

Appellate Court Rules all NOI Challenges in Medical Malpractice Cases Must be Made at Time Defendant First Responds to Complaint

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In a recent ruling, the Michigan Court of Appeals has held that any and all challenges to the Notice of Intent (NOI) in a medical malpractice case, including challenges regarding service, must be made by motion at the time that the first response to the complaint is filed.

In *Sanders v. McLaren-Macomb, et. al.*, Docket No. 336409 (Feb. 27, 2018), the plaintiff filed a medical malpractice case after mailing a copy of the NOI to the defendants at the incorrect addresses. After the complaint was filed, defense counsel contacted the plaintiff and requested a copy of the NOI that was sent, indicating that the defendants had not received a copy.

The plaintiff forwarded a copy of the NOI to defense counsel, who subsequently filed an answer on behalf of the defendants. Along with the answer, the defendants raised as an affirmative defense that “[t]he claims are barred for failing to comply with MCL 600.2912b by not properly filing and providing sufficient Notice of Intent.” Approximately one month later, the defendants moved for summary disposition, arguing that the plaintiff failed to give the defendants the requisite notice.

The plaintiff argued that the defendants’ motion was untimely under MCR 2.112(L)(2) which requires all challenges to a NOI to be made “by motion ... at the time the defendant files its first response to the complaint.” The defendants argued that their challenge was based only on a claim that there was lack of service and not the content of the NOI. They further argued that their challenge to the NOI was preserved by including it within their affirmative defenses.

In this published opinion, the appellate court reasoned that whether a challenge to the NOI is based on timeliness, compliance with the waiting period, claiming that no NOI was received, or the contents of the NOI, all types of challenges are ultimately directed at the sufficiency of the notice received regarding the plaintiff’s intent to sue. The appellate court held that regardless of how defendants labeled the challenge, it was time barred by MCR 2.112(L)(2). The appellate court also found no good cause to allow a late challenge, because the defendants had the necessary information to comply with time requirements prior to filing their answers. Furthermore, the affirmative defense plead by the defendants on this issue was not a motion, as required by the court rule, and did not suffice to preserve

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the issue.