STATE OF MICHIGAN

COURT OF APPEALS

Estate of KERIN LAJOICE.

TIMOTHY LAJOICE, Personal Representative for the Estate of KERIN LAJOICE,

Plaintiff-Appellant,

v

NORTHERN MICHIGAN HOSPITALS, INC., BRAD E. VAZALES, M.D., GREAT LAKES CARDIOTHORACIC & VASCULAR SURGERY, P.L.L.C., DANIEL E. MCDONNELL, M.D., and DANIEL E. MCDONNELL, M.D., P.C.,

Defendants-Appellees.

UNPUBLISHED
August 28, 2012

Nos. 300684 & 300788
Emmet Circuit Court
LC No. 06-009165-NH

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this medical-malpractice action, plaintiff Timothy LaJoice, as Personal Representative for the Estate of Kerin LaJoice, appeals by right the trial court's dismissal of the lawsuit with prejudice on the basis of its finding that plaintiff's notice of intent (NOI) was defective and could not be cured because it did not constitute a good-faith attempt to comply with the requirements of MCL 600.2912b(4). Because we find that, while defective, the NOI does constitute a good-faith attempt to comply with MCL 600.2912b(4), we reverse and remand to enable plaintiff to file an amended NOI.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. MEDICAL CARE AT ISSUE

According to plaintiff's NOI, on April 16, 2002, decedent Kerin LaJoice, then 39 years old, was transferred by ambulance from a hospital to defendant Northern Michigan Hospitals, Inc.'s ("NMH") emergency department with a diagnosis of leukocytosis (increased white blood cells), fever, and left lower-lobe pneumonia. Upon admission to NMH, LaJoice was acutely ill

and had a pulse of 175 and a respiratory rate of 30. Lab results from a blood draw were abnormal (the NOI provides specific lab values).

While at NMH, defendants Daniel McDonnell, M.D., a pulmonologist/internist, and Brad Vazales, M.D., a thoracic surgeon, treated LaJoice. McDonnell performed a thoracentesis on April 17, withdrawing 500 ccs of thick, cloudy, yellow fluid from LaJoice's lung. The next day, a size-28 French chest tube was inserted, which yielded an immediate return of 750 ccs of cloudy yellow fluid. On April 21, Vazales performed a thoracotomy to drain empyema (pus) and debride nonviable lung tissue. Three chest tubes were inserted and hooked to suction in order to drain fluid from LaJoice's lungs. On May 2, chest x-rays revealed "loculated pleural fluid and possibly empyema." The next day, suction was withdrawn from the chest-drainage tubes, and ostomy (drainage) bags were attached.

LaJoice was discharged from NMH on May 4. At the time of her discharge, LaJoice was still experiencing significant chest and back pain, and she had an incessant cough. Although she chose to be discharged home rather than to a rehabilitation facility, McDonnell denied her request for a home health nurse.

On May 7, LaJoice contacted Vazales's office four times complaining of coughing up blood-tinged sputum, incessant coughing, and chest and back pain. She was told that everything was fine and to keep her appointment that had been scheduled for the next week.

On May 8, LaJoice contacted Vazales's office twice. She again attempted to schedule an appointment with him because she had coughed so hard that a very-large blood clot entirely filled one of her ostomy bags. Vazales's answering service apparently connected LaJoice directly to Vazales at his home after hours. Vazales yelled at her, told her that she was bothering him, and stated that he had already worked all day. When she told him about the blood clot and how she had started to cough up blood-tinged sputum, he told her to call the office in the morning.

The next morning, Lajoice called Vazales's office and was given permission to come in for an evaluation. LaJoice was so weak by this time that she needed assistance getting into the car and was taken to Vazales's office at NMH by wheelchair. She could not stand at Vazales's office in order to be weighed. She described to Vazales's staff her increased weakness and chest pain. She explained that her ostomy bag had to be emptied at least three times per day but that the drainage had recently slowed down. She described a change in color of the drainage and that it now had a "very bad smell." A chest x-ray revealed a small pneumothorax (air or gas in the pleural cavity) and a suspicious cavity. A blood draw revealed low hemoglobin and hematocrit and an increased neutrophil count. Vazales told LaJoice that he was in a hurry to get to surgery, somebody would clean up her tubes, and then she could go home. Despite his office record to the contrary, Vazales later documented LaJoice's visit as "no unusual chest tube drainage."[1] LaJoice was sent home.

[1] Moreover, McDonnell documented LaJoice's visit with Vazales, stating the following: "everything looked fine," "quite frankly, she looked great," and "she had no cough and was feeling fine."

A short time after returning home, LaJoice began to cough up blood. An ambulance was called and LaJoice was taken to a nearby hospital where she was diagnosed with acute progressive hemoptysis (expectoration of blood or bloody mucus) and possible sepsis. McDonnell was called, and he agreed to accept LaJoice as a patient upon transfer back to NMH. LaJoice was transported to NMH by ambulance. After she was admitted, LaJoice suffered a cardiopulmonary arrest. Although medical personnel were able to resuscitate her, LaJoice had suffered anoxic encephalopathy (oxygen deprived brain damage). Later that day, she was removed from life support and died, leaving behind her husband and their 1- and 3-year-old sons.

B. CONTENT OF PLAINTIFF'S NOTICE OF INTENT

An estate was opened in February of 2004, and on August 1, 2005, plaintiff sent an NOI addressed to all defendants named in the instant case. Under MCL 600.2912b(4), an NOI must include "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. [MCL 600.2912b(4)(a)-(f).]

With respect to the factual basis for the claim, MCL 600.2912b(4)(a), plaintiff's NOI contains two and one-half single-spaced pages of factual information regarding LaJoice's medical care as summarized above.

With respect to the applicable standard of care or practice alleged, MCL 600.2912b(4)(b), plaintiff's NOI contains seven single-spaced pages subdivided into four subsections: the first applies to NMH and contains 15 standards of care[2]; the second applies to "all defendant healthcare principles, agents, and/or employees, including but not limited to, defendants Vazales and McDonnell, physician's assistants and/or registered nurses" and contains 45 standards of care; the third applies to Vazales, McDonnell, and "their actual and/or ostensible principles, agents and/or employees" and contains 42 standards of care; and the fourth applies to Vazales and "his actual and/or ostensible principles, agents and/or employees" and contains 13 standards of care. In total, the NOI sets forth 115 separate applicable standards of care or practice.

[2] On appeal, plaintiff has expressly agreed that he is not pursuing any direct-liability claims against NMH; instead, his claims against NMH are on the basis of vicarious liability.

Regarding the manner in which the applicable standard of practice or care was breached, MCL 600.2912b(4)(c), the NOI contains a single sentence: "The applicable standard of practice and care was breached as evidenced by the failure to do those things set forth in section II above." Likewise, with regard to the action that should have been taken to achieve compliance with the alleged standard of practice or care, MCL 600.2912b(4)(d), the NOI contains a single sentence: "The action that should have been taken to achieve compliance with the standard of care should have been those things set forth in section II above."

With regard to the manner in which the alleged breach of the standard of practice or care was the proximate cause of the injury claimed, MCL 600.2912b(4)(e), the NOI contains the following sentence: "As a result of defendants' blatant, gross and negligent errors and omissions, a Wife and Mother of two young Sons became permanently and cognitively impaired, and ultimately, she died." With regard to the names of all health professionals and facilities to which the claimant is providing the NOI, MCL 600.2912b(4)(f), all defendants are named. At the end of the NOI, the following paragraph is provided:

> If you need any additional information regarding the specifics of this Notice of Intent or this claim, please advise in writing. Should any of the foregoing text be interpreted as ambiguous and/or unclear, and/or if any additional information is necessary regarding the specifics of this Notice of Intent and/or this claim, immediately advise in writing.

C. PLAINTIFF'S SUIT AND SUBSEQUENT PROCEEDINGS

After filing his NOI and waiting the requisite time period set forth in MCL 600.2912b to enable defendants an opportunity to investigate and, if they deemed it appropriate, settle—which did not happen—plaintiff filed a complaint and two affidavits of merit.

Defendants sought to dismiss plaintiff's complaint, and the trial court subsequently granted defendants' motions for summary disposition. The trial court held that the NOI was defective for failing to state with particularity the standards of care that applied to each defendant, emphasizing that the standards of care included in the NOI were "vague, general and conclusory." The trial court further held that the NOI did not state particularized allegations as to how defendants breached the standards of care or what actions defendants should have taken to comply with the standards of care. The trial court also found similar defects in the affidavits of merit and concluded that the NOI and affidavits of merit failed to provide reasonable notice to defendants as to the nature of the claims against them. Because the statute of limitations in the case had run, the trial court dismissed plaintiff's complaint with prejudice.

Plaintiff appealed to this Court. In *LaJoice v Northern Mich Hosps* (*LaJoice I*), unpublished opinion per curiam of the Court of Appeals, issued October 28, 2008 (Docket No 277587), vacated 485 Mich 915 (2009), a panel of this Court held that plaintiff's NOI failed to comply with the statutory requirements of MCL 600.2912b for the reasons outlined by the trial court, that the filing of a defective NOI did not toll the statute of limitations, and that dismissal with prejudice was appropriate. This Court also concluded that the trial court correctly disallowed an amendment of the defective NOI. This Court did not reach the issue regarding the sufficiency of plaintiff's affidavits of merit. In lieu of granting leave to appeal, our Supreme

Court vacated both this Court's decision and the trial court's order and remanded the case to the trial court for reconsideration of defendants' motions for summary disposition in light of *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009). *LaJoice v Northern Mich Hosps (LaJoice II)*, 485 Mich 915; 773 NW2d 264 (2009). Under *Bush*, a trial court is prohibited from dismissing a cause of action with prejudice on the basis of a defective NOI unless the plaintiff did not make a good-faith attempt to comply with the statutory requirements. *Bush*, 484 Mich at 177-178.

On remand, the trial court once again found that plaintiff's NOI was defective under MCL 600.2912b. It also found that plaintiff's NOI was not a good-faith attempt to comply with the statutory requirements and, therefore, that leave to amend under *Bush* was unwarranted. Finally, because the statute of limitations and the wrongful-death savings period had run, the trial court dismissed the case with prejudice.

II. STANDARD OF REVIEW

This court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a notice of intent complies with the requirements of MCL 600.2912b is a question of law that we also review de novo. *Swanson v Port Huron Hosp (On Remand)*, 290 Mich App 167, 177; 800 NW2d 101 (2010).

III. ANALYSIS

A. ASSESSMENT OF NOI'S COMPLIANCE WITH MCL 600.2912b(4)

Plaintiff first argues that the trial court erred in concluding that his NOI was defective. We disagree. We considered and rejected this argument in *LaJoice I*. While the Supreme Court vacated this Court's opinion in *LaJoice I*, the Court did not cite any deficiency in this Court's finding that plaintiff's NOI was defective. See *LaJoice II*, 485 Mich at 915. As further discussed below, viewed in its entirety, the NOI, while extensive in content, is heavy on boilerplate allegations and weak on the particulars of who did what wrong and when, leaving the reader to surmise what exactly plaintiff is claiming was a breach of the standard of care. Most notable among the NOI's weaknesses is the failure to expressly explain how defendants' alleged negligent care proximately caused LaJoice's death other than through an implication that it was caused by a failure to competently treat pneumonia and its ensuing complications, which, as gleaned from the NOI, may have included insufficient oxygenation, infection, hemodynamic instability, and internal bleeding.

B. ASSESSMENT OF WHETHER PLAINTIFF MADE A GOOD-FAITH ATTEMPT TO COMPLY WITH MCL 600.2912b(4)

Plaintiff also argues that the trial court erred in concluding that the NOI did not constitute a good-faith attempt to comply with the requirements of MCL 600.2912b(4) and, therefore, that it erred in denying plaintiff an opportunity to cure the NOI by way of an amendment under MCL 600.2301. We agree.

In *Bush*, our Supreme Court noted that the purpose of MCL 600.2912b is "to provide a mechanism for promoting settlement without the need for formal litigation" and to reduce the cost of medical-malpractice litigation. *Bush*, 484 Mich at 174 (internal quotation omitted). The Court emphasized that "[t]o hold that [failure to comply with MCL 600.2912b] in and of itself mandates dismissal with prejudice would complicate, prolong, and significantly increase the expense of litigation." *Id*. As such, "[d]ismissal with prejudice would be inconsistent with these stated purposes." *Id*. at 175. The Court also noted that, because an NOI is part of a medical malpractice "process" or "proceeding," it is subject to MCL 600.2301. *Id*. at 176-177. MCL 600.2301 reads as follows:

> 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.

The Court in *Bush* clarified how MCL 600.2301 applies to medical-malpractice cases and NOI defects:

> [T]he applicability of [MCL 600.]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." 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. Further, we hold that the 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 [MCL 600.]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*. [*Id*. at 177-178 (emphasis added).]

With regard to the substantial-right prong, because this is a medical-malpractice case and defendants are "sophisticated health professionals with extensive medical background and training" so as to have "more than enough medical expertise to opine in [their] own defense," the defendants are capable of understanding the nature of the claims being made against them even in the presence of defects in the NOI; therefore, no substantial rights are implicated. See *id*.; see also *Swanson*, 290 Mich App at 181.

With regard to the furtherance-of-justice prong, *Bush* makes clear that the only time a trial court should consider dismissal of a medical-malpractice action on the basis of a defective NOI is when it finds that the plaintiff has not made a good-faith attempt to comply with the requirements of MCL 600.2912b(4). *Bush*, 484 Mich at 178. *Bush* does not provide explicit guidelines for what is to be deemed a "good-faith attempt." However, some guidance can be found in the two documents that the Court scrutinized in *Bush*: the plaintiff's NOI, which was deemed to be defective but a good-faith attempt, and one of the defendant's statutorily required responses to the plaintiff's NOI, which was deemed to be defective and *not* a good-faith attempt. *Id*. at 179-185.

In *Bush*, the Court found that the plaintiff's NOI was thirteen pages long, that the plaintiff made an effort to address each of the required subsections, and that "the vast majority of plaintiff's NOI was in compliance with [MCL 600.]2912b(4)." *Id*. at 178. The *Bush* Court found that the plaintiff's NOI was defective as to some of the defendants because it failed to adequately address how those defendants breached the standard of care, what actions should have been taken to avoid breach, and how those breaches proximately caused the claimed injuries. *Id*. at 179-180. However, because the majority of the NOI as a whole, including the sections dealing with the remaining defendants, complied with the statutory requirements, the *Bush* Court concluded that the NOI was a good-faith attempt to comply with those requirements. *Id*. at 180-181.

Like a plaintiff's NOI, a defendant's response to an NOI must contain certain, analogous information. See MCL 600.2912b(7). In *Bush*, the entire substantive portion of the defendant's response read as follows:

> 1. FACTUAL BASIS FOR DEFENSE TO CLAIM
>
> The medical records involved in this case, together with deposition testimony, will form the primary defense to this case. Briefly, Dr. Shabahang contends that he properly evaluated, assessed and treated Gary Bush. The actions of Dr. Shabahang were well within the standard of care.
>
> 2. STANDARD OF CARE AND COMPLIANCE
>
> The standard of care required Dr. Shabahang to do things demonstrated in the medical records, which may be further augmented by deposition testimony. At all times, he acted within the standards of care in his care and treatment of Gary Bush.
>
> 3. MANNER OF COMPLIANCE
>
> See § 2 above. The manner in which Dr. Shabahang complied with the applicable standard of care is outlined in the medical records, and will be further augmented by sworn deposition testimony.

> 4. PROXIMATE CAUSE
>
> It is the position of Dr. Shabahang that his actions did not within a reasonable degree of medical probability contribute in any way to the complications alleged by Gary Bush. Additionally, it is the position of Dr. Shabahang that the current medical condition of Gary Bush was not in any way caused or contributed by the activities of Dr. Shabahang. [*Id*. at 182-183.]

The *Bush* Court found this response to be "utterly lacking in a good-faith attempt to comply" and "nothing more than a blanket denial of any wrongdoing." *Id*.

The question then is where on the spectrum of these two examples the NOI in the instant case falls. The NOI in *Bush* was relatively extensive at thirteen pages; while it contained defects as to some of the defendants, it was not defective as to all of the defendants, and the court found that the majority of the document complied with the statute. *Id*. at 178-179. In the instant case, the NOI is relatively long at eleven pages and single spaced with relatively small font. Seven of the eleven pages are devoted to standards of care, and the trial court outlined in detail the ways in which the vast majority of that section failed to meet the statutory requirements. This Court was likewise very critical of the standard-of-care section in *LaJoice I*. The section contains numerous boilerplate allegations that are not factually tied to the instant case in any way, are not particularized to any of the defendants in any way, and do not outline in what ways the defendants were supposed to comply with those standards of care. And while the trial court identified 41 potentially acceptable standards of care within the 115 listed, several of those are repetitive and lack important "who, what, when, where, and how" information that is not supplied by the neighboring sections. The sections of the NOI intended to address how the standards of care were breached and what actions should have been taken to comply with the standard of care simply direct the reader back to the applicable standard-of-care section. Finally, the NOI concludes by stating that defendants' negligent errors and omissions caused LaJoice's death but does not actually allege what negligent acts or omissions occurred or how they led to LaJoice's death. Although the adequacy of an NOI is measured by viewing it as a whole rather than by subsection[3], plaintiff's NOI is nevertheless defective because it leaves the reader guessing as to what exactly went wrong and how defendants proximately caused LaJoice's death. When viewed as a whole, however, it is apparent that plaintiff—while also throwing in the proverbial kitchen sink to cover his bases—was making a good-faith attempt to comply with MCL 600.2912b. Rather than finding the NOI to be terse, formulaic, and hollow as exemplified by the NOI response in *Bush*, the trial court's criticism of the NOI here was that it was so engorged with boilerplate and repetitive allegations that it clouded the meritorious issues, several of which the trial court found to exist.

[3] MCL 600.2912b(4) only requires that the information for the categories be present in some readily decipherable form. Although separating the information into subsections may be useful and easier for the reader, it is not necessary as long as the required information can actually be found somewhere in the document without difficulty. *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). MCL 600.2912b(4) makes clear that "a statement" of at least all of the information required in the statute is necessary for an NOI to be compliant.

In the midst of extensive generalized allegations and repetition, one can arguably glean from plaintiff's NOI that defendants used the wrong size chest tube when draining fluid from LaJoice's lung, which deprived her of a maximal flow rate in order to prevent loculations, tissue scarring, and fibrinogen coagulation and collection within the chest tube and also to minimize the chance of developing an abscess; prematurely discontinued suction from her chest tubes when she was still draining lung debris; failed to order up-to-date testing before deciding to discharge her; prematurely discharged her from NMH given her overall condition and lab findings, including an infection in the lung space and an increased prothrombin value; failed to order Vitamin K to treat her coagulation issue; failed to order a home health nurse for adequate post-discharge supervision or otherwise make sure that she had ready access to appropriate medical professionals; failed to take seriously her concerns regarding post-discharge complications that could include abscess formation, infection, insufficient oxygenation, and internal bleeding; failed to order a chest x-ray with a STAT interpretation by a radiologist; failed to order and interpret coagulation and complete blood-count studies; failed to perform an emergent thoracotomy and lobectomy when she presented with increasing problems that included persistent coughing and a blood clot that filled the drainage bag; and failed to immediately readmit her to the hospital in light of her developing complications, including the disruption of a blood vessel, a liquifying lung, coagulation, and a "raging infection." Ultimately, as stated above, plaintiff's NOI is defective because it is so repetitive, vague, and rambling that it is unreasonably laborious to sift through it and leaves the reader guessing as to what the alleged breaches are and how they proximately caused LaJoice's death. Plaintiff's NOI holds both Vazales and McConnell accountable for the above failures and contends on appeal that the standard of care for each physician required the same conduct to treat LaJoice's condition. Because the NOI is designed to convey what plaintiff alleges was the applicable standard of care and does not require proof of the actual standard of care, evaluation of plaintiff's accuracy in that regard is not appropriate. See *Roberts v Mecosta Co Hosp*, 470 Mich 679, 691-692; 684 NW2d 711 (2004) (explaining that a claimant is only required in an NOI to state the specific standard of care that she is *claiming* because it is reasonable to anticipate that a claimant's averments regarding the standard of care may later prove to be inaccurate).

Despite its failings, it is readily apparent that the drafter of the NOI was attempting to cover all conceivable bases at the earliest stage of litigation so as to preserve plaintiff's right to pursue claims that are later determined during discovery to have merit. We will not fault the drafter of an NOI who effectively tries too hard while ultimately falling short of the mark. Because we find that plaintiff's NOI constitutes a good-faith, albeit unsuccessful, attempt to meet the requirements of MCL 600.2912b(4), we reverse and remand for reinstatement of the case and to allow plaintiff an opportunity to file an amended, compliant NOI.[4] Given such

[4] As in *Bush*, an amendment of the NOI would "relate back to the time that the original NOI was mailed in accord with the treatment afforded to pleadings when amended under MCR 2.118(D)." *Bush*, 484 Mich at 181 n 44.

finding, we need not address the parties' arguments regarding the nature of a dismissal because the case is not being dismissed.[5]

C. REQUEST FOR REASSIGNMENT TO A DIFFERENT JUDGE

Plaintiff has also requested that the case be assigned to a different judge. The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case. *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992). Remand to a different judge is warranted if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication. *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989), overruled in part on other grounds *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83; 706 NW2d 843 (2005). Repeated rulings against a party, no matter how erroneous and vigorously or consistently expressed, are not disqualifying. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995).

In this case, while the trial-court judge has twice held against plaintiff, there is no evidence of past comments or expressed views to suggest that he would be unable to fairly adjudicate plaintiff's case if it were remanded to his courtroom again. In fact, after the instant case was remanded back to the judge by our Supreme Court, the trial court drafted a detailed and extensive opinion reconsidering plaintiff's case in light of both the case law mentioned in the order to remand as well as each of the cases cited by plaintiff as grounds for a different result. Because there is evidence that the judge is willing to carefully reevaluate the case on the merits and no evidence of past comments or expressed views to suggest that the judge would be unable to fairly adjudicate plaintiff's case if it were remanded to his courtroom again, remand to a different judge is not warranted in this case.

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

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly

[5] Furthermore, we decline to address defendants' argument regarding the sufficiency of plaintiff's affidavits of merit where the trial court did not address this issue on remand from our Supreme Court.