STATE OF MICHIGAN

COURT OF APPEALS

LYNN M. ROUSSEAU, Personal Representative of the Estate of KELLY SUE ROUSSEAU, Deceased,

Plaintiff-Appellant,

v

KRISTINA MASUGA, M.D., TIMOTHY TETZLAFF, D.O., JOHN OCKENFELS, D.O., and RIVERSIDE MEDICAL ASSOCIATES, P.C.,

Defendants,

and

TENDERCARE, INC.,

Defendant-Appellee.

UNPUBLISHED
April 21, 2009

No. 280441
Chippewa Circuit Court
LC No. 05-007915-NH

LYNN M. ROUSSEAU, Personal Representative of the Estate of KELLY SUE ROUSSEAU, Deceased,

Plaintiff-Appellee,

v

KRISTINA MASUGA, M.D., TIMOTHY TETZLAFF, D.O., and RIVERSIDE MEDICAL ASSOCIATES, P.C.,

Defendants-Appellants,

and

JOHN OCKENFELS, D.O., and TENDERCARE, INC.,

No. 281093
Chippewa Circuit Court
LC No. 05-007915-NH

Defendants.

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

These consolidated appeals involve the parties' dispute regarding the specificity of a medical malpractice notice of intent to sue filed by plaintiff Lynn M. Rousseau, the personal representative of the estate of decedent Kelly Sue Rousseau. In Docket No. 280441, plaintiff appeals by leave granted a circuit court order granting defendant Tendercare, Inc. summary disposition. In Docket No. 281093, defendants Kristina Masuga, M.D., Timothy Tetzlaff, D.O., and Riverside Medical Associates, P.C., appeal by delayed leave granted a circuit court order denying their motion for summary disposition.[1] We affirm both orders.

I. Facts and Proceedings

In July 2001, Kelly Sue Rousseau developed back pain and leg weakness. Dr. Masuga evaluated Rousseau in the War Memorial Hospital emergency room in Sault Ste. Marie, and suspected that Rousseau suffered from a neurological disorder called transverse myelitis. Dr. Masuga transferred Rousseau to Marquette General Hospital for further evaluation and treatment. At Marquette General, Rousseau lost the ability to walk. During her 41-day hospital stay, Rousseau received an anticoagulant drug intended to decrease her risk of developing deep venous thrombosis (DVT). On August 21, 2001, Marquette General transferred Rousseau to Tendercare for rehabilitative therapy. On admission there, Dr. Masuga determined that Rousseau could not move her right leg and had only limited movement of her left leg. Dr. Masuga's notes also describe Rousseau as "morbidly obese," and observe that she possibly had a condition called polycystic ovarian syndrome (PCOS). Dr. Masuga prescribed an oral contraceptive to treat the suspected PCOS, but did not order any medication to prevent DVT.

On September 6, 2001, Rousseau developed swelling in her right foot and ankle. A Tendercare nurse advised Dr. Masuga of the swelling, and four days later Dr. Masuga ordered Rousseau fitted with TED hose, tightly fitting stockings designed to promote circulation in the legs. The Tendercare nursing notes reflect that on September 27, 2001, Rousseau complained of "general malaise, sore throat, dizziness, 'sore-tight chest' and headache," and had an elevated blood pressure. A nurse notified Dr. Tetzlaff of these developments, and he prescribed over the telephone a medication intended to reduce Rousseau's blood pressure. At 6:00 a.m. on September 29, 2001, a nurse noted Rousseau's statement, "I can't breathe," and that she had reduced oxygen saturation with "quick" respirations. A nursing note written at approximately

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[1] This Court consolidated the appeals in April 2008. *Rousseau v Masuga*, unpublished order of the Court of Appeals, entered April 30, 2008 (Docket Nos. 280441, 281093).

2:00 p.m. documented that Rousseau continued to experience shortness of breath and felt lethargic. At 2:50 p.m., Rousseau had a seizure. Rousseau was transferred to an emergency room, where she died. An autopsy identified the cause of her death as a massive pulmonary embolism that totally occluded both pulmonary arteries.

On April 13, 2004, plaintiff's counsel mailed to defendants a notice of intent to sue (NOI) pursuant to MCL 600.2912b. The NOI first set forth a factual summary describing the chain of events leading to Rousseau's death, which we have described above. In part two of the NOI, the notice set forth as follows the applicable standard of care regarding the Tendercare nurses:

> The standard of care required of nursing personnel is to perform assessments, determine the nursing diagnosis, identify outcomes, plan care, implement care and evaluate the care provided, to record the assessment, nursing diagnosis, the outcomes, interventions, and the evaluations. Nursing assessment and interventions are required to increase as the patient's condition warrants, and the continuous collection of data is required to be documented.

The NOI then supplied the following statement concerning the nurses' breach of the standard of care:

> The nurses failed to properly and timely assess Ms. Rousseau, failed to increase the monitoring parameters as Ms. Rousseau's condition changed, failed to timely develop a plan of care, to follow that plan of care and to implement nursing interventions on a timely basis. The nurses failed to document their assessments and failed to notify physicians of their findings. In essence, the nurses failed to implement the nursing process as described in paragraph 2.

With respect to defendant physicians, the NOI described as follows the standard of care governing their conduct:

> The standard of care requires a family practice physician to recognize the risks for the development of deep vein thrombosis in patients with the diagnoses such as Ms. Kelly Rousseau.
>
> It is further required that family practice physicians refrain from prescribing medications that increase the likelihood of the development of deep vein thrombosis. The standard of care requires the institution of prophylactic measures for DVT in patient's [sic] at risk for the development of such.
>
> The standard of care also requires that a family practice physician evaluate a patient who develops unilateral edema in the lower extremities. The standard of care requires that a physician evaluate a patient who is normotensive and suddenly develops hypertension, complaints of chest pain, and chest tightness. It is further required that the physician is required to make a timely diagnosis and order specific monitoring parameters, evaluations and/or diagnostic studies for a patient such as Ms. Rousseau.

> The applicable standard of care requires that a physician notified of a blood pressure of 170/110 evaluate the patient or order that they be transferred to an emergency room for an evaluation.

Part four of the NOI addressed "the action that should have been taken to achieve compliance with the standard of practice or care," here stating with regard to defendant physicians, "The physicians and nurses failed to do what was described in paragraphs 2 and 3 above in breach of the standard of care."

Concerning proximate cause, the NOI averred in part five,

> The failure of the nurses and physicians failed [sic] to do what was described in paragraph 2 resulting in the failure to diagnose the deep vein thrombosis which evolved and caused the patient to suffer a massive pulmonary embolus, causing her death.

On February 7, 2005, plaintiff filed a wrongful death medical malpractice complaint against defendants. The case proceeded through discovery, the depositions of expert witnesses, and case evaluation. On October 27, 2006, defendant physicians filed a motion for summary disposition pursuant to MCR 2.116(C)(4), (7) and (8), asserting that plaintiff's NOI "fails to make specific averments against each named defendant and is otherwise vague," thus violating MCL 600.2912b(4). On February 12, 2007, Tendercare also moved for summary disposition, apparently under MCR 2.116(C)(7),[2] on the basis that the NOI "does not contain the required specific allegations regarding how the conduct of any of the named Defendants caused the Plaintiff's injury."

On May 22, 2007, the circuit court issued a written opinion granting defendants' motions based on *Roberts v Mecosta Co Gen Hosp (After Remand)* (*Roberts II)*, 470 Mich 679; 684 NW2d 711 (2004), and *Boodt v Borgess Medical Ctr (Boodt I)*, 272 Mich App 621; 728 NW2d 471 (2006), rev'd in part *Boodt v Borgess Medical Ctr* (*Boodt II*), 481 Mich 558; 751 NW2d 44 (2008). The circuit court ruled that the allegations in parts four and five of the NOI "lack sufficient specificity as required by statute and applicable case law."

Plaintiff filed a motion for reconsideration, which the circuit court granted. The circuit court proceeded to affirm its prior grant of summary disposition to Tendercare, but reversed itself with regard to defendant physicians. In a bench ruling, the circuit court reasoned that the NOI set forth adequate proximate cause contentions against defendant physicians, explaining,

> . . . [T]his was an obese young woman who was immobile in a wheelchair and was pre-menopausal and that you don't give birth control pills to somebody that was their claim of what the standard is. You don't give birth control pills to

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[2] Although Tendercare did not specifically invoke MCR 2.116(C)(7) in its motion for summary disposition, it averred that because the insufficient NOI did not toll "the statute of limitations[, which] has run, the case must be dismissed with prejudice."

> somebody who presents with those—with that situation, and because she had been given these birth control pills that placed her at high risk for a deep vein thrombosis and that in fact would dictate she needed closer supervision and monitoring. And looking at the notice of intent that was filed there is reference to those specific ingredients . . . .

Plaintiff and defendant physicians now appeal.

II. Analysis of NOI Allegations Against Tendercare, Docket No. 280441

Plaintiff challenges the circuit court's decision to grant Tendercare summary disposition. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). The circuit court did not identify pursuant to which subrule of MCR 2.116(C) it found summary disposition appropriate. Whether an NOI's filing tolls the statute of limitations as contemplated in MCL 600.5856(c) depends on the adequacy of the NOI. Because the summary disposition motions filed by Tendercare and defendant physicians focused on the alleged inadequacy of plaintiff's NOI, and their motions plainly implicate the statute of limitation, we view MCR 2.116(C)(7) as the most appropriate subrule governing our review of the motions. In considering a similar motion for summary disposition challenging the sufficiency of an NOI, this Court stated the following standard of review of (C)(7) motions:

> In the absence of disputed facts, we . . . review de novo whether the applicable statute of limitations bars a cause of action. This Court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and construes the pleadings in the plaintiff's favor. Furthermore, we accept as true the complaint's contents unless contradicted by documentary evidence provided by the movant. [*Miller v Malik*, 280 Mich App 687, 693-694; 760 NW2d 818 (2008).]

In MCL 600.2914b(4), the Legislature required that an NOI contain a statement addressing the following subjects:

> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (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.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (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 . . . .

In *Roberts II*, *supra* at 696 n 14, our Supreme Court explained that the purpose of an NOI is to advise "potential malpractice defendants of the basis of the claims against them." An NOI must

"set forth allegations in good faith, in a manner that is responsive to the specific queries posed by the statute, and with enough detail to allow the potential defendants to understand the claimed basis of the impending malpractice action . . . ." *Id*. at 691-692 n 7. The Supreme Court held in *Roberts II* that when crafting an NOI, a plaintiff is "required to make a good-faith averment of *some* particularized standard for each of the professionals and facilities named in the notices." *Id*. at 694 (emphasis in original). These allegations need not appear in "separately headed paragraphs," although that "may be the better practice." *Boodt I*, *supra* at 628 (lead opinion by Davis, J.), 638 (White, J., concurring), 650 (Whitbeck, C.J., concurring in part and dissenting in part). Rather, "as long as the required information can actually be found somewhere in the document without difficulty," the statutory requirements are satisfied. *Id*.

Applying these principles to the instant NOI, we conclude that the circuit court properly granted summary disposition to Tendercare on the ground that the NOI's allegations of the "action that should have been taken to achieve compliance with the alleged standard of practice or care," § 2912b(4)(d), and 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," § 2912b(4)(e), lacked adequate specificity. Reviewing the NOI as a whole and endeavoring to analyze it in the light most favorable to plaintiff, we find virtually no specific, particularized, definite or certain information about the role the Tendercare nurses played in Rousseau's death. The NOI's "factual basis" section mentions that Rousseau made various complaints to the Tendercare nursing staff, and that "Dr. Ockenfels instructed the nursing staff to monitor her blood pressure." But the NOI contains no additional details regarding the nursing care, including whether the nurses followed Dr. Ockenfels's order, communicated Rousseau's complaints to a physician, or made or failed to make appropriate nursing assessments.

The next section of the NOI, addressing the applicable standard of care, provides that the nurses were required to

> perform assessments, determine the nursing diagnosis, identify outcomes, plan care, implement care and evaluate the care provided, to record the assessment, nursing diagnosis, the outcomes, interventions, and the evaluations. Nursing assessment and interventions are required to increase as the patient's condition warrants, and the continuous collection of data is required to be documented.

This statement closely resembles the standard of care allegation condemned in *Roberts II*, *supra*, concerning which the Supreme Court summarized,

> Thus, in response to the statutory query, "What is the applicable standard or [sic] practice or care alleged by the claimant?", plaintiff has essentially answered in part: "The standard of care required that defendants adhere to the standard of care." Obviously, this statement is tautological and unresponsive, and it cannot be viewed as minimally compliant with § 2912b(4)(b). [*Id*. at 693-694.]

Arguably, one sentence in the instant NOI's standard of care paragraph relates directly to the facts of this case: "Nursing assessment and interventions are required to increase as the patient's condition warrants, and the continuous collection of data is required to be documented." However, the NOI utterly fails to give any information about which assessments and

interventions the nurses should have obtained, why Rousseau's condition "warrant[ed]" additional data collection, or how additional information would have improved the outcome.

The NOI similarly lacks a meaningful statement describing the "manner in which it is claimed that the applicable standard of practice or care was breached." § 2912b(4)(c). The applicable NOI section avers that the nurses "failed to properly and timely assess Ms. Rousseau," and failed to "increase the monitoring parameters" as Rousseau's condition changed. But this information lacks any relationship to the facts described elsewhere in the NOI. The NOI entirely fails to address which nursing assessments should have been done but were not, the manner in which any accomplished assessments qualified as improper, when the assessments should have been performed, or which "monitoring parameters" should have been increased. Essentially, a litigant could insert this paragraph into any NOI alleging inadequate nursing care, merely by substituting a different patient's name. In conclusion, we agree with the circuit court's conclusion that the NOI lacked adequate specificity in its allegations regarding Tendercare's nurses, and thus affirm its grant of summary disposition to Tendercare.

III. Analysis of NOI Allegations Regarding Defendant Physicians, Docket No. 281093

Defendant physicians contend that the NOI fails to meet the requirements of § 2912b(4)(e), which mandates that an NOI contain a "statement" setting forth "[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." According to defendant physicians, the NOI's statement of proximate cause "is substantially indistinguishable" from that construed in *Miller*, *supra*, this Court's recent decision considering the adequacy of an NOI. In *Miller*, the Court affirmed a circuit court's grant of summary disposition premised on deficient allegations of proximate cause, explaining that a reader of the NOI "cannot discern the manner in which any defendant's conduct or omission caused [the decedent's] DVT, pulmonary embolism, or death." *Id*. at 698.

We begin by examining plaintiff's NOI as a whole to determine whether it adequately communicates the nature of plaintiff's claims regarding proximate cause. *Roberts II*, *supra* at 691-692 n 7; *Miller*, *supra* at 696; *Boodt I*, *supra* at 628. Proximate cause "involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable, and depends in part on foreseeability." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 497; 668 NW2d 402 (2003). In accordance with the meaning of proximate cause, we must first consider the NOI's statements concerning defendant physicians' wrongful conduct, then determine whether plaintiff's NOI establishes a connection between the alleged breaches of the standard of care and Rousseau's death. In contrast with plaintiff's standard of care assertions concerning the nurses, the NOI's allegations regarding defendant physicians qualify as specific and detailed. Part two contains particularized contentions with respect to the standard of care governing the physicians' conduct. Construed in a commonsense manner, the NOI asserts that to achieve compliance with the standard of care, defendant physicians should have (1) recognized Rousseau's risks for developing DVT, (2) refrained from prescribing medications increasing the likelihood that Rousseau would develop a DVT, (3) prescribed prophylactic measures to prevent an occurrence of DVT, and (4) personally evaluated Rousseau after she developed unilateral leg edema, new hypertension, and chest pain. Part three of the NOI avers that defendant physicians "failed to appreciate the risk of the development of DVT and to timely evaluate, diagnose, and treat" Rousseau's condition "as described in" the factual statement and standard of care summary.

Part five of the NOI sets forth that the failure of the physicians to comply with the standards described in part two "result[ed] in the failure to diagnose the deep vein thrombosis which evolved and caused the patient to suffer a massive pulmonary embolus, causing her death." This statement adequately describes the manner in which the physicians' alleged breaches of the standard of care proximately caused Rousseau's death. When read together, the factual summary, standard of care, and proximate cause sections of plaintiff's NOI contend that the prescription of a medication (presumably birth control pills), and the failure to prescribe a drug or order other means to prevent DVT, created the conditions within Rousseau's body that led to her development of a DVT, which eventually evolved into a fatal pulmonary embolism. The notice further conveys that defendant physicians' failure to investigate Rousseau's respiratory symptoms resulted in their inability to diagnose her DVT.

The NOI in this case is readily distinguishable from the defective NOI construed by our Supreme Court in *Boodt II*. In that case, the NOI stated concerning causation only that "[i]f the standard of care had been followed, (David) Waltz would not have died on October 11, 2001." *Id*. at 560. The Supreme Court emphasized, "Even when the notice is read in its entirety, it does not describe the manner in which the breach was the proximate cause of the injury." *Id*. The NOI in *Boodt* additionally averred that the defendant physician had perforated the decedent's coronary artery and "then failed to do several things that he presumably should have done," but failed to "describe the manner in which these actions or the lack thereof caused Waltz's death." *Id*. Unlike the NOI construed in *Boodt II*, plaintiff's NOI describes the manner in which the negligence of defendant physicians caused Rousseau's death, by explaining that the medication she received "increase[d] the likelihood of the development of deep vein thrombosis," that defendant physicians failed to institute "prophylactic measures for DVT," and that these breaches resulted in the DVT that "evolved and caused the patient to suffer a massive pulmonary embolus, causing her death."[3]

In summary, because the instant NOI contains a sufficient statement of the manner in which defendant physicians' breach of the standard of care proximately caused Rousseau's death, the circuit court correctly denied summary disposition to these defendants.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher

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[3] The NOI in this case likewise differs substantially from the NOI construed in *Miller*, *supra*. Unlike the NOI reviewed in *Miller*, the instant NOI contains specific standard of care assertions that inform and clarify the proximate cause claim by linking defendant physicians' breaches of the standard of care with Rousseau's consequent development of a DVT and a fatal pulmonary embolism.