STATE OF MICHIGAN

COURT OF APPEALS

KENNETH HOBDY, Successor Personal Representative of the Estate of DONNY HARRISON, Deceased, and APRIL HARRISON, Personal Representative of the Estate of DONNY HARRISON, Deceased,

Plaintiffs-Appellees,

v

HARPER UNIVERSITY HOSPITAL, DETROIT MEDICAL CENTER, and PAUL S. SWERDLOW, M.D.,

Defendants-Appellants.

UNPUBLISHED
January 22, 2009

No. 258114
Wayne Circuit Court
LC No. 03-331642-NH

ON REMAND

KENNETH HOBDY, Successor Personal Representative of the Estate of DONNY HARRISON, Deceased, and APRIL HARRISON, Personal Representative of the Estate of DONNY HARRISON, Deceased,

Plaintiffs-Appellees,

v

HARPER UNIVERSITY HOSPITAL, DETROIT MEDICAL CENTER, and PAUL S. SWERDLOW, M.D.,

Defendants-Appellants.

No. 260666
Wayne Circuit Court
LC No. 03-331642-NH

KENNETH HOBDY, Personal Representative of the Estate of DONNY HARRISON, Deceased,

Plaintiff-Appellee,

v

No. 270471
Wayne Circuit Court
LC No. 06-601087-NH

HARPER UNIVERSITY HOSPITAL, DETROIT MEDICAL CENTER, and PAUL S. SWERDLOW, M.D.,

Defendants-Appellants.

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

We previously issued an opinion in this case reversing the trial court's denial of summary disposition.[1] On March 24, 2008, the Supreme Court issued an order reversing in part our decision in Docket Nos. 258114 and 260666, reinstating the trial court's denial of defendants' motion for summary disposition and remanding for this Court to consider defendants' remaining issues that were not addressed in our previous opinion. *Hobdy v Harper Univ Hosp*, 480 Mich 1133; 745 NW2d 787 (2008). On remand, we affirm, in part, and reverse and remand, in part.

I. Docket No. 258114

Defendants argue that the trial court erred in granting plaintiff's motion to amend the complaint to substitute plaintiff Kenneth Hobdy as the successor personal representative for plaintiff's decedent. This Court will not reverse a trial court's grant or denial of a motion to amend a complaint unless the trial court has abused its discretion. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 400-401; 729 NW2d 277 (2006). We hold that the trial court did not abuse its discretion in permitting plaintiff to amend the complaint to substitute the successor personal representative. We note that the rationale for amending the complaint no longer exists because the initial lawsuit filed by the first personal representative was timely under *Mullins v St Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007), and the lawsuit commenced by Hobdy has been dismissed on res judicata grounds. Under MCL 700.3613, however, "a successor personal representative must be substituted in all actions and proceedings in which the former personal representative was a party." Thus, the trial court did not abuse its discretion in granting plaintiff's motion to amend the complaint to substitute plaintiff Hobdy as the successor personal representative.

II. Docket No. 260666

A. Affidavit of Merit

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[1] *Hobdy v Harper Univ Hosp*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2007 (Docket Nos. 258114; 260666; 270471).

Defendants argue that the trial court erred in denying their motion for summary disposition based on the insufficiency of the affidavit of merit. According to defendants, plaintiff's affidavit of merit was insufficient under MCL 600.2169 because plaintiff's attorney could not have formed a reasonable belief that the pediatrician who signed the affidavit of merit, Dr. Arthur J. Provisor, matched the board certification of defendant Dr. Paul S. Swerdlow.

This issue involves the interpretation of MCL 600.2912d and MCL 600.2169. Statutory interpretation is a question of law that this Court reviews de novo. *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 488; 697 NW2d 871 (2005). This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10)[2] is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

The sufficiency of an affidavit of merit is governed by MCL 600.2912d and MCL 600.2169. MCL 600.2912d provides, in relevant 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.* The affidavit of merit shall certify that the

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[2] Although defendants moved for summary disposition under MCR 2.116(C)(8), the trial court considered documentary evidence beyond the complaint in ruling on defendants' motion. Therefore, we review whether the trial court properly denied defendants' motion for summary disposition under MCR 2.116(C)(10).

health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and 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. [Footnote omitted; emphasis added.]

MCL 600.2169 provides, in relevant part:

(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) *If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.*

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty. [Emphasis added.]

With respect to the matching practice element of § 2169(1)(a), the Supreme Court has explained:

> Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care . . . it follows that the plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty.
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> Both the dictionary definition of "specialist" and the plain language of § 2169(1)(a) make it clear that a physician can be a specialist who is not board certified. They also make it clear that a "specialist" is somebody who can potentially become board certified. Therefore, a "specialty" is a particular branch of medicine or surgery in which one can potentially become board certified. . . .
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> [A] "subspecialty" is a particular branch of medicine or surgery in which one can potentially become board certified that falls under a specialty or within the hierarchy of that specialty. A subspecialty, although a more particularized specialty, is nevertheless a specialty. Therefore, if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action.
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> [W]e conclude that to be "board certified" within the meaning of § 2169(1)(a) means to have received certification from an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications. Accordingly, if a defendant physician has received certification from a medical organization to this effect, the plaintiff's expert witness must also have obtained the same certification in order to be qualified to testify concerning the appropriate standard of medical practice or care. [*Woodard v Custer*, 476 Mich 545, 560, 561, 562, 564; 719 NW2d 842 (2006) (footnotes omitted).]

Defendant Dr. Swerdlow is board-certified in internal medicine and internal medicine-hematology. At the time of the alleged malpractice, Dr. Swerdlow was treating the 17-year-old decedent's sickle cell anemia symptoms, specifically "vaso occlusive disease, secondary to sickle cell anemia of long duration." Because Dr. Swerdlow's allegedly negligent treatment of the decedent involved a blood disease in a juvenile patient, Dr. Swerdlow was practicing pediatric hematology at the time of the alleged negligent occurrence. Dr. Swerdlow was board certified in hematology, but was not a board certified pediatrician.

The curriculum vitae of Dr. Provisor, who signed the affidavit of merit, stated that his "specialty board status" included being both a "Diplomate, American Board of Pediatrics" and a "Diplomate, Sub-board of Pediatric Hematology-Oncology." The website of the American

Medical Association identified Dr. Provisor's primary specialty as "Pediatric Hematology—Oncology." Dr. Provisor was qualified to offer standard of care testimony in treating a pediatric patient because he was a board certified pediatrician. Dr. Provisor was also qualified to offer standard of care testimony regarding the specialty, or subspecialty, of hematology because he was board certified in hematology. Defendants' argument that Dr. Provisor must match Dr. Swerdlow's board certification in internal medicine is unavailing because Dr. Swerdlow's board certification in internal medicine was unrelated to his treatment of the decedent, which involved pediatric hematology. Dr. Provisor was only required to "match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice . . . ." *Woodard, supra* at 560.

B. Notice of Intent

Defendants argue that the trial court erred in ruling that plaintiff's notice of intent satisfied MCL 600.2912b and *Roberts v Mecosta Co General Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004). According to defendants, the notice of intent is not sufficiently specific and contains vague assertions unrelated to specific defendants concerning the applicable duty of care, the manner of breach, the manner in which the breach proximately caused the plaintiff's injuries, and fails to apprise defendants of the nature of plaintiff's malpractice claim.

MCL 600.2912b articulates the requirements for a notice of intent:

> (1) Except as otherwise provided in this section, 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 written notice under this section not less than 182 days before the action is commenced.
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> (4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
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> (a) The factual basis for the claim.
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> (b) The applicable standard of practice or care alleged by the claimant.
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> (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.
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> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
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> (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.

In *Roberts*, our Supreme Court explained:

> 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. . . . Although there is no one method or format in which a claimant must set forth the required information, that information must, nevertheless, be specifically identified in an ascertainable manner within the notice. [*Roberts*, *supra* at 700-701.]

A notice of intent must be viewed as a whole to ascertain whether it contains sufficient information regarding the elements in MCL 600.2912b. *Tousey v Brennan*, 275 Mich App 535, 539-540; 739 NW2d 128 (2007). "[T]he question is 'whether the *notice* contains the required information, not whether any specific portion of the notice does.'" *Id.*, quoting *Boodt v Borgess Med Ctr*, 272 Mich App 621, 628; 728 NW2d 471 (2006), rev'd in part on other grounds 481 Mich 558 (2008) (emphasis in original).

Plaintiff directed the notice of intent to defendants Dr. Swerdlow, Harper Hospital, and Detroit Medical Center. We first address the sufficiency of the notice as to defendant Dr. Swerdlow. The relevant portion of ¶ B of the notice sets forth the general, nonspecific contention that he owed "[t]he degree of reasonable care, diligence, learning, judgment and skill ordinarily and reasonably exercised and possessed by Physicians/healthcare providers, including nurses, under the same or similar circumstances." This standard of care summary ignores the specific standard of care applicable to a physician specialist, like Dr. Swerdlow, who according to defendant Detroit Medical Center's website practiced in the specialty area of "hematology/oncology." The notice's standard of care averments are too general to comply with § 2912b(4)(b).

Although ¶ B alone does not contain sufficient information concerning Dr. Swerdlow's standard of care obligation, viewing the notice as a whole, we find that the notice is sufficient to satisfy § 2912b(4)(b), as well as § 2912b(4)(c)-(e). Paragraph C, subparagraphs (v) through (ee), allege ten specific instances of breach of the standard of care in the decedent's treatment. Considering ¶ C, subparagraphs (v) through (ee), together with the detailed statement of the claim's factual basis, we find that the notice of intent satisfies MCL 600.2912b(4)(b) (the applicable standard of care), because "no guesswork is required to appreciate that the standard of care is to have taken the actions that defendant allegedly failed to take." *Boodt*, *supra* at 631. Furthermore, these same portions of the notice satisfy § 2912b(4)(c) (the manners in which Dr. Swerdlow breached the standard of care), (d) (the actions Dr. Swerdlow should have taken to comply with the standard of care) and (e) (the manner in which the alleged breaches by Dr. Swerdlow proximately caused the decedent's injury), because these sections of the notice apprise Dr. Swerdlow, in at least a negatively stated fashion, of the relevant applicable standard of care and, in a positive manner, about numerous specific actions on the part of Dr. Swerdlow that

constituted alleged breaches of the applicable standard of care that caused the decedent's death by morphine intoxication. See *id.* "When viewed as a whole and in conjunction with the underlying facts, the notice of intent at issue here "involves 'no real guesswork' regarding the grounds upon which 'plaintiff believes recovery [to be] justified.'" *Tousey*, *supra* at 541, quoting *Boodt*, *supra* at 627, 632. We therefore find that plaintiff's notice of intent satisfies all the requirements of MCL 600.2912b(4) with respect to Dr. Swerdlow.

The notice also provides to defendants Harper Hospital and Detroit Medical Center adequate notice of a claim of vicarious liability for the actions of Dr. Swerdlow. At the top of the notice of intent, after identifying to whom it is directed, the notice states: "This Notice is intended to apply to the above health care professionals, entities, and/or facilities as well as their employees or agents, actual or ostensible, thereof, who were involved in the treatment of the patient: DONNY HARRISON, DOB 6-30-1983 (emphasis in the original)." In ¶C, subparagraph (b), plaintiff alleges that defendants "failed to ascertain and assure that trained and competent hospital personnel were, and would be, caring for and administering to the patient and allowed untrained, and/or unqualified personnel to care for and treat the patient." In ¶C, subparagraph (i), plaintiff alleges that defendants "failed to provide the patient with reasonably prudent and proper medical care, and treatment." While these allegations are generic and nonspecific, the notice as a whole articulates the alleged breaches attributable to Dr. Swerdlow, the physician at Harper Hospital who treated decedent during his admission. This is sufficient to place defendants Harper Hospital and Detroit Medical Center on notice that plaintiff seeks to hold them vicariously liable for any breaches of the applicable standard of care by Dr. Swerdlow, whether he be an actual or an ostensible agent.

The notice of intent is insufficient, however, with respect to either direct or vicarious liability for the actions of any other actual or ostensible agents of Harper Hospital and Detroit Medical Center. Beyond the boilerplate assertions of the manner of breach in ¶ C, subparagraphs (a)-(u), subparagraphs (v) through (ee) do contain specific allegations of negligent actions, but they appear to apply to Dr. Swerdlow alone. The statement of the malpractice claim's factual basis also fails to attribute the various acts of malpractice to anyone other than Dr. Swerdlow. Consequently, our review of the notice as a whole reveals that the notice is not sufficient regarding (1) what specific standard of care allegedly applies to Harper Hospital and Detroit Medical Center or its other employees or agents, (2) how precisely Harper Hospital and Detroit Medical Center or its other employees or agents breached the standard of care, (3) what these entities, employees, or agents should have done to comport with the relevant standard of care, and (4) how any negligent action attributable to Harper Hospital or Detroit Medical Center or their other employees or agents proximately caused the decedent's untimely death. Plaintiff's notice of intent is insufficient with respect to Harper Hospital and Detroit Medical Center as to anyone's negligence other than Dr. Swerdlow because it leaves the reader speculating or wondering what negligent actions by others were committed at Harper Hospital and Detroit Medical Center. Therefore, the circuit court should have dismissed any claims of direct liability and any claims of vicarious liability for the conduct of anyone other than Dr. Swerdlow against Harper Hospital and Detroit Medical Center on the basis of the insufficient notice of intent.

III. Conclusion

In summary, we find that the trial court properly granted plaintiff's motion to amend the complaint. Furthermore, the trial court also properly denied defendants' motion for summary

disposition because the affidavit of merit was sufficient under MCL 600.2912d and MCL 600.2169. Finally, while the trial court properly concluded that plaintiff's notice of intent was sufficient to satisfy MCL 600.2912b(4) as to Dr. Swerdlow and any vicarious liability of defendants Harper Hospital and Detroit Medical Center for Dr. Swerdlow's actions, the trial court erroneously ruled that the notice of intent was sufficient as to any other claims against defendants Harper Hospital and Detroit Medical Center. We therefore reverse the trial court's denial of summary disposition in part as to defendants Harper Hospital and Detroit Medical Center and remand for the trial court to dismiss plaintiff's remaining claims case against them without prejudice. See *Potter v McLeary (On Remand)*, 278 Mich App 279, 286; 748 NW2d 599 (2008).

Affirmed, in part, and reversed and remanded, in part. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering