

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LARRY LEE,

Plaintiff,

v.

C.A. No.: 2:09-cv-12471-AJT-MJH
Honorable Arthur J. Tarnow
Magistrate Michael Hluchaniuk

WASHTENAW COUNTY, DANIEL MINZEY,
in his official and individual capacities; CHAD
GRONDA, in his official and individual capacities;
RYAN MCLAUGHLIN, in his official and individual
capacities; JOSEPH FENDT, in his official and
individual capacities; RICK CASEY, in his official
and individual capacities; RICHARD WILLIAMS, JR.,
in his official and individual capacities; ANTONIO
VAUGHN, in his official and individual capacities;
JILL WILLIAMS, in her official and individual capacities;
RICHARD WILLIAMS, SR., in his official and individual
capacities; KURT SCHIAPPACASSE, in his official and
individual capacities; EDWARD MOOREMAN,
in his official and individual capacities; DARYL PARKER,
in his official and individual capacities; SECURECARE, INC.;
JANE DOE, in her official and individual capacities; and
JOHN DOE, in his official and individual capacities.

**DEFENDANT DR. PARKER &
SECURECARE, INC.'S MOTION
TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(b)(6)**

Defendants.

DAVID A. SANTACROCE (P61367)
Attorney for Plaintiff
801 Monroe Street
363 Legal Research Building
Ann Arbor, MI 48109-1215
(734) 763-4319

D. JENNIFER ANDREOU (P38973)
EMILY BALLEMBERGER (P64410)
Attorneys for Defendants Dr. Parker
& SecureCare, Inc.
10 S. Main Street, Suite 400
Mt. Clemens, MI 48043
(586) 466-7607/783-7621

CYNTHIA L. REACH (P55903)
Attorney for Washtenaw County and
Named County Employees
121 W. Washington St.
Suite 400
Ann Arbor, MI 48104
(734) 994-1400

DEFENDANTS, DR. PARKER and SECURECARE, INC.'S
MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Now comes Defendants, DR. PARKER and SECURECARE, INC. by their attorneys, PLUNKETT COONEY and hereby request this Court grant their Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), for the following reasons:

1. On November 19, 2009, Larry Lee filed a First Amended Complaint alleging vague and various violations of 42 U.S.C. § 1983 and violations of the Eighth and Fourteenth Amendments of the United States Constitution against these Defendants.¹ (Exhibit A - Plaintiff's First Amended Complaint)

2. The only allegations in Plaintiff's First Amended Complaint as to Dr. Parker and SecureCare, Inc. are in paragraphs 70-73 which set forth conclusory allegations of "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments of the United States Constitution and "deliberate indifference to serious medical needs" under 42 U.S.C. § 1983.

3. Plaintiff has not alleged any facts in support of a violation of the Eighth or Fourteenth Amendment of the United States Constitution as committed by Dr. Parker and/or SecureCare, Inc., nor has Plaintiff alleged any causal relationship as to what injury or damage these purported violations caused him as committed by these Defendants.

4. Accordingly, Plaintiff's allegation that Dr. Parker and SecureCare, Inc. violated the Eighth and Fourteenth Amendment of the United States Constitution should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

¹Plaintiff, Larry Lee had on October 14, 2009 previously filed a Complaint against Dr Parker and others, but no Answer nor other responsive pleading had been filed as of yet on behalf of Dr. Parker and thus, this Motion constitutes these Defendants' first responsive pleading.

5. Plaintiff has also not alleged any facts to support that Dr. Parker and/or SecureCare, Inc. were “deliberately indifferent” under 42 U.S.C. § 1983 to his medical needs; what those medical needs were; or how such purported deliberate indifference was the proximate cause of any injury or damage to Plaintiff as committed by these Defendants.

6. Accordingly, Plaintiff’s allegation regarding violations of 42 U.S.C. § 1983 as to Dr. Parker and/or SecureCare, Inc. should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

7. Any claim Plaintiff may have against these Defendants (although Defendants dispute the validity of any such claim) properly sounds in medical malpractice; yet, Plaintiff has failed to comply with the requisite provisions of the Michigan Medical Malpractice Tort Reform Act, MCL § 600.2912, et seq, with respect to the filing of a Notice of Intent or Affidavit of Meritorious Claim, as well as other provisions of MCL § 600. 2912, et seq.

8. In *Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 471 Mich. 411; 684 N.W.2d 864 (2004), the Michigan Supreme Court held that a claim should have been filed as a medical malpractice claim if:

- (1) The claim pertains to an action that occurred within the course of a professional relationship; and
- (2) the claim raises questions of medical judgment beyond the realm of common knowledge and experience. *Bryant* at 422.

9. According to the Court in *Bryant*, a “professional relationship” exists when a licensed health care professional is subject to a contractual duty that requires the licensed health care professional to render professional health care services to the decedent. *Bryant* at 425.

10. Since Dr. Parker is a licensed health care professional under the Michigan Public Health Code, a professional relationship existed as between Plaintiff and Dr. Parker.

11. The Court in *Bryant* further held that “medical judgment beyond the realm of a common knowledge and experience” is necessary, if the reasonableness of the health care

professional's actions can only be evaluated by the jury after being presented with standard of care testimony by an expert." *Bryant* at 423.

12. Here, Plaintiff alleges as to Dr. Parker deliberate indifference to Mr. Lee's "serious medical needs including, but not limited to severe anxiety, depression and head trauma." (Paragraph 70 of Plaintiff's First Amended Complaint)

13. Whether or not Dr. Parker rendered appropriate medical treatment in response to Plaintiff's purported complaints is not within the knowledge of an ordinary layperson and requires expert testimony from other qualified healthcare providers. As such, these allegations sound in medical malpractice.

14. In order to pursue a claim for medical malpractice, a plaintiff is required to comply with the statutory provisions set forth in MCL § 600.2912, et seq.

15. Dismissal of Plaintiff's cause of action is mandated when a Plaintiff fails to comply with these statutory provisions. *Roberts v. Mecosta General Hosp.*, 470 Mich. 679; 684 N.W.2d 711 (2004); *Nippa v. Botsford General Hosp.*, 257 Mich. App. 387 N.W.2d 268 (2003).

16. Plaintiff has failed to comply with MCL § 600.2912d and MCL § 600.2912b; accordingly, dismissal is required pursuant to Fed. R. Civ. P. 12(b)(6).

17. If the Court is not inclined to dismiss this action as to Dr. Parker and SecureCare, Inc., Defendants respectfully request pursuant to Fed. R. Civ. P. 12(e), that Plaintiff be required to amend his Complaint to set forth a more definite statement of his claims against these Defendants and, further, comply with the provisions of the Michigan Medical Malpractice Tort Reform Act, including but limited to the filing of an appropriate Notice of Intent and a proper Affidavit of Merit as to Dr. Parker.

WHEREFORE, Defendants, DR. PARKER and SECURECARE, INC. respectfully request this Honorable Court dismiss them as Defendants from this action, or in the alternative, require Plaintiff to set forth a more definite statement under Fed. R. Civ. P. 12(e), together with the recovery of all costs and attorney fees.

Respectfully submitted,

PLUNKETT ♥ COONEY

By: /s/ D. Jennifer Andreou

D. JENNIFER ANDREOU (P38973)
EMILY BALLEMBERGER (P64410)
Attorneys for Defendants Dr. Parker
& SecureCare, Inc.
10 South Main Street, Suite 400
Mt. Clemens, MI 48043
(586) 466-7607/783-7621

Dated: December 9, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LARRY LEE,

Plaintiff,

v.

C.A. No.: 2:09-cv-12471-AJT-MJH
Honorable Arthur J. Tarnow
Magistrate Michael Hluchaniuk

WASHTENAW COUNTY, DANIEL MINZEY,
in his official and individual capacities; CHAD
GRONDA, in his official and individual capacities;
RYAN MCLAUGHLIN, in his official and individual
capacities; JOSEPH FENDT, in his official and
individual capacities; RICK CASEY, in his official
and individual capacities; RICHARD WILLIAMS, JR.,
in his official and individual capacities; ANTONIO
VAUGHN, in his official and individual capacities;
JILL WILLIAMS, in her official and individual capacities;
RICHARD WILLIAMS, SR., in his official and individual
capacities; KURT SCHIAPPACASSE, in his official and
individual capacities; EDWARD MOOREMAN,
in his official and individual capacities; DARYL PARKER,
in his official and individual capacities; SECURECARE, INC.;
JANE DOE, in her official and individual capacities; and
JOHN DOE, in his official and individual capacities.

**DEFENDANT DR. PARKER &
SECURECARE, INC.'S BRIEF
IN SUPPORT OF MOTION TO
DISMISS PURSUANT TO
FED. R. CIV. P. 12(b)(6)**

Defendants.

DAVID A. SANTACROCE (P61367)
Attorney for Plaintiff
801 Monroe Street
363 Legal Research Building
Ann Arbor, MI 48109-1215
(734) 763-4319

D. JENNIFER ANDREOU (P38973)
EMILY BALLEMBERGER (P64410)
Attorneys for Defendants Dr. Parker
& SecureCare, Inc.
10 S. Main Street, Suite 400
Mt. Clemens, MI 48043
(586) 466-7607/783-7621

CYNTHIA L. REACH (P55903)
Attorney for Washtenaw County and
Named County Employees
121 W. Washington St.
Suite 400
Ann Arbor, MI 48104
(734) 994-1400

TABLE OF CONTENTS

	<u>PAGE:</u>
INDEX OF AUTHORITIES.....	ii
STATEMENT OF ISSUES PRESENTED.....	iv
INTRODUCTION	1
STATEMENT OF FACTS	1
STANDARD OF REVIEW	3
LAW AND ARGUMENT	4
I. PLAINTIFF’S CLAIM THAT DR. PARKER AND/OR SECURECARE, INC. DEMONSTRATED “DELIBERATE INDIFFERENCE” TO HIS SERIOUS MEDICAL NEEDS IN VIOLATION OF 42 U.S.C. § 1983 SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO PLEAD ANY FACTUAL ALLEGATIONS IN SUPPORT OF SAME AND, PLAINTIFF HAS FAILED TO PLEAD ANY CAUSAL RELATIONSHIP BETWEEN THESE PURPORTED VIOLATIONS AND WHAT INJURIES AND DAMAGES WERE SUSTAINED BY THE PLAINTIFF AS A RESULT OF THESE DEFENDANTS ACTIONS.....	4
II. ANY CLAIM PLAINTIFF HAS AGAINST THESE DEFENDANTS (WHICH IS DENIED) SOUNDS IN MEDICAL MALPRACTICE AND SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO COMPLY WITH THE REQUISITE STATUTORY PROVISIONS OF THE MICHIGAN MEDICAL MALPRACTICE TORT REFORM ACT, MCL § 600.2912, et seq, WITH RESPECT TO THE FILING OF A NOTICE OF INTENT AND AN AFFIDAVIT OF MERIT.....	5
III. IN THE ALTERNATIVE, THESE DEFENDANTS REQUEST A MORE DEFINITIVE STATEMENT.....	7
PROOF OF SERVICE	

INDEX OF AUTHORITIES

Federal Cases:

Carter v. Cornwell, 983 F.2d 52, 54 (6th Cir. 1993)3

Estelle v. Gamble, 429 U.S. 97, 98-101 (1976)4, 5

Gazette v. City of Pontiac, 41 F.3d 1061, 1064 (6th Cir. 1994)3

Guaranty Trust Co. of New York v. York,
426 U.S. 99, 109 (1945)7

Jackson v. Richards Medical Co., 961 F.2d 575, 577 (6th Cir. 1992).....3

McLeod v. Plymouth Court Nursing Home,
957 F. Supp. 113, 115 (E.D. Mich. 1997).....6

Monell v. Dept. of Social Services in New York,
436 U.S. 658, 690-91 (1978)4

Morgan v. Church’s Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987).....3

Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983)3

State Cases:

Bryant v. Oakpointe Villa Nursing Centre, Inc.,
471 Mich. 411; 684 N.W. 2d 864 (2004).....5, 6

Lee v. Putz, W.L. 1791304 (W.D. Mich. 2006).....6

MacDonald v. Barbarotto, 161 Mich App. 542;
411 N.W. 2d 747 (1987)6

Nippa v. Botsford General Hosp., 257 Mich App. 387;
668 N.W. 2d 628 (2003)7

Roberts v Mecosta General Hosp., 470 Mich 679;
684 N.W. 2d 711 (2004)7

Tipton v. William Beaumont Hosp., 266 Mich App. 27, 33;
697 N.W. 2d 552 (2007)6

Statutes:

MCL § 600.2912i, 5
MCL § 600.2912b6, 7
MCL § 600.2912d6, 7
MCL § 691.14061
42 U.S.C. § 1983i, 1, 2, 4, 5

Rules:

Fed. R. Civ. P. 12(b)(6).....1, 3, 5, 7
Fed. R. Civ. P. 12(e)8

Other:

Eighth Amendment - U.S. Constitution.....1, 2
Fourteenth Amendment - U.S. Constitution1, 2

STATEMENT OF ISSUES PRESENTED

- I. WHETHER PLAINTIFF'S CLAIM THAT DR. PARKER AND/OR SECURECARE, INC. CONSTITUTES A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO PLEAD ANY FACTUAL ALLEGATIONS IN SUPPORT OF SAME AND THUS THERE IS NO MATERIAL FACT IN DISPUTE AS TO THIS ALLEGATION.

Defendants Dr. Parker and SecureCare, Inc. answer "yes."

Plaintiff presumably answers "no."

- II. WHETHER PLAINTIFF'S CLAIM THAT DR. PARKER AND SECURECARE, INC. WERE DELIBERATELY INDIFFERENT TO HIS MEDICAL NEEDS IN VIOLATION OF 42 U.S.C. § 1983 SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO PLEAD ANY FACTUAL ALLEGATIONS IN SUPPORT OF SAME NOR HAS PLAINTIFF PLED ANY CAUSAL RELATIONSHIP BETWEEN THESE PURPORTED VIOLATIONS AND WHAT INJURIES AND DAMAGES WERE SUSTAINED AS A RESULT OF THESE ACTIONS.

Defendants Dr. Parker and SecureCare, Inc. answer "yes."

Plaintiff presumably answers "no."

- III. WHETHER PLAINTIFF'S CLAIM AS TO THESE DEFENDANTS PROPERLY SOUNDS IN MEDICAL MALPRACTICE (IF ANYTHING) AND THUS SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILED TO COMPLY WITH THE REQUISITE STATUTORY PROVISIONS OF THE MICHIGAN MEDICAL MALPRACTICE TORT REFORM ACT, MCL §600.2912, ET SEQ. WITH RESPECT TO THE FILING OF A NOTICE OF INTENT AND AFFIDAVIT OF MERIT.

Defendants Dr. Parker and SecureCare, Inc. answer "yes."

Plaintiff presumably answers "no."

INTRODUCTION

On October 14, 2009, Plaintiff, Larry Lee, filed a pro se Complaint against numerous Defendants alleging vague and various violations of 42 U.S.C. § 1983; violations of the Eighth and Fourteenth Amendments; violations of MCL § 691.1406 and other “tort actions of negligence.”

On November 19, 2009, a First Amended Complaint was filed Attorney David Santacroce on behalf of Mr. Lee. Although the First Amended Complaint goes a long way in cleaning up the pleadings, the allegations against these Defendants, Dr. Parker and SecureCare, Inc., remain vague and conclusory. Accordingly, these Defendants have filed this 12(b)(6) motion and request that this Honorable Court dismiss paragraphs 70-73 of Plaintiff’s First Amended Complaint, thereby dismissing these Defendants from this matter.

STATEMENT OF FACTS

According to the allegations set forth in Mr. Lee’s First Amended Complaint, Plaintiff entered the Washtenaw County Jail on June 9, 2006, was convicted on December 12, 2006 and was sentenced on March 13, 2007. Shortly after sentencing, Mr. Lee was transferred to Florence Crane. The allegations at issue occurred during the time period during which Mr. Lee was incarcerated in the Washtenaw County Jail; thus, presumably during the period of June 9, 2006 through March 13, 2007.

As noted above, a First Amended Complaint was filed on November 19, 2009 against these Defendants and others. The only allegations set forth against these Defendants are included in paragraphs 70-73 and allege:

70. By virtue of the foregoing, defendants Daniel Minzey, Daryl Parker, and Chad Gronda, acting under color of state law, were deliberately indifferent to Mr. Lee's serious medical needs, including but not limited to, severe anxiety, depression, and head trauma.
71. These defendants were subjectively aware of these serious medical needs, and their inaction directly and proximately caused Mr. Lee to suffer cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution as actionable under 42 U.S.C. § 1983.
72. By virtue of the foregoing, defendants Washtenaw County, Daniel Minzey, Daryl Parker, and SecureCare failed to train and supervise and effectuated a custom, policy and practice of inaction with respect to responding to, diagnosing, and treating serious medical needs.
73. These defendants' inadequate training and supervision and custom, policy and practice of inaction were deliberately indifferent and directly and proximately deprived Mr. Lee of his fundamental rights under the Eighth and Fourteenth Amendments of the United States Constitution as actionable under 42 U.S.C. § 1983.

(Please see paragraphs 70-73 of Plaintiff's First Amended Complaint attached as Exhibit A)

Given the vague and conclusory nature of Plaintiff's allegations against these Defendants,

Dr. Parker and SecureCare, Inc. are left wondering:

- When did these purported violations occur?
- What treatment or failure to treat constituted a deliberate indifference as claimed by the Plaintiff?
- What were the signs and symptoms demonstrated by Plaintiff (with respect to his claimed "severe anxiety, depression and head trauma") which were not acted upon by Dr. Parker and any other employee, agent or servant of SecureCare, Inc.?
- How did Dr. Parker and SecureCare, Inc.'s alleged acts or failures to act cause Plaintiff, Larry Lee, to sustain injuries and damages?

Those are just a few of the questions that remain unanswered via the allegations set forth in Plaintiff's First Amended Complaint. As such, Plaintiff's pleading does not state a claim for

which can be granted against these Defendants and accordingly, Dr. Parker and SecureCare, Inc. should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

STATEMENT OF REVIEW

A motion to dismiss under Fed. R. Civ. P. 12 (b)(6) tests the legal sufficiency of the complaint, asking whether the plaintiff has stated a claim for which the law provides relief. *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994). Technically, a 12(b) motion does not attack the merits of the case, it merely challenges the pleader's failure to state a claim properly. In deciding a 12(b)(6) motion, a district court must determine whether the plaintiff's complaint sets forth sufficient allegations to establish a claim for relief. The court must accept all allegations in the Complaint at face value and construe them in a light most favorable to the plaintiff. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983) and *Jackson v. Richards Medical Co.*, 961 F.2d 575, 577 (6th Cir. 1992). A court need not, however, accept as true legal conclusions or unwarranted factual inferences, *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). A district court may properly grant a motion to dismiss when no set of facts exists which would allow the plaintiff to recover, *Carter by Carter v. Cornwell*, 983 F.2d 52, 54 (6th Cir. 1993).

LAW AND ARGUMENT

- I. PLAINTIFF'S CLAIM THAT DR. PARKER AND SECURECARE, INC. WERE DELIBERATELY INDIFFERENT TO HIS MEDICAL NEEDS IN VIOLATION OF 42 U.S.C. § 1983 SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO PLEAD ANY FACTUAL ALLEGATIONS IN SUPPORT OF SAME AND PLAINTIFF HAS FAILED TO PLEAD ANY CAUSAL RELATIONSHIP BETWEEN THESE PURPORTED VIOLATIONS AND WHAT INJURIES AND DAMAGES WERE SUSTAINED BY PLAINTIFF AS A RESULT OF THESE DEFENDANTS' ACTIONS OR INACTIONS.

Paragraphs 70-73 of Plaintiff's First Amended Complaint allege these Defendants were deliberately indifferent to Mr. Lee's serious medical needs and that such deliberate indifference caused Mr. Lee to suffer cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution as actionable under 42 U.S.C. § 1983. These allegations, however, do not set forth a valid claim under § 1983.

In order to establish liability under § 1983, a plaintiff must demonstrate that a person acting under the color of state law deprives another of rights protected by the Constitution or the laws of the United States. *Monell v. Dept. of Social Services in New York*, 436 U.S. 658, 690-91 (1978). The courts have continually held that a violation of § 1983 does not occur every time a prisoner claims he received inadequate medical treatment. *Estelle v. Gamble*, 429 U.S. 97, 98-101 (1976). Even an inadvertent failure to provide medical care is not actionable. *Estelle* at p. 105-106. Rather, "a prisoner must allege facts and/or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle* at p. 106.

In his Complaint, Plaintiff does not allege any acts or omissions by Dr. Parker or SecureCare, Inc. which support a claim they acted with deliberate indifference to Mr. Lee's alleged serious medical needs. In fact, the First Amended Complaint does not set forth with any specificity: 1) what the alleged acts or omissions were that constituted deliberate indifference; 2)

when these purported acts or omissions occurred; 3) how these purported acts or omissions caused Mr. Lee injuries and damages; and 4) what purported serious medical needs were ignored by these Defendants. Thus, as in *Estelle, supra*, Plaintiff has not alleged acts or omissions by these Defendants to support a violation of § 1983. Accordingly, paragraphs 70-73 of Plaintiff's First Amended Complaint should be dismissed and Plaintiff's allegations against these Defendants should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

II. PLAINTIFF'S CLAIM AS TO THESE DEFENDANTS PROPERLY SOUNDS IN MEDICAL MALPRACTICE (IF ANYTHING) AND THUS SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILED TO COMPLY WITH THE REQUISITE STATUTORY PROVISIONS OF THE MICHIGAN MEDICAL MALPRACTICE TORT REFORM ACT, MCL § 600.2912, ET SEQ. WITH RESPECT TO THE FILING OF A NOTICE OF INTENT AND AFFIDAVIT OF MERIT.

Although Plaintiff's Complaint is vague in its allegations that Dr. Parker and SecureCare, Inc. were deliberately indifferent to Mr. Lee's serious medical needs, Plaintiff claim as to these Defendants properly sounds (if at all) in medical malpractice and thus, should be dismissed for failing to the comply with the requisite statutory provisions of the Michigan Medical Malpractice Tort Reform Act set forth at MCL §600. 2912, et seq.,

In *Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 471 Mich. 411; 684 N.W. 2d 864 (2004), the Michigan Supreme Court held that a claim should have been filed as a medical malpractice claim if:

- (1) The claim pertains to an action that occurred within the course of a professional relationship; and
- (2) the claim raises questions of medical judgment beyond the realm of common knowledge and experience. *Bryant* at 422.

According to the Court in *Bryant*, a “professional relationship” exists when a licensed health care professional is subject to a contractual duty that requires the health care professional to render professional health care services to the decedent. *Bryant* at 425.

The Court in *Bryant* further held that “medical judgment beyond the realm of a common knowledge and experience” is necessary, if the reasonableness of the health care professional’s actions can only be evaluated by the jury after being presented with standard of care testimony by an expert.” *Bryant* at 423. A Complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence. *McLeod v. Plymouth Court Nursing Home*, 957 F. Supp. 113, 115 (E.D. Mich. 1997), citing *MacDonald v. Barbarotto*, 161 Mich. App. 542; 411 N.W. 2d 747 (1987). It is well established that the gravamen of an action is determined by reading the claim as a whole and it is essential to look beyond the procedural labels to determine the exact nature of the claim. *Tipton v. William Beaumont Hosp.*, 266 Mich. App. 27, 33; 697 N.W. 2d 552 (2007).

Here, Plaintiff’s First Amended Complaint alleges as to Dr. Parker, a health care professional, that he was deliberately indifferent to Mr. Lee’s serious medical needs and that such needs included severe anxiety, depression and head trauma. Although Plaintiff’s allegations remain vague and conclusory, whether or not those medical conditions were appropriately treated falls within the ambit of expert testimony. More specifically, determining the propriety of Dr. Parker’s actions and whether he complied with the applicable standard of care in treating Mr. Lee constitutes a medical malpractice claim.

In order to file a medical malpractice claim, a plaintiff is required to comply with the Michigan tort reform.² MCL § 600.2912d; MCL § 600.2912b. Failure to comply with tort

² If Plaintiff attempts to argue he did not need to comply with the Statutory requirements for filing a claim of Medical Malpractice, this argument is legally incorrect. In *Lee v. Putz*, W.L. 1791304 (W.D. Mich. 2006), the court addressed this issue. It stated:

Because there is no conflict between § 6000.2912d and the Federal Court Rules, the Court applies the *Erie* rule to determine if state law should apply. *Hanna*, 380 U.S. at 470. In applying *Erie*, the objective is “to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal

reform requires dismissal. *Roberts v. Mecosta General Hosp.*, 470 Mich 679; 684 N.W. 2d 711 (2004); *Nippa v. Botsford General Hosp.*, 257 Mich App. 387; 668 N.W. 2d 628 (2003). Plaintiffs never mailed a Notice of Intent to Dr. Parker, Nurse Claudette or Washtenaw County Jail as required by MCL § 600.2912d. Plaintiff also failed to file an Affidavit of Merit with their complaint as required by MCL § 600.2912b. Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is required.

Here, Plaintiff failed to file and properly serve Dr. Parker with a Notice of Intent setting forth the basis of his allegations, as required by MCL § 600.2912d.

Plaintiff also failed to file the requisite Affidavit of Merit as to Dr. Parker, as required by MCL § 600.2912b. Accordingly, dismissal of these allegations is warranted pursuant to Fed. R. Civ. P. 12(b)(6).

III. IN THE ALTERNATIVE, DEFENDANTS REQUEST A MORE DEFINITIVE STATEMENT.

If the Court is not inclined to dismiss this action as to these Defendants, Dr. Parker and SecureCare, Inc. request that Plaintiff be required to amend his Complaint to set forth a more definitive statement of the claims against these Defendants.

Moreover, Plaintiff should not be allowed to forego the requisite requirements of the Michigan Medical Malpractice Tort Reform Act, including the filing and service of an

courts should be substantially the same, so far as legal rules determine the outcome of the litigation, as if it would be tried in the State court." *Guaranty Trust Co. of New York v. York*, 426 U.S. 99, 109 (1945). With this principle in mind, it is clear that § 600.2912d is substantive in nature.

Id. at 5.

The *Lee* court concluded that in order to properly file a medical malpractice claim in federal court plaintiff was required to comply with the requirements of Mich. Comp. Law § 600.2912d. *Id.* at 5 .

appropriate Notice of Intent against Dr. Parker and the filing of an Affidavit of Merit signed by qualified healthcare providers delineating the claims as to Dr. Parker.

WHEREFORE, Defendants, DR. PARKER and SECURECARE, INC. respectfully request this Honorable Court dismiss them as Defendants from this action, or in the alternative, require Plaintiff to set forth a more definite statement under Fed. R. Civ. P. 12(e), together with the recovery of all costs and attorney fees.

Respectfully submitted,

PLUNKETT & COONEY

By: /s/ D. Jennifer Andreou

D. JENNIFER ANDREOU (P38973)
EMILY BALLEMBERGER (P64410)
Attorneys for Defendants Dr. Parker,
& Washtenaw County Jail
10 South Main Street, Suite 400
Mt. Clemens, MI 48043
(586) 466-7607/783-7621

Dated: December 9, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LARRY LEE,

Plaintiff,

v.

C.A. No.: 2:09-cv-12471-AJT-MJH
Honorable Arthur J. Tarnow
Magistrate Michael Hluchaniuk

WASHTENAW COUNTY, DANIEL MINZEY, in his official and individual capacities; CHAD GRONDA, in his official and individual capacities; RYAN MCLAUGHLIN, in his official and individual capacities; JOSEPH FENDT, in his official and individual capacities; RICK CASEY, in his official and individual capacities; RICHARD WILLIAMS, JR., in his official and individual capacities; ANTONIO VAUGHN, in his official and individual capacities; JILL WILLIAMS, in her official and individual capacities; RICHARD WILLIAMS, SR., in his official and individual capacities; KURT SCHIAPPACASSE, in his official and individual capacities; EDWARD MOOREMAN, in his official and individual capacities; DARYL PARKER, in his official and individual capacities; SECURECARE, INC.; JANE DOE, in her official and individual capacities; and JOHN DOE, in his official and individual capacities.

**DEFENDANT DR. PARKER &
SECURECARE, INC.'S PROOF
OF SERVICE**

Defendants.

DAVID A. SANTACROCE (P61367)
Attorney for Plaintiff
801 Monroe Street
363 Legal Research Building
Ann Arbor, MI 48109-1215
(734) 763-4319

D. JENNIFER ANDREOU (P38973)
EMILY BALLEMBERGER (P64410)
Attorneys for Defendants Dr. Parker
& SecureCare, Inc.
10 S. Main Street, Suite 400
Mt. Clemens, MI 48043
(586) 466-7607/783-7621

CYNTHIA L. REACH (P55903)
Attorney for Washtenaw County and
Named County Employees
121 W. Washington St.
Suite 400
Ann Arbor, MI 48104
(734) 994-1400

PROOF OF SERVICE

The undersigned certifies that on December 9, 2009, I electronically filed the foregoing pleading with the Clerk of the Court using ECF system which will send notification of such filing to the all attorneys of record of all parties in the above cause.

/s/ D. Jennifer Andreou

Detroit.00400.93705.1407047-1