# STATE OF MICHIGAN

# COURT OF APPEALS

ROXIE PHILLIPS,

Plaintiff-Appellant,

v

KAREN MCDONALD LOPEZ,

Defendant-Appellee.

UNPUBLISHED
March 16, 2010

No. 288236
Genesee Circuit Court
LC No. 07-087516-NM

Before: K. F. Kelly, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right the trial court's order granting summary disposition to defendant. We affirm.

The underlying case involved a medical malpractice claim against George Dass, M.D. Dr. Dass had performed surgeries on plaintiff's elbow on October 29, 1999, and April 16, 2001. On March 24, 2003, plaintiff, acting in pro per, served a notice of intent on Dr. Dass. Thereafter, plaintiff retained defendant, who filed a complaint on October 20, 2003. However, the complaint was dismissed because plaintiff had failed to serve the defendants or place a copy of the complaint in the hands of a process server before the expiration of the statute of limitations. This Court affirmed that dismissal in *Phillips v Dass*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2006 (Docket No 267992).

In the present lawsuit, plaintiff averred that, due to defendant's negligence, she lost the ability to pursue her case against Dass. Defendant countered that the notice of intent served on Dr. Dass, which was required by MCL 600.2912b, was deficient. MCL 600.2912b provides that the notice must be served 182 days before the filing of a medical malpractice complaint. If served and the limitations period on the claim would expire during the 182 days, the limitations period is tolled "not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." See MCL 600.5856. Defendant argued that the limitations period expired on April 16, 2003, and, because it was not tolled by the deficient notice, the underlying case was therefore subject to dismissal before plaintiff even retained defendant. Plaintiff's counsel acknowledged there could be no legal malpractice if the medical malpractice case was "dead" when it came to defendant. The trial court determined that the limitations period was not tolled because the notice was deficient and, therefore, defendant could not be liable for legal malpractice. Accordingly, the trial court granted defendant's motion for summary disposition.

This Court reviews an order granting summary disposition de novo. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). A motion under MCR 2.116(C)(10) should be granted if the evidence submitted by the parties "fails to establish a genuine issue regarding any material fact, [and] the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The elements of a legal malpractice claim are "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993) (footnotes and citation omitted). To prove proximate cause, a plaintiff "must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit." *Id*. In other words, the plaintiff must prove two cases within a single proceeding. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994).

Defendant's alleged negligence would have proximately caused plaintiff's injury only if the medical malpractice case would otherwise have proceeded against Dr. Dass. The question, therefore, is whether the medical malpractice case would have been dismissed based on the notice of intent.

Whether the notice of intent was deficient must be judged based on the case law in effect at the time the medical malpractice case would have been pending. Since the notice of intent was served on March 24, 2003, this would be the starting point of the analysis. We note that the case law on sufficiency has evolved,[1] culminating in a decision adverse to plaintiff with the release of *Boodt v Borgess Medical Ctr*, 481 Mich 558; 751 NW2d 44 (2008)(*Boodt II)*. While it is possible that the medical malpractice case would have settled or terminated while the case law favored plaintiff, plaintiff would not be able to meet her burden of establishing this fact. Thus, we conclude that the sufficiency of the notice must be judged according to *Boodt II*.

MCL 600.2912b(4) provides:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.

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[1] Based on *Roberts v Mecosta Co Gen Hosp (On Remand)*, 252 Mich App 664; 653 NW2d 441 (2002)*(Roberts on Remand)*, plaintiff's 2003 notice of intent was adequate when filed. We conclude that it would have been deemed inadequate under *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 701; 684 NW2d 711 (2004)(*Roberts II)*, but that it would have passed muster under *Boodt v Borgess Medical Center*, 272 Mich App 621, 728 NW2d 471 (2006)(*Boodt I)*.

(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.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

In *Boodt II, supra,* the Court held:

> Regarding causation, the notice of intent states: "If the standard of care had been followed, [the decedent] would not have died on October 11, 2001." This statement does not describe 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," as required by MCL 600.2912b(4)(e). 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. When so read, the notice merely indicates that [the defendant] caused a perforation and that he then failed to do several things that he presumably should have done. . . . However, the notice does not describe the manner in which these actions or the lack thereof caused [the] death. As this Court explained in [*Roberts II*], "it is not sufficient under this provision to merely state that defendants' alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury." (Emphasis in original.)
>
> Although the instant notice of intent may conceivably have apprised [the defendant] of the nature and gravamen of plaintiff's allegations, this is not the statutory standard; § 2912b(4)(e) requires something more. In particular, it requires a "statement" describing 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." MCL 600.2912b(4)(e). The notice at issue here does not contain such a statement. [481 Mich at 560-561 (footnote omitted).]

The statement regarding proximate causation in the instant case is not distinguishable from that deemed insufficient in *Boodt II*. Here, plaintiff's notice stated: "As a result of the violations of the standard of care, [plaintiff] has required additional surgery, pain and discomfort and other problems." This statement indicates the alleged breach was a cause but not the "but for" cause of additional surgery. Moreover, there is no explanation of the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury."

Indeed, one is left to wonder whether the prosthesis may have failed for other or additional reasons. Accordingly, under the Supreme Court's decision in *Boodt II*, plaintiff's notice of intent would have been deficient. The trial court did not err in granting summary disposition.[2]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Brian K. Zahra

[2] We note that in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), the Supreme Court held that a defective but timely notice of intent would toll the statute of limitations given a 2004 amendment to MCL 600.5856. Whether plaintiff's medical malpractice case would have been pending when *Bush* was decided need not be determined. Plaintiff would not be entitled to tolling based on *Bush* since her May 23, 2003 notice of intent was served when the predecessor statute was still in effect.