STATE OF MICHIGAN

COURT OF APPEALS

LITITIA BOND, Personal Representative of the Estate of NORMA JEAN BLOCKER, Deceased,

Plaintiff-Appellant,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

ADAM COOPER, M.D., KRISTEN MCDANIEL, D.O., and BOTSFORD GENERAL HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
May 22, 2008

ON RECONSIDERATION

No. 273315
Oakland Circuit Court
LC No. 2005-066794-NH

Before: Meter, P.J., and Kelly and Fort Hood, JJ

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) in this medical malpractice action. We vacate and remand for proceedings consistent with this opinion.

The trial court determined that plaintiff's notice of intent to file suit (NOI) failed to adequately state "[t]he 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." MCL 600.2912b(4)(e). The trial court did not address defendants' additional argument that plaintiff's affidavit of merit was also deficient.

The issues involve matters of statutory interpretation, which are reviewed de novo. This Court also reviews the trial court's grant of summary disposition de novo. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 685; 684 NW2d 711 (2004).

We agree with plaintiff that, contrary to the approach of defendants and the trial court, an analysis of the adequacy of the NOI requires review of the NOI as a whole, not section by section. In *Boodt v Borgess Medical Ctr*, 272 Mich App 621, 626-627, 638; 728 NW2d 471 (2006), the majority agreed that "MCL 600.2912b requires that the information for the categories

be *present* in some readily decipherable form, not that it 'be in any particular format.'" *Id*., p 628, quoting *Roberts, supra,* p 696. Separating the information into specially labeled paragraphs may be helpful, but "it is by no means necessary as long as the required information can actually be found somewhere in the document without difficulty." *Boodt, supra,* p 628. In this case, in analyzing whether the NOI complied with MCL 600.2912b(4)(e), the trial court unduly limited its review to the paragraph labeled, "The Manner in Which the Breach was a Proximate Cause of the Claimed Injury."

We need not determine whether the NOI, when examined as a whole, was adequate to put defendants on notice of "'the nature of the claim against them,'" and provided sufficient details to allow them "'to understand the claimed basis of the impending malpractice action.'" *Boodt, supra,* p 621, quoting *Roberts, supra,* p 692 n 7, 701, because we conclude that dismissal without prejudice is the appropriate remedy in light of the deficiencies in plaintiff's affidavit of merit.[1]

Pursuant to MCL 600.2912d(1)(d), the affidavit "shall contain a statement of each of the following . . . [t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice."

The affidavit of merit that accompanied plaintiff's complaint stated that defendant doctors "when presented with a patient exhibiting the signs and symptoms such as those demonstrated by Norma Jean Blocker, owe a duty to timely and properly":

> a. Perform a thorough and complete examination at regular and proper intervals;
>
> b. Obtain and thorough and complete medical history at regular and proper intervals;
>
> c. Avoid unnecessary surgical procedure, i.e., TAH and BSO;
>
> d. Implement conservative treatment including but not limited to, further observation and/or Lupon therapy;
>
> e. Avoid injury to the bowel by excessive traction or packing;
>
> f. Adequately observe the abdominal contents prior to closure of the abdomen;
>
> g. Recognize the signs and symptoms of and [sic] ileus or bowel obstruction;

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[1] Even if defendants asserted that the NOI was nonetheless deficient when examined as a whole in light of *Boodt, supra*, the trial court's remedy for a deficient notice of intent is also dismissal without prejudice. *Potter v Murry (On Remand)*, ___ Mich App ___; ___ NW2d ___ (2008) (Docket No. 262529, issued March 20, 2008), slip op pp 4-5.

h. Perform appropriate diagnostic testing to rule in or rule out an ileus or bowel obstruction including, but not limited to, an MRI, CT scan, lower GI series or abdominal x-rays;

i. Consult with the appropriate specialists including, but not limited to, an Infectious Disease Specialist, General Surgeon and/or Gastroenterologist;

j. Timely and properly diagnose and treat an ileus or bowel obstruction;

k. Recognize the need for prolonged in-patient hospitalization, continued encourage ambulation and the need for positive bowel movement; and

l. Any and all acts of negligence identified through the course of discovery.

With respect to defendant hospital, the affidavit of merit repeated these assertions and added:

a. Select, employ, train and monitor its employees, servant, agents, ostensible agents and/or its staff of physicians, nurses, nurses' aides, technicians and residents, to insure they were competent to perform adequate medical care;

b. Ensure that appropriate policies and procedures are adopted and followed including, but not limited to, pursuing patient advocacy by following the chain of command where indicated.

The remainder of the affidavit of merit states, in its entirety:

5. It is my opinion that the acts or omissions listed above constitute violations of the applicable standard of care.

6. In order to have conformed with the standard of care, the above named should have done those things listed in paragraph 3 above.

7. Within a reasonable degree of medical certainty, the violations of the standard of care are a proximate cause of the damages claimed by the Plaintiff.

8. Within a reasonable degree of medical certainty, the damages claimed by the Plaintiff could not have happened without the occurrence of negligence.

9. This opinion is based upon a review of the information to date and may or may not change upon review of additional materials.

The deficiency of this affidavit of merit is apparent. Simply stating that violations of the standard of care "are a proximate cause of the damages" does not fulfill the statutory requirement that the affidavit state 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)(d). The deficiency is not remedied by an examination of the affidavit as a whole. The affidavit of merit simply sets forth contentions regarding the duties owed; it does not identify any breach or "violations" of the

standard of care. Inasmuch as the affidavit does not identify any breaches of the standard of care, it is also deficient in explaining the manner in which they caused an injury to the decedent.

Although we conclude that the affidavit of merit was deficient, the "complaint and affidavit of merit toll the period of limitations until the validity of the affidavit is successfully challenged in 'subsequent judicial proceedings.'" *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007). Therefore, once it is concluded that the affidavit of merit is invalid, the period of limitations commences again provided there is time remaining. *Id*. Thus, the remedy for a successful challenge to the affidavit of merit is dismissal without prejudice. *Id*. If time remains, the plaintiff may file a new complaint with conforming affidavits of merit. *Potter v Murry (On Remand)*, ___ Mich App ___; ___ NW2d ___ (2008) (Docket No. 262529, issued March 20, 2008), slip op p 3. Accordingly, we vacate the trial court's order granting summary disposition with prejudice and remand in light of *Kirkaldy, supra*, and *Potter, supra*.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood