involved not a P.C. but a hospital - Botsford.

MR. RICHTARCIK: Right - and you're right, and I would -

JUSTICE YOUNG: So we don't have the problem in Cox that we have here.

MR. RICHTARCIK: Right. They don't distinguish though between it being a - specifically distinguish it between it being a hospital or a licensed facility -

JUSTICE YOUNG: They - they.

MR. RICHTARCIK: The Court - sorry.

JUSTICE YOUNG: Okay. Again, you know I'm concerned about what the Legislature said. We may be wrong because the issue didn't get framed. In Cox, it couldn't have been framed because in Cox there was a bona fide healthcare facility; namely, a hospital, that is entitled to notice of intent.

JUSTICE CORRIGAN: It also had the problem of nursing malpractice -

MR. RICHTARCIK: Right.

JUSTICE CORRIGAN: which wasn't specifically identified either. So there are plainly areas that the Legislature doesn't touch in the medical malpractice context.

MR. RICHTARCIK: I agree.

JUSTICE CORRIGAN: And another question of our power isn't it?

MR. RICHTARCIK: And one of those areas is vicarious liability. It doesn't specifically state anywhere in the medical/malpractice statute. You can sue someone vicariously for medical malpractice.

JUSTICE YOUNG: Right.

MR. RICHTARCIK: Hence the premise you can under the common law and in the principles of respondeat superior so I'm going off of the premise it seems to apply that if you can sue them for medical malpractice because the courts have interpreted the statutes to say that you can, then like they said - like the Court said in *Nippa* that the same procedural requirements provide as if they were identical parties they would be entitled to notice, they're entitled to receive an affidavit of merit indicating -

JUSTICE YOUNG: That's the premise I'm challenging.

MR. RICHTARCIK: Right. And I said I don't have a better answer for you than that.

JUSTICE YOUNG: You got *Nippa*, but is *Nippa* right?

MR. RICHTARCIK: Pardon?

MR. RICHTARCIK: You say I've got *Nippa*; I'm saying but in light of what we've just - what you've acknowledged the NOI provision does not apply - is *Nippa* correctly decided?

MR. RICHTARCIK: I think *Nippa* is correctly decided for - based on the theory of respondeat superior; based on the fact that if the principal is entitled to all the defenses that the agent is entitled to, one of those defenses is that they're entitled to an NOI, and if they don't get the NOI then the claim's not properly stated. And they didn't get an NOI - well, they received an NOI, but they didn't receive an NOI that in any way indicates anything about the matter other than it's addressed to them. So if we were gonna say in this case I think that vicarious liability doesn't apply to 2912(b), then how can it apply to any other provision of the medical malpractice statutes. I don't know how you can imply it in the one section that you can sue a P.C. vicariously under common law, but then under another section they're not entitled to the same defenses as the agent would be entitled to.

JUSTICE YOUNG: They're entitled to the agent's defense. If the agent gets a defective NOI, the hospital - the P.C. gets to rely on that defect. But I don't see how it gets its independent notice given the statute doesn't allow - it doesn't require it.

MR. RICHTARCIK: Because they're being sued independently for medical malpractice in a vicarious theory, and a theory in

which the courts have determined, in Cox even, that you don't even have to sue the agents, you can just sue the principal. So I'm back to the absurd result argument that how can we - since it's silent as to the vicarious liability and as to nonlicensed principals - since the statute is silent as to that, how can we - we need to interpret to say well what about these P.C.s? Can you even - if you can sue them are they entitled to notice. I mean you step into the same shoes.

JUSTICE YOUNG: Why is it absurd? Why is it - you know - I think people like to jump to absurd when they don't like the result. Why is it absurd for the Legislature, consciously or otherwise, to omit P.C.s such that we then say notwithstanding we're gonna import all those procedural protections to them anyway. And, again, I'm hoping you can help me because my theory then is all right we've got a world now in the common law that allows the P.C. to be sued with or without its responsible agents, and it is entitled to some of the procedural protections of the med/mal tort reform, but not all of them. And why isn't that all we can do unless we alter the common law in terms of vicarious liability in this context.

MR. RICHTARCIK: I mean I agree that it's troubling and challenging to a plaintiff in a case to read into a statute like 2912(b) they're required to sue an entity that's not even named in specifically in that statute. The only thing that I can come back with is again the nature of vicarious liability - they get the same defenses - the same - and I thought this one through too in terms of okay, let's assume they get the same defense as well. The physician got notice, and it says that you're entitled to the same defense as if the physician was named as a party. Well, the physician got notice so what are you worrying about? But the thing is it's a separate and independent claim against - well not separate and independent totally, it's vicarious liability so it's related to the claim - but it's still directed to the P.C. And if we're trying to further the purpose of 2912(b) which is to facilitate settlement - it's a stated purpose of the statute - and we're trying to interpret it as to a vicariously liable party who's not even provided for in the medical malpractice statutes, we can only interpret that to mean to further that purpose they would have had to expect notice to be going - to go to everybody. It creates a troubling problem and I agree because it doesn't state - I mean does the plaintiff have fair notice then? I mean -

CHIEF JUSTICE KELLY: Mr. Richtarcik? Last year this Court came out with an opinion in the case of *Kuznar v Raksha Corp*

which is a unanimous decision, which held that a pharmacy, because it wasn't listed in 20106, was not entitled to notice under 2912(b). And that case too is one where vicarious liability could have been sought against the pharmacy. Well, how could we follow in our own precedent a hole that a professional corporation which is not listed would be subject to 2912(b) when a pharmacy wasn't?

MR. RICHTARCIK: I do have an answer for that one, and I thought that one through as well. I think because in that particular case it dealt with a pharmacy and it sounded like a pharmacy technician or something like that, and neither of them were - one wasn't a licensed health agency and the other wasn't a professional so medical malpractice didn't even apply to any of them so you don't get to whether or not an NOI is required. I don't think they addressed the question that we're addressing here where there is a licensed health professional involved, and you're arguing about vicarious liability. Do they step - does the principal step into the boots of the P.C., and are they entitled to notice? I don't think that question was addressed in *Kuznar*. On its face I mean I agree that *Kuznar* defines a licensed health facility not to include us, and if you're reading 2912(b) it doesn't specifically include a P.C.

JUSTICE MARKMAN: Counsel?

MR. RICHTARCIK: Yes.

JUSTICE MARKMAN: In terms of giving some legislative sustenance to the idea of vicarious liability, could you tell me what the consequences are in your judgment to the language contained in 5838(a) "a claim based on the medical malpractice". It doesn't say a claim against certain entities, but it says a claim based on the medical malpractice of a person or entity who is or holds himself or herself out to be a licensed healthcare professional, licensed health facility, or agency, or an employee, or so on. What is the significance to the word "based on". What does it (inaudible)?

MR. RICHTARCIK: What section are we talking about here?

JUSTICE MARKMAN: 5838(a).

JUSTICE YOUNG: (1).

MR. RICHTARCIK: I don't know if I have that one here. Oh, here we are.

JUSTICE MARKMAN: Is there any hint or suggestion in that provision that possibly there is some sense of vicarious liability that can be imported into the statute?

JUSTICE YOUNG: Do you have it in front of you?

MR. RICHTARCIK: I'm looking at it right now, sorry.

JUSTICE MARKMAN: It doesn't say a claim against a class of individuals later - laid out in that section, but it says a claim based on -

MR. RICHTARCIK: Of malpractice -

JUSTICE MARKMAN: I mean isn't that the essence of a vicarious liability claim that it's based on the misconduct of someone else?

MR. RICHTARCIK: Yes, it is.

JUSTICE MARKMAN: You haven't really assessed that have you?

MR. RICHTARCIK: No, I haven't unfortunately; I wish I had an opportunity to do that, but no I haven't. But it does say what you say, and it's based on the malpractice of a person. It doesn't distinguish whether or not it includes vicarious liability so I would argue under the circumstances the assumption is it would include it.

JUSTICE MARKMAN: But you haven't argued.

MR. RICHTARCIK: But I haven't brief it; I haven't researched -

JUSTICE MARKMAN: Let me ask Mr. Granzotto when he comes back.

MR. RICHTARCIK: I have nothing further, unless there's more questions.

CHIEF JUSTICE KELLY: Thank you, sir.

MR. RICHTARCIK: Thank you.

MR. GRANZOTTO: A number of points. You mentioned what Cox was about - it had a hospital. Well, *Nippa - Nippa* involved 2169 - that was the big dispute which as you've acknowledged is one that applies to professional corporations. But the institutional defendant in the *Nippa* case was a hospital; it was in fact a health facility. *Nippa* obviously was addressing - it wasn't addressing 2912(b) which is the specific statute we're dealing with. And by the way Justice Markman, your question regarding 5838(a) is - might have been pertinent when we were - when you were dealing with the *Kuznar* case, but it doesn't apply to this case because as Justice Young has pointed out we have a statute that has in fact assessed a subset of the medical malpractice cases. A subset of medical malpractice cases against a health professional or a health facility. And as my opponent has acknowledged, this is neither. So a citation at this stage to 5838(a) is sort of irrelevant because we're dealing with a different statute. But let me -

JUSTICE YOUNG: But we are trying to figure out - I mean this is a new thought. I mean and I think practitioners as is evidenced in this case when you have a malpractice case and you decided you wanted to sue not only the practitioners but their professional corporation everybody sued the P.C. and followed the same procedures. So we're in a - we're kind of in a new thing now. What does it mean now that the P.C. is no longer subject to all of the procedural regime under the med/mal tort reform? So we're trying to figure out -

MR. GRANZOTTO: Okay.

JUSTICE YOUNG: how the pieces fit now.

MR. GRANZOTTO: But you have figured out how the statute reads I think. Well, the way the statute reads is if you have a medical malpractice case and it is against a health professional or a health facility, you have to send a notice to that health professional or that health facility. It's not a difficult step it seems to me to say that if you don't have - if you have a medical malpractice case, that's not the issue here whether this is in fact a medical malpractice case, but if it fits the subset of medical malpractice cases that have been identified in 2912(b)(1), and this doesn't by the concession of my opponent. Now he's also suggested that they stand in the shoes - these people stand in the shoes and there's some - there's some citation to vicarious liability. But remember, the fact is that the doctor who is the owner, part or full, of the P.C. is going to get the notice. The suggestion -

JUSTICE YOUNG: Not necessarily. I mean that's what we - again, under the common law you need not sue the doctor, correct?

MR. GRANZOTTO: You need not.

JUSTICE YOUNG: Right.

MR. GRANZOTTO: That's correct.

JUSTICE YOUNG: All right. So I mean again we're -

MR. GRANZOTTO: But have you ever seen a case? Have you seen a medical malpractice case where the doctor is not sued?

JUSTICE YOUNG: I don't - Well, once we launch this ship and we say you don't have to do an NOI for a P.C., the world may change. So I'm just trying to think through what that will - what that looks like. So indulge me just a bit here.

MR. GRANZOTTO: Okay.

JUSTICE YOUNG: And so let's assume that in order to avoid some of the regime of the med/mal tort reform it now becomes propitious to sue only the P.C. And - okay - so I'm just trying to figure that out.

MR. GRANZOTTO: I'll accept your hypothetical, okay.

JUSTICE YOUNG: All right. Now and Justice Markman asked well looking at 5838(a)(1) it talks about claims based on medical malpractice. That seems not to be quite as restrictive as the NOI provision, and I guess he was asking whether that influences how we import procedural protections in other - in this context.

MR. GRANZOTTO: But there's no question by common law, Cox - by common law vicarious liability exists. I'm not here attacking vicarious liability. I'm not attacking 5838(a) or its application and anything it has to do or say about vicarious liability. All I'm talking about is this one exception that you have identified; one particular aspect of the tort reform statute which has to do with the notice of intent which doesn't apply to this particular type of medical malpractice. Now my opponent has talked about absurd results, okay.

JUSTICE YOUNG: You like those.

MR. GRANZOTTO: Absurd results. And, quite frankly, I would love to talk to you for a length of time about absurd results in the context of the notice of intent because I'll tell you what's absurd. What's absurd is filing a case, having that case go through fourteen months of litigation, and having the defendant then say, oh, mirabile dictu, I have found a mistake in a piece of paper that was filed six months before this case was filed, some what twenty months ago. That to me is absurd; absolutely absurd, but it happens every single day in this state. Every single day fourteen or twenty months after litigation starts - I've got a case right now in the Court of Appeals where a week before trial started in a medical malpractice case they found a mistake they said in a notice of intent. This is not the way the system should run. It is not the way things should operate. The defendant shouldn't be able to wait fourteen months to say that a piece of paper filed six months before is somehow defective. It didn't give me notice. I applied for leave to appeal in this case on the basis of that the Court of Appeals erred in this case in not reversing - or not affirming the summary disposition denial as to this particular P.C. The Court has chosen not to grant my application for leave on that point, but think about this. My notice of intent was found to be defective because I identified Dr. Murry's negligence, I sent a notice of intent to both Dr. Murry and the P.C. that employed her, and, and, my notice was found defective because I forgot to tell the defendants that Dr. Murry was one of her employees. I forgot - I forgot to tell the P.C. that Dr. Murry was not one of her employees. That's why this - that's why this case is here; that's why this NOI was defective. That's absurd.

JUSTICE HATHAWAY: Do you know the purpose of the notice of intent? Isn't its purpose to provide the parties with time to discuss settlement?

MR. GRANZOTTO: Yes, that's true.

JUSTICE HATHAWAY: That's the purpose, right? And - so was there ever a discussion regarding settlement in this case?

MR. GRANZOTTO: In this case as in most other cases that I've ever seen, no. The answer is no. And, in fact, they had fourteen months during the course of litigation to talk about settlement and they didn't. The simple fact is this case should never have gone down on a bad NOI. And something I've told this

Court once or twice before when I've been here - because unfortunately I've been here on two other NOI cases - it's astounding to me that the recipients of these documents, these highly trained, highly professional, highly intelligent people, are somehow struck completely senseless when presented with this document. They can't read these things; they can't read English. They don't understand what's being presented to them. And this P.C. could not understand when it was served with this document in which the standard of care as to their employee, that P.C. somehow could not grasp the fact that they were being sued for the negligence of Dr. Murry.

JUSTICE MARKMAN: But that's not the standard whether or not it's sufficient to communicate the gravamen of the suit; the standard in the law is whether or not you've - is that you have to comply with certain details, with certain -

MR. GRANZOTTO: That's correct; that's correct. And would suggest to you -

JUSTICE MARKMAN: I'm not saying it's a good policy, but I'm simply saying whether or not the doctor understands the gravamen or the essence of the suit is simply not what's critical in reviewing this.

MR. GRANZOTTO: And I'll say this. In light of the Cox opinion from this Court, the Cox opinion that says the standard of care as to a principal is that of the agent. I'm suggesting to you that when this NOI says Dr. Murry did this wrong, did this wrong, and this wrong, and I serve that NOI both on Dr. Murry and her P.C., that that P.C. knows - that that P.C. knows that those are the standards of care based on vicarious liability that apply to them as well - the P.C.

JUSTICE YOUNG: You're arguing the merits of the NOI here.

MR. GRANZOTTO: That's correct.

JUSTICE YOUNG: Unfortunately, you have argued persuasively that the NOI provision doesn't even apply to (inaudible).

MR. GRANZOTTO: And you have pointed out something at the very beginning of this argument that suggests at least for some reason extrinsic to the briefs my position does me no good. And I am suggesting to you that this NOI was good. And it's good -

JUSTICE YOUNG: But it doesn't matter because it isn't required in the first instance in this case. As you have persuasively, at least to me, argued, the NOI provision does not apply to P.C.s. You were not obligated to send them - the P.C.

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MR. GRANZOTTO: That's correct.

JUSTICE YOUNG: and I might agree with you that if you sent the NOI properly identifying the standard of care and the breaches there of to the agent doctor that's all you had to do.

MR. GRANZOTTO: And the principal in this case.

JUSTICE YOUNG: Well, but that's surplusage, not a statutory requirement.

MR. GRANZOTTO: Not if your position that you've enunciated here today with respect to 5856(c) happens to be correct.

JUSTICE YOUNG: Well, tell me -

MR. GRANZOTTO: If your position is that you have to have a completely compliant NOI in order to toll the statute of limitations, I am suggesting to you that you -

JUSTICE YOUNG: No, no, no, no. I'm not sure I understand your point. Let me make sure I'm clear in mine. I do not believe the NOI is required for a P.C. under the statute - in terms of the statute.

MR. GRANZOTTO: We're in agreement on this.

JUSTICE YOUNG: In which case, 5856(c) does not seem to apply because it refers back to the notice compliance with the applicable notice period under 2912(b) which is not applicable to a P.C.

MR. GRANZOTTO: Well, as I told you in my opening salvo here. My interpretation of 5856(c) is different.

JUSTICE YOUNG: Well, tell me - I don't understand it, so if you could help me understand it I'd appreciate it.

MR. GRANZOTTO: Yes, okay. I don't have it in front of me; you read it out loud, I heard it. The question becomes quite

simply if I - if I do a compliant NOI as to any defendant - any defendant, does that toll the statute of limitations?

JUSTICE YOUNG: For all defendants.

MR. GRANZOTTO: For all defendants, otherwise -

JUSTICE YOUNG: Okay, let me give you a counter -

MR. GRANZOTTO: otherwise you're gonna have splitting of causes of action that require one.

JUSTICE YOUNG: Let me give you a counter hypothetical. There are three parties defendant - the P.C. and they're two doctors.

MR. GRANZOTTO: Yes.

JUSTICE YOUNG: Dr. A and Dr. B. You file a compliant notice of NOI against Dr. A, but not Dr. B. The statute is tolled as to A, are you saying the defective - that the affective notice as to A tolls as to B?

MR. GRANZOTTO: No, I can't say that.

JUSTICE YOUNG: Well, then how then - how then does it apply to the third defendant?

MR. GRANZOTTO: Well, obviously he's a health professional under both 5838(a) and 2912(b), there's no question about that.

JUSTICE YOUNG: Right.

MR. GRANZOTTO: Okay. So obviously I can't take that position.

JUSTICE YOUNG: Okay, then why does it toll as to the third defendant for whom no notice is required at all?

MR. GRANZOTTO: It's tolled by my reading of the literal text of 5856(c) - my memory of the literal text of 5856(c).

JUSTICE YOUNG: I understand but if A and B are treated differently, why isn't the P.C. entitled to the same -

MR. GRANZOTTO: It's a very good question. Quite frankly, I'd like to have the opportunity to brief this is if you'd be entertaining supplemental briefing on the subject.

JUSTICE YOUNG: You'd have to ask the Chief, she calls the shots on (inaudible).

CHIEF JUSTICE KELLY: You're welcome to file a supplemental brief.

MR. GRANZOTTO: Then I will. Thank you. Any other questions?

JUSTICE YOUNG: I sure would like to know how this all works.

MR. GRANZOTTO: You're asking for a splitting of causes of action; there's gonna have to be splitting of causes of action.

JUSTICE YOUNG: I'm not - the Legislature seems to - might have done that by (inaudible) or inadvertence.

MR. GRANZOTTO: Thank you.

CHIEF JUSTICE KELLY: Thank you, Mr. Granzotto.

JUSTICE MARKMAN: I was gonna ask one more question, please.

CHIEF JUSTICE KELLY: Yes, go ahead.

JUSTICE MARKMAN: Can you tell me Mr. Granzotto why a health facility is not properly defined in MCL 333.20106(1) as a clinical laboratory, and why it's clear to you that HVR falls outside the definition of being a clinical laboratory?

MR. GRANZOTTO: Yes. Obviously we're dealing with a different situation than *Kuznar* in one respect and that is - in two respects. One is that the Public Health Code was actually incorporated specifically by the Legislature into 5838(a); that's the part that you're reading, okay. Another thing that's important I think in terms of differentiating this case from *Kuznar* is that the actual definition that was used in 5838(a) is in fact broader than that which is provided in the statute under consideration today because if 5838(a) says public facility or agency it is in fact broader in scope than the one we're dealing with because a health - excuse me - health facility or agency.

This is - this is more narrow; textually more narrow with health facility only, and this - clearly, I think, if you, my favorite *noscitur a sociis*, if you apply that to the Public Health Code and look at all of those things that are on that long list in the statute that you've read from you will see that those are - with the exceptions of HMOs which is, I assume, the basis for the agency - the insertion of the word agency into that particular provision, but other than that you are dealing with physical locations for the provision of health care if you look at all of those things including the laboratory that you're talking about, okay. And this P.C. comes no where close to any of those.

JUSTICE YOUNG: The defendant is - I think conceded it is not.

MR. GRANZOTTO: Yeah, the defendant is conceding the point, that's correct.

CHIEF JUSTICE KELLY: Thank you, Mr. Granzotto.

MR. GRANZOTTO: Thank you.

CHIEF JUSTICE KELLY: Thank you.