STATE OF MICHIGAN

COURT OF APPEALS

LINDA SHEMBER,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN MEDICAL CENTER, UNIVERSITY OF MICHIGAN BOARD OF REGENTS, UNIVERSITY OF MICHIGAN HOSPITALS & HEALTH CENTERS, AND UNIVERSITY OF MICHIGAN HEALTH SYSTEM,

Defendants,

and

PIA MALY SUNDGREN, ANTHONY D'AMICO, STEVEN KRONICK, JOHN N. SHENK, SONJA KRAFCIK, CAROL R. BRADFORD, M.D., DALE EKBOM, M.D., JAMES A. FREER, M.D., and PAUL DEFLORIO, M.D.,

Defendants-Appellees.

FOR PUBLICATION
August 21, 2008

No. 276515
Washtenaw Circuit Court
LC No. 06-000080-NH

Advance Sheets Version

Before: Markey, P.J., and White and Wilder, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree that the circuit court did not err by denying plaintiff's motion to amend her complaint to allege fraudulent concealment. Although amendment normally should be permitted, and the factual support then tested by summary disposition, in the instant case plaintiff provided the court, through her attorney's affidavit, with the factual basis for her claim of fraudulent concealment, and the court did not err in rejecting that basis as inadequate. Thus, I agree with the affirmance with respect to defendants first identified by name in the amended notice of intent (NOI). I also agree that the NOI is insufficient as to Doctors Bradford and Ekbom, the otolaryngologists.

I disagree with respect to Doctors Freer and DeFlorio, the emergency-room physicians. Read in its entirety, the NOI sufficiently states that the emergency-room doctors violated the standard of care by failing to order appropriate films in an emergent or stat manner, order timely complete blood counts, order timely or emergent/stat consultations, including neurosurgery in view of plaintiff's progressive neurological deficit, obtain plaintiff's past medical history and consult her treaters, and order a stat magnetic resonance imaging and immediately take plaintiff to surgery given the presence of massive infection and cord compression.

The claimed deficiency in the NOI is its failure to specifically state the standard of care applicable to each defendant. The NOI does, however, state a specific standard of care. In contrast to the tautological statement involved in *Roberts v Mecosta Co Gen Hosp (After Remand)* 470 Mich 679; 684 NW2d 711 (2004) *(Roberts II)*—specifically, that the standard of care required that the health care professionals render competent advice and assistance in the care and treatment of the plaintiff and render same in accordance with the standard of care—the NOI here set forth the specific actions required to comply with the standard of care. While the NOI referred to "Health Care Professionals" rather than to emergency-room physicians, the statement of facts, read together with the statement of the applicable standard of care, sufficiently identifies the standard applicable to the emergency-room physicians.

I agree with plaintiff that, under the amended version of MCL 600.5856(c), giving notice in compliance within the applicable notice period under MCL 600.2912b operates to toll the statute of limitations if the claim would be barred during that period. However, § 5856(c) expressly provides that the statute of limitations is tolled for a period not longer than the number of days remaining in the notice period. Hence, plaintiff makes the additional argument that the filing of the complaint and affidavits of merit further tolled the running of the statute of limitations under § 5856(a) and *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), until the claim was dismissed, and that the dismissal should have been without prejudice.

In *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008), decided after this case was submitted, our Supreme Court declined to apply *Kirkaldy* in the context of a defective NOI and rejected the argument that the filing of a complaint and affidavit after giving a defective NOI tolls the statute of limitation under § 5856(a). However, *Boodt* is distinguishable because in the instant case plaintiffs filed an amended NOI[1] within the statutory limitations period.[2] To be sure, because the complaint was filed just days after the amended NOI was sent, it was premature.

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[1] The first amended NOI, sent January 18, 2005, was far more detailed and specific than the original NOI.

[2] The original NOI was sent with at least six days remaining in the statutory limitations period and thus, even if inadequate, under the amended tolling provision of § 5856(c), it tolled the statute of limitations for the time remaining in the notice period. The amended NOI was sent 182 days later and was thus sent within the statutory limitations period.

However, the remedy for this is dismissal without prejudice. *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26; 594 NW2d 455 (1999). Thus, because the first NOI tolled the statute, the second NOI was timely; if the second NOI was sufficient, the action was timely but premature, and the dismissal should have been without prejudice, notwithstanding *Boodt*.[3] I would remand for determination whether the amended NOI was sufficient.[4]

/s/ Helene N. White

[3] Section 2912b(6) is not implicated because we are not here concerned with tacking.

[4] The amended NOI cannot under any circumstances save the action against the doctors first named in it because the original NOI did not toll the statute with respect to them.