STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of VILMA BANDY

KENNETH FERRY, Personal Representative of the Estate of VILMA BANDY,

Plaintiff-Appellant/Cross-Appellee,

v

OAKWOOD HEALTHCARE, INC., d/b/a OAKWOOD SOUTH SHORE MEDICAL CENTER, and BEN SCHEINFELD, M.D.,

Defendants-Appellees/Cross-Appellants,

and

BEN SCHEINFELD, M.D., P.C.,

Defendant.

UNPUBLISHED
July 15, 2010

No. 290715
Wayne Circuit Court
LC No. 08-124681-NH

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

In this medical-malpractice action, the trial court determined that the notice of intent (NOI) filed by plaintiff Kenneth Ferry, in his capacity as personal representative of the estate of Vilma Bandy, was defective and dismissed the cause of action that plaintiff brought against defendant Ben Scheinfeld, M.D., and Oakwood Healthcare, Inc. (Oakwood). We reverse and remand.

On September 14, 2005, Bandy, aged 76, arrived at the emergency room at Oakwood complaining of rectal bleeding and severe abdominal pain. She was admitted, and Dr. Scheinfeld, a gastroenterologist, was called in for a gastrointestinal (GI) consultation. According to the NOI:

> During this initial stay at Oakwood Southshore [sic], laboratory tests were performed as well as endoscopic evaluation by Dr. Scheinfeld. Additionally, a

> CAT scan of the abdomen and pelvis was performed. The CAT scan showed some thickening of the distal sigmoid colon with some strandy density suggesting an inflammatory or infiltrative process or possible ischemia. There was also a sophagogastroduodenoscopy as well as a colonoscopy performed by Dr. Scheinfeld. During that procedure, five polyps were removed from Ms. Bandy's colon as well as a polyp from her rectum, which also showed some small internal hemorrhoids. Scattered biopsies were obtained throughout the colon. Ms. Bandy was discharged the next day on September 19th, with a diagnosis of diverticulosis with hemorrhage as the main diagnosis. She was placed on antibiotics along with her other home medications.

On September 20, Bandy returned to the Oakwood emergency room complaining of rectal bleeding, lightheadedness, abdominal pain, cramping, and general weakness. Dr. Scheinfeld was again consulted on her condition, and Bandy was readmitted to the hospital with a diagnosis of recurrent lower GI bleed. The NOI continued:

> On her second admission she underwent a flexible sigmoidoscopy with biopsy by Dr. Scheinfeld, a gastroenterologist, who also attempted an unprepped colonoscopy. It was noted that the study that was done was limited and only the sigmoid portions of the colon were observed. On September 22nd, a consult with an infectious disease physician was had and it was noted that Ms. Bandy developed increasing leukocytosis since her admission. The infectious disease physician, Dr. Vaclav discontinued the previous antibiotics of Levaquin and Flagyl. There were additional tests that showed positive gastrointestinal bleeding with small activity seen in the right lower quadrant. Ms. Bandy was also seen by a general surgeon, Dr. Lamb for a consultation. Dr. Lamb saw Ms. Bandy on September 22nd.

On September 23, Bandy's bowel movements contained bright red liquid, and it was determined that she was losing a substantial amount of blood through rectal bleeding. Her blood pressure decreased and she showed signs of low oxygen in her blood. The following day, Bandy experienced hypovolemic shock and soon thereafter suffered a stroke, leaving her comatose. Bandy was eventually stabilized and discharged to a nursing home, where she remained in a comatose-like state until her death on January 18, 2006.

On January 31, 2008, Ferry sent the NOI to Oakwood and Dr. Scheinfeld, as well as to Drs. Arum Singal and Allan Lamb. The NOI stated, "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, VILMA BANDY, DOB 7-11-29." After describing the factual scenario, the NOI set forth the applicable standard of care as follows:

> The standard of care required of Oakwood Southshore Medical Center, Benjamin Scheinfeld, M.D., Arun Singal, M.D. and Allan Lamb, D.O. was the reasonable care, diligence, judgment and skill ordinarily and/or reasonably exercised and possessed by similar physicians and similarly staffed and equipped hospitals and PCs, both directly and vicariously, under the circumstances.

> Oakwood Southshore Medical Center is vicariously liable based on the negligence of the hospital staff members, ostensible agents, servants and employees who treated Ms. Bandy or through direct negligence in the hiring, supervision and training of its staff.
>
> Given Ms. Bandy's presentation, the standard of care required that she receive a nuclear medicine scan on the admission of September 14th and if it was positive, to do an arteriogram, and if she kept bleeding, to immediately go to surgery.
>
> The standard of care required that Ms. Bandy not be discharged on September 19th.

The NOI then listed more general requirements of all defendants to act in accordance with the standard of care.[1]

After setting forth the standard of care, the NOI detailed how the standard of care was breached, stating:

> Given Ms. Bandy's presentation, it was a breach of the standard of care to do a colonoscopy and to take out more polyps and mask the cause of the blood.
>
> Given Ms. Bandy's presentation, it was a breach of the standard of care that Ms. Bandy did not receive a nuclear medicine scan on the admission of September 14th and if it was positive, to do an arteriogram, and if she kept bleeding, to immediately go to surgery.
>
> It was a breach of the standard of care to discharge Ms. Bandy on September 19th.
>
> During the second admission, there was a breach of the standard of care when there was a bleeding scan done and it was positive for small focal area of

[1] Such requirements included (a) the need to properly and timely diagnose the patient's condition and properly treat the patient; (b) to conduct proper and complete examinations of the patient; (c) to diagnose, treat, or advise the patient to seek proper medical care; (d) to conduct necessary tests and examinations; (e) to properly observe and report the patient's condition; (f) to consult with other staff members regarding the patient's treatment and condition; (g) to consult with and refer a patient to a qualified specialist; (h) to pursue more conservative treatments before undertaking a course of treatment that was not medically justified; (i) to employ sufficient and competent medical personnel to care for the patient; (j) to comply with legal and professional standards for patient care; (k) to assure that all necessary medical personnel were fully apprised of the patient's condition and requirements for proper care; (l) to keep complete, detailed, and specific records concerning the patient's symptoms, complaints, and progress; (m) to advise, instruct, and supervise non-physician personnel regarding the proper care of the patient; and (n) to provide the patient with reasonably prudent and proper medical care, treatment, and services, and to establish reasonable procedures for the patient's care and protection.

> bleeding, it was a violation to fail to have an exploratory surgery or to have a mesenteric angiography with vasopressin infusion and perform a segmental bowel resection if necessary.
>
> There was a breach of the standard of care in not attempting an endoscopic coagulation.
>
> There was a breach of the standard of care in failing to do a hemicolectomy.

The NOI then claimed that all defendants had breached the more general requirements of the standard of care by failing to (a) properly and timely diagnose Bandy's condition, (b) properly and timely monitor Bandy's condition, (c) conduct proper and complete examinations of Bandy, (d) conduct necessary tests and examinations to properly diagnose and care for Bandy, (e) consult with other staff members regarding Bandy's condition, and (f) keep complete, detailed, and specific records regarding Bandy's progress, symptoms, and complaints.

Next, the NOI described the actions that should have been taken to comply with the standard of care:

> Ms. Bandy should not have been discharged on September 19th.
>
> Ms. Bandy should not have received a colonoscopy with removal of polyps, and multiple biopsies.
>
> Ms. Bandy should have received a nuclear medicine scan, and if positive, a mesenteric arteriogram.
>
> If the bleeding could have been diagnosed by mesenteric angiography, vasopressin infusion should have been utilized. In the alternative, a segmental bowel resection should have been done.
>
> Endoscopic coagulation should have been attempted either on the first or second admission.

The NOI then indicated that all defendants should have complied with the more general requirements of the standard of care that they had breached, as described above.

Finally, plaintiff specified the manner in which the breach of the standard of care proximately caused Bandy's death, stating:

> Due to the colonoscopy with multiple biopsies; because the defendants failed to perform an immediate nuclear medicine scan; because the defendants failed to perform an immediate mesenteric arteriogram; because the defendants failed to attempt an endoscopic coagulation and because of the failure to perform a segmental bowel resection and/or hemicolectomy, Ms. Bandy continued to bleed out, and as a result became hypotensive, developed respiratory distress, required intubation, a tracheostomy and subsequently suffered a CVA. As a result

> of the aforementioned acts of negligence, Mrs. Bandy was rendered vent dependent and rendered virtually comatose for the remainder of her life.
>
> If proper monitoring, testing and treatment were provided as indicated above, the standard of care would have been met and Vilma Bandy would not have sustained the injuries articulated above and she would not have died on 1-19-06, being vent dependent and virtually comatose.

On September 26, 2008, plaintiff filed a complaint alleging that Oakwood and Dr. Scheinfeld breached the standard of care they were obligated to provide to Bandy, resulting in her death. The reasons given to explain why Oakwood and Dr. Scheinfeld breached the standard of care were the same as those listed in the NOI. The complaint did not mention Drs. Singal and Lamb.

Dr. Scheinfeld moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), claiming that the NOI was not sufficiently specific. Oakwood concurred in Dr. Scheinfeld's motion. In ruling on the motion, the trial court concluded:

> I think looking at the NOI, I think it is defective because it doesn't identify the doctors in particular and what their violations were and I don't think it complied with the statute. And for that reason I'm going to grant the motion for summary disposition and have the case dismissed against him without prejudice. And that's my decision on the matter.

The trial court granted Dr. Scheinfeld's motion for summary disposition and dismissed plaintiff's cause of action without prejudice as to Dr. Scheinfeld only. The order also indicated that it resolved the last pending claim and closed the case. Although this order did not dismiss plaintiff's cause of action against Oakwood, the lower court record includes a copy of a later order dismissing all claims against Oakwood without prejudice.[2]

On appeal, plaintiff claims that the trial court erred in finding the notice of intent (NOI) defective for failing to identify the violations committed by each particular doctor listed on the NOI.[3] In particular, plaintiff claims that there is no requirement to specify to which doctor each breach of the standard of care refers. However, in light of our Supreme Court's decision in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), we conclude that even if the NOI were defective, it constitutes a good-faith attempt by plaintiff to comply with the content requirements of MCL 600.2912b and does not implicate defendants' substantial rights. Accordingly, dismissal of plaintiff's cause of action was not warranted, and the alleged defects in the NOI on which the trial court based its decision to grant summary disposition in favor of defendants should simply be disregarded.

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[2] The original copy of this order is not included in the lower court file.

[3] Plaintiff's failure to identify the violations committed by each particular doctor listed on the NOI is the only reason given by the trial court to explain its decision to grant summary disposition to defendants.

We review de novo the question whether a notice of intent complies with the requirements of MCL 600.2912b. *Jackson v Detroit Med Ctr*, 278 Mich App 532, 545; 753 NW2d 635 (2008). We also review de novo a trial court's decision regarding a motion for summary disposition. *Bush*, 484 Mich at 164.

MCL 600.2912b(1) requires that a plaintiff give written notice at least 182 days before commencing an action alleging medical malpractice against a health professional or health facility. Pursuant to MCL 600.2912b(4), the notice must 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.
>
> (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.

However, even presuming that the trial court correctly determined that the NOI was defective, the defectiveness of an NOI is not grounds for dismissal with prejudice under MCL 600.2912b if the plaintiff made a good-faith attempt to comply with the content requirements of MCL 600.2912b(4). In *Bush*, our Supreme Court, after reviewing MCL 600.2912b and MCL 600.5856(c), concluded:

> The 2004 amendment of § 5856 . . . limits compliance to the notice period under § 2912b. Thus, pursuant to the clear language of § 2912b and the new § 5856(c), if a plaintiff complies with the applicable notice period before commencing a medical malpractice action, the statute of limitations is tolled. [*Bush*, 484 Mich at 169.]

Accordingly, the *Bush* Court determined that "pursuant to the clear language of § 2912b and § 5856(c), if a plaintiff files a timely NOI before commencing a medical malpractice action, the statute of limitations is tolled despite the presence of defects in the NOI." *Id.* at 170.

The *Bush* Court then considered the ramifications attaching to a defective NOI. Initially, the *Bush* Court noted that MCL 600.2912b was silent regarding the consequences of filing a defective NOI and, in particular, made no reference to mandatory dismissal in the event of a defect. *Id.* at 172-173. After considering the relevant legislative history, the *Bush* Court concluded, "[T]he Legislature did not intend for a defect in an NOI to be grounds for dismissal with prejudice based on § 2912b." *Id.* at 173. Instead, the *Bush* Court concluded, mandatory

dismissal with prejudice would complicate, prolong, and increase the expense of litigation, contradicting the purpose of MCL 600.2912b, which is to promote settlement. *Id.* at 174-175.

The *Bush* Court identified MCL 600.2301 as the appropriate method for "curing" defects in the NOI.[4] *Bush*, 484 Mich at 176-177. The *Bush* Court explained:

> Service of an NOI is clearly part of a medical malpractice "process" or "proceeding" in Michigan. Section 2912b mandates that "an action alleging medical malpractice" in Michigan "shall not commence . . . unless the person has given the health professional or health facility written notice . . . ." Since an NOI must be given before a medical malpractice claim can be filed, the service of an NOI is a part of a medical malpractice "proceeding." As a result, § 2301 applies to the NOI "process." As Justice CAVANAGH opined in his dissent in *Boodt* [*v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008)], this Court has for several decades applied MCL 600.2301 or its predecessor (which contained nearly identical language) to allow amendment of documents that, although not aptly characterized as pleadings, might well fall under the broad category of a "process" or "proceeding." Accordingly, we hold that § 2301 may be employed to cure defects in an NOI. [*Id.*]

The *Bush* Court continued:

> We recognize that § 2301 allows for amendment of errors or defects, whether the defect is in form or in substance, but only when the amendment would be "for the furtherance of justice." Additionally, § 2301 mandates that courts disregard errors or defects when those errors or defects do not affect the substantial rights of the parties. Thus, the applicability of § 2301 rests on a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed "on such terms as are just." [*Id.* at 177-178.]

Accordingly, MCL 600.2301 permits errors or defects in the NOI to be amended or disregarded when such an action would not implicate the substantial rights of the parties, and when such a cure is in the furtherance of justice.

The *Bush* Court concluded that, given the expertise that many medical-malpractice defendants had with regard to the breach in the standard of care that would typically be levied

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[4] MCL 600.2301 states:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

against them in a medical-malpractice action, the presence of a defect in an NOI would not typically implicate any substantial right of a health-care provider. The *Bush* Court explained:

> Given that NOIs are served at such an early stage in the proceedings, so-called "defects" are to be expected. The statute contemplates that medical records may not have been turned over before the NOI is mailed to the defendant. Defendants who receive these notices are sophisticated health professionals with extensive medical background and training. Indeed, these same defendants are allowed to act as their own reviewing experts. A defendant who has enough medical expertise to opine in his or her own defense certainly has the ability to understand the nature of claims being asserted against him or her even in the presence of defects in the NOI. Accordingly, we conclude that no substantial right of a health care provider is implicated. [*Id*. at 178.]

While the *Bush* Court did not state that a health care provider's training and expertise would per se exclude him from claiming that a defect in the NOI would implicate his substantial rights, it did indicate that a health care provider's background and training should be seriously considered when determining whether a substantial right has been implicated.

In this case, the alleged defects in the NOI are not so severe that they would implicate Dr. Scheinfeld's substantial rights. Although the NOI admittedly does not specify which doctors committed which breaches of the standard of care, Dr. Scheinfeld was provided with enough information in the NOI to understand the nature of the claims against him. Specifically, the NOI indicated that plaintiff planned to bring a cause of action against Dr. Scheinfeld in relation to Dr. Scheinfeld's involvement in providing medical care to Bandy in September 2005. The NOI indicated that Dr. Scheinfeld was consulted during both of Bandy's stays at Oakwood, performed two colonoscopies and other procedures, and was otherwise involved in Bandy's care. The NOI only noted two affirmative acts that it alleged constituted a breach of the standard of care: performing a colonoscopy in which polyps were unnecessarily removed, and discharging Bandy from the hospital on September 19. Considering that the NOI indicates that Dr. Scheinfeld performed the colonoscopies that Bandy received, Dr. Scheinfeld would be able to conclude that plaintiff was alleging that he breached the standard of care when he decided to perform at least one of the colonoscopies and, when doing so, removed more polyps than were necessary. Similarly, considering that the NOI noted that Dr. Scheinfeld was consulted throughout Bandy's first hospital stay, Dr. Scheinfeld would be able to conclude that plaintiff was alleging that his overall contribution to Bandy's medical care during the first hospital stay, which led to her discharge on September 19, constituted another breach of the standard of care.

The remaining alleged breaches of the standard of care concern actions that plaintiff claims that Drs. Scheinfeld, Singal, and Lamb failed to take, including the failure to give Bandy a nuclear medicine scan at the time of her initial admission to the hospital, the failure to attempt an endoscopic coagulation, the failure to perform a hemicolectomy, and the failure to have an exploratory surgery or a mesenteric angiography with vasopressin infusion after a bleeding scan taken after Bandy was readmitted to the hospital indicated a small focal area of bleeding. As a gastroenterologist, Dr. Scheinfeld would be familiar with these procedures and would be able to determine the level of his involvement in any failure to perform any of these procedures on Bandy. Accordingly, any alleged defects in the NOI arising from plaintiff's failure to specify

which doctors committed which breaches of the standard of care would not implicate Dr. Scheinfeld's substantial rights.

Similarly, the alleged defects in the NOI would not implicate Oakwood's substantial rights. The NOI specified that Oakwood was "vicariously liable based on the negligence of the hospital staff members, obstensible [sic] agents, servants and employees who treated Ms. Bandy or through direct negligence in the hiring, supervision and training of its staff." Further, as discussed earlier, the NOI detailed specific breaches of the standard of care that occurred at the hospital and which, according to plaintiff, resulted in Bandy's death. Oakwood's agents are hospital administrators familiar with the types of liability that typically attach to a hospital when its employees and doctors practicing medicine on its premises breach the applicable standard of care. They were in the position to conclude from this NOI that plaintiff planned to file a cause of action holding them vicariously liable for actions taken by its employees and certain identified doctors on its premises that, according to plaintiff, constituted breaches of the standard of care. Accordingly, any alleged defects in the NOI arising from plaintiff's failure to specify which doctors committed which breaches of the standard of care would not implicate Oakwood's substantial rights.

Next, the *Bush* Court addressed the second prong of the test, holding:

> [T]he second prong of the test, which requires that the cure be in the furtherance of justice, is satisfied when a party makes a good-faith attempt to comply with the content requirements of § 2912b. Thus, only when a plaintiff has not made a good-faith attempt to comply with § 2912b(4) should a trial court consider dismissal of an action without prejudice. [*Bush*, 484 Mich at 178.]

Again, even assuming that defects existed in the NOI, plaintiff made a good-faith attempt to comply with the content requirements of MCL 600.2912b. Plaintiff separately addressed each provision that MCL 600.2912b(4) required for inclusion in the statement of facts. Although plaintiff failed to specify which doctors committed which breaches of the standard of care in the section of the NOI entitled "The Manner the Applicable Standard of Practice or Care was Breached," this omission does not appear to have been made in an attempt to obfuscate the nature of the allegation or otherwise confuse the recipients of the NOI. Instead, plaintiff noted Dr. Scheinfeld's performance of the colonoscopies and involvement in Bandy's care during her first stay in the hospital elsewhere in the NOI, connecting him to the affirmative acts that he claimed constituted breaches of the standard of care. Further, even though plaintiff's allegations concerning actions that Drs. Scheinfeld, Singal, and Lamb allegedly failed to take were not tailored to a particular individual, they still constituted a good-faith attempt to inform these doctors that plaintiff planned to allege these breaches of the standard of care against each doctor. Similarly, plaintiff's indication in the NOI that it planned to hold Oakwood vicariously liable for the involvement of its staff and other agents in the breaches that allegedly led to Bandy's death constitutes a good-faith attempt to inform Oakwood that plaintiff planned to hold Oakwood liable for its connection to the actions and inaction that, plaintiff claimed, constituted breaches of the standard of care.

Looking at the NOI as a whole, we conclude that it constitutes a good-faith attempt by plaintiff to comply with the content requirements of MCL 600.2912b. The defect alleged in this case, the failure to specify which doctors committed which breaches of the standard of care, is

minor and would not prevent an Oakwood administrator or a doctor with Dr. Scheinfeld's level of medical training and expertise from understanding the nature of claims being asserted against him. To the contrary, the NOI indicates that plaintiff intended to bring a medical-malpractice cause of action against Dr. Scheinfeld, Oakwood, and two other doctors and specified actions taken or not taken by the individual doctors that, plaintiff claimed, constituted breaches of the standard of care leading to Bandy's death. Considering that plaintiff made a good-faith attempt to comply with the content requirements of MCL 600.2912b and that any alleged defect in the NOI did not implicate either Dr. Scheinfeld's or Oakwood's substantial rights, dismissal of plaintiff's cause of action was not warranted.[5] In light of the futility of ordering amendment of the NOI at this point, the alleged defects in the NOI should simply be disregarded.

Because we have concluded that dismissal of plaintiff's cause of action was not warranted, we need not address whether the dismissal entered should have been with or without prejudice. To the extent that Oakwood argues that plaintiff failed to properly present his argument that his cause of action against Oakwood should be reinstated on appeal and, therefore, the dismissal of Oakwood's claims should stand, we believe that such an argument lacks merit. It appears that plaintiff referenced Dr. Scheinfeld's motion for summary disposition in his brief on appeal because only Dr. Scheinfeld actually filed a motion for summary disposition; Oakwood simply concurred in the motion. Further, plaintiff indicated in his brief that he sought reversal of the orders of summary disposition granted to both Dr. Scheinfeld and to Oakwood, noted that his argument that his claims against Dr. Scheinfeld should be reinstated also applied to Oakwood, and provided authority supporting his argument that the NOI was not defective. Finally, because plaintiff's claims against Oakwood should be reinstated in light of *Bush*, dismissal of plaintiff's claims would not be in the interest of justice.

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

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Donald S. Owens

[5] We note that *Bush* was released after plaintiff filed his brief on appeal in this case. Accordingly, the trial court did not have the benefit of our Supreme Court's opinion in *Bush* when rendering his decision.