STATE OF MICHIGAN

COURT OF APPEALS

NANCY MILLER, as Personal Representative of the Estate of William Miller, Deceased, Plaintiff-Appellant, v GHAUS MALIK, M.D., SUSAN E. OSHNOCK, P.A.-C, HENRY FORD HEALTH SYSTEM, d/b/a NEUROSURGERY ASSOCIATES-OAKLAND, ASHOK PRASAD, M.D., and WILLIAM BEAUMONT HOSPITAL, Defendants-Appellees.	FOR PUBLICATION September 18, 2008 9:00 a.m. No. 277952 Oakland Circuit Court LC No. 2006-072158-NH Advance Sheets Version

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

KELLY, J.

This wrongful-death, medical-malpractice case primarily concerns whether plaintiff's notice of intent required under MCL 600.2912b was sufficient with respect to defendants, Ghaus Malik, M.D., Susan E. Oshnock, P.A.-C., Henry Ford Health System, doing business as Neurosurgery Associates-Oakland (Henry Ford), Ashok Prasad, M.D., and William Beaumont Hospital (Beaumont). Plaintiff, as personal representative of the estate of her deceased husband, William Miller (Miller), appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7) (claim barred by statute of limitations). We affirm.

I. Basic Facts and Proceedings

Malik, a neurosurgeon, performed a cervical diskectomy on Miller at Beaumont. Miller experienced numbness in his legs after the surgery. Miller was transferred to Beaumont's rehabilitation unit for physical and occupational therapy, and he was required to wear TED hose,[1] but he removed them because they were too small and uncomfortable. Pneumatic compression devices were ordered (presumably to promote blood flow in the legs), but they were

[1] TED is an abbreviation for Thrombo-Embolic Deterrent, and TED hose are tightly fitting stockings designed to promote circulation.

never applied. Beaumont physicians and nurses did not record any reports of calf tenderness by Miller or other signs or symptoms of deep vein thrombosis (DVT). Miller was discharged, and his discharge orders did not include DVT prophylaxis or information about symptoms.

Miller continued to experience numbness after going home, and he fell on one occasion. His legs became red, shiny, and swollen, and plaintiff repeatedly called Malik's office. However, Oshnock, a certified physician's assistant, allegedly told her that Miller did not need to see Malik. Plaintiff called Prasad, Miller's internist and primary care provider, and Prasad scheduled an appointment for four days later, on September 19, 2003. Prasad initially diagnosed cellulitis over the telephone and prescribed antibiotics. On the day of his appointment, Miller went to Prasad's office, where he went into cardiac arrest. Miller was taken to Botsford General Hospital, where he was pronounced dead upon arrival. An autopsy revealed that Miller died of a pulmonary embolism from a DVT in his leg.

Pursuant to MCL 600.2912b, plaintiff mailed a notice of intent to file a claim to each defendant on April 22, 2005. As required by § 2912b(4), plaintiff included in her notice of intent a statement of proximate causation, which stated the following: "Had the standard of care been complied with in a timely and appropriate manner, William Miller's deep vein thrombosis would have been avoided and/or timely diagnosed and treated, thereby avoiding his demise from pulmonary embolism." After 182 days, in October 2005, plaintiff alleged a wrongful-death claim based on medical malpractice against defendants and filed affidavits of meritorious claim. All defendants moved for summary disposition, challenging the proximate causation statements in the notice of intent and affidavits of merit. The trial court concluded that the notice of intent and affidavits of merit were insufficient, and because the statutory period of limitations had expired, it granted defendants summary disposition.

II. Waiver

Plaintiff argues that defendants waived their right to challenge the notice of intent pursuant to MCR 2.111(F)(2)[2] because they failed to plead this defense in their affirmative defenses, as required by subsection F(3)[3] of that rule. We disagree.

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[2] MCR 2.111(F)(2) provides:

> A party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim must assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading or by motion as provided by these rules is waived . . . .

[3] MCR 2.11(F)(3) pertains specifically to affirmative defenses and states:

> Affirmative defenses must be stated in a party's responsive pleading . . . . Under a separate and distinct heading, a party must state facts constituting
>
> (a) an affirmative defense, such as . . . statute of limitations . . . .

All defendants, except Beaumont, specifically raised the statute of limitations and the inadequacy of the notice of intent in their affirmative defenses, citing MCL 600.2912b. As our Supreme Court stated in *Burton v Reed City Hosp Corp*, 471 Mich 745, 755; 691 NW2d 424 (2005), where almost identical affirmative defenses were pleaded, "[s]uch a direct assertion of these defenses by defendants can by no means be considered a waiver."

Beaumont asserted in its affirmative defenses that plaintiff's claim was barred by the applicable statute of limitations, without referring to MCL 600.2912b or otherwise specifically challenging the notice of intent. However, a defendant is not obligated to challenge the sufficiency of a plaintiff's notice of intent pursuant to MCL 600.2912b until the plaintiff has raised the issue of the tolling provision of MCL 600.5856, which necessarily occurs after the defendant has raised a statute of limitations defense in its first responsive pleading. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 70 n 7; 642 NW2d 663 (2002) (*Roberts I*). Therefore, Beaumont did not waive its right to challenge the notice of intent. Although a party may waive a statute of limitations defense by its course of action and conduct, plaintiff has identified no acts or conduct on the part of any defendant that amount to waiver. *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 665; 741 NW2d 857 (2007).

III. Sufficiency of the Notice of Intent

Plaintiff next contends that the trial court erred by ruling that the proximate causation statement in her notice of intent was deficient and, because the period of limitations had expired, the deficiency in the notice of intent could not be cured and summary disposition was appropriate for defendants. We disagree.

This Court reviews de novo a motion for summary disposition pursuant to MCR 2.116(C)(7). *Trentadue v Buckler Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). In the absence of disputed facts, we also review de novo whether the applicable statute of limitations bars a cause of action. *Id.* This Court considers "all affidavits, pleadings, and other documentary evidence submitted by the parties and construe[s] the pleadings in [the] plaintiff's favor." *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004). Furthermore, we accept as true the complaint's contents unless contradicted by documentary evidence provided by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

The statute of limitations in a malpractice action is two years. MCL 600.5805(6). In order to initiate the lawsuit, the claimant must provide the defendant with a notice of intent to file suit at least 182 days before filing the complaint. MCL 600.2912b(1). If a claim would become barred under the statute of limitations during this 182-day waiting period after the notice of intent is served, then the statute is tolled for the "number of days remaining in the applicable notice period after the date notice is given." MCL 600.5856(c). However, if it is determined that the notice of intent is deficient, then the notice of intent will not function to toll the statute, *Roberts I*, *supra* at 64, because, in effect, the claimant has not commenced the action, *Boodt v Borgess Med Ctr*, 481 Mich 558, 563; 751 NW2d 44 (2008) (*Boodt II*).

In the present matter, Miller passed away on September 19, 2003. Accordingly, the two-year period of limitations would expire on September 19, 2005. See MCL 600.5805(6). Plaintiff filed her notice of intent on April 22, 2005, and her complaint and affidavits of merit 182 days later, on October 21, 2005. Given these facts, plaintiff's notice of intent tolled the statute of

limitations and her claim was properly before the court, presuming that her notice of intent was sufficient. See *Roberts I*, *supra* at 64; MCL 600.5856(c).

However, in order for a notice of intent to be sufficient, it must contain all the information required under § 2912b(4). See *Boodt II*, *supra* at 562-563. That provision provides the following:

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

A claimant must present this information "with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them." *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 701; 684 NW2d 711 (2004) (*Roberts II*). Although some of the information supplied in the notice of intent will evolve as discovery proceeds, a claimant is "required to make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings." *Id.* (emphasis in original). With respect to causation, it is not sufficient to state that defendants' negligence caused the alleged harm. *Id*. at 699 n 16. Rather, the claimant must describe the manner in which the actions or lack thereof caused the complained-of injury. *Boodt II*, *supra* at 560. Further, no portion of the notice of intent may be read in isolation; rather, the notice of intent must be read as a whole. *Boodt v Borgess Med Ctr*, 272 Mich App 621, 628, 630; 728 NW2d 471 (2006) (*Boodt I*), rev'd in part on other grounds 481 Mich 558 (2008).

In the instant case, the standard of care portion of the notice of intent (paragraph II) identified the following duties with respect to all defendants: obtain patient histories and perform a physical examination, recognize the signs and symptoms of a DVT and the need to immediately examine a patient exhibiting these signs and symptoms, obtain Doppler studies of the lower extremities, immediately refer a patient with the signs and symptoms of a DVT to the emergency room, and any acts of negligence identified through discovery. With respect to Malik, Oshnock, Henry Ford, and Beaumont, plaintiff averred that they had the following additional duties: order appropriate DVT prophylaxes, ensure the proper use of anti-embolitic stockings or pneumatic compression devices, assess lower extremities, order laboratory studies,

and find alternative DVT prophylaxes when the appropriate size stockings are not available. Plaintiff asserted that Malik and Oshnock also had a duty to be readily available to, and communicate with, other medical personnel. Regarding Henry Ford and Beaumont, plaintiff averred that they had the following additional duties: select, employ, train, and monitor their employees, agents, and staff, ensure that appropriate policies and procedures are adopted and enforced, and ensure proper communication among medical personnel. Plaintiff averred that Beaumont also had a duty to inform the appropriate personnel when an alternative method of DVT prophylaxis is necessary. In claiming that defendants had breached the applicable standard of practice or care, plaintiff stated, "There was a failure to do all things listed in paragraph II above." With respect to the action that defendants should have taken to comply with the standard of practice or care, plaintiff simply stated, "See paragraph II above." Regarding the manner in which the alleged breach was a proximate cause of the claimed injury, plaintiff asserted, "Had the standard of care been complied with in a timely and appropriate manner, William Miller's deep vein thrombosis would have been avoided and/or timely diagnosed and treated, thereby avoiding his demise from pulmonary embolism."

Although plaintiff stated that the DVT and Miller's subsequent death would have been avoided if the standard of care had been followed, nowhere did she state how any defendant failed to prevent, diagnose, or treat the DVT or pulmonary embolism. The reader is left to wonder whether plaintiff is alleging that the DVT could have been prevented, whether a diagnosis of the DVT could have been made in time to avoid the pulmonary embolism, or whether the pulmonary embolism could have been diagnosed or treated in time to avoid Miller's death. See *Roberts II*, *supra* at 699. Plaintiff identified many duties in the standard of care portion of the notice of intent, but she failed to describe the manner in which any failure on the part of any defendant to perform any of these duties caused Miller's DVT, pulmonary embolism, or death. For example, plaintiff asserted that all defendants had a duty to recognize the signs and symptoms of a DVT. However, she never identified these signs or symptoms or stated which, if any, Miller exhibited or how recognition of them would have prevented Miller's pulmonary embolism or death. Similarly, plaintiff never indicated how a history, physical examination, Doppler study, DVT prophylaxis, laboratory study, or alternative prophylaxes to TED hose would have prevented Miller's DVT, pulmonary embolism, or death. The notice of intent provides that all defendants had a duty to refer a patient with signs and symptoms of DVT to the emergency room, but plaintiff failed to state what treatment might have been initiated or how emergency room personnel would have prevented Miller's pulmonary embolism or death. With respect to Henry Ford and Beaumont, plaintiff asserted that they had several duties regarding policies and procedures, but she failed to identify how any breach of these duties caused Miller's DVT, pulmonary embolism, or death. Reading the notice of intent as a whole and taking into account the duties listed in the standard of care portion, the reader cannot discern the manner in which any defendant's conduct or omission caused Miller's DVT, pulmonary embolism, or death.

While recognizing that the notice of intent is served in the early stage of proceedings, we do not believe that plaintiff provided good-faith averments of details that are responsive or particularized. See *Roberts II*, *supra* at 701. The notice of intent merely stated that Miller's DVT would have been avoided or treated and his death would have been avoided if defendants had complied with the standard of care. It is not sufficient "to merely state that defendants' alleged negligence caused an injury"[;] plaintiff must provide a statement regarding "the *manner* in which it is alleged that the breach was a proximate cause of the injury." *Id.* at 699 n 16

(emphasis in original). Plaintiff asserts that medical professionals understand that an untreated DVT can break loose, become an embolus, and cause respiratory arrest. In the context of the statement of the standard of care, our Supreme Court has stated that there may be situations, such as the amputation of the wrong limb, the extraction of the wrong tooth, or the failure to remove a surgical instrument from a patient's body, where the burden required for the statement would be minimal. *Id.* at 694 n 12. However, plaintiff never stated how any defendant's failure to perform any duty caused Miller's DVT, pulmonary embolism, or death, and causation is not obvious to a casual observer. Because plaintiff failed to connect Miller's DVT, pulmonary embolism, or death to the conduct of any defendant in any meaningful way, the notice of intent failed to sufficiently put defendants on notice of the nature of the claim. *Id.* at 701. Accordingly, the trial court properly determined that the notice of intent was insufficient.

Plaintiff asserts that defendants answered her complaint, which contained the same factual allegations and breaches of the standard of care as the notice of intent, and filed affidavits of meritorious defense, which demonstrates that they understood the claims against them. However, a notice of intent requires more than merely apprising the potential defendant of the "nature and gravamen" of the plaintiff's allegations; it requires a statement of 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.'" *Boodt II*, *supra* at 560-561, quoting MCL 600.2912b(4)(e).

Plaintiff contends that the appropriate remedy for an invalid notice of intent is dismissal without prejudice. Our Supreme Court recently decided *Kirkaldy v Rim*, 478 Mich 581, 585-586; 734 NW2d 201 (2007), in which it held that a complaint and affidavit of merit toll the limitations period pursuant to MCL 600.5856(a) until the affidavit is determined to be invalid in a subsequent proceeding. However, an insufficient notice of intent does not toll the limitations period. *Boodt II*, *supra* at 561. Rather, if the notice of intent is lacking, the plaintiff is not yet authorized to file a complaint and affidavit of merit, and the limitations period cannot be tolled. *Id.* at 562-563. We therefore affirm the trial court's grant of summary disposition.

IV. Sufficiency of the Affidavits of Merit

Plaintiff also asserts that the trial court erred by ruling that the proximate causation statement in her affidavits of merit was deficient and by granting summary disposition. Given our conclusion that summary disposition was properly granted regarding the notice of intent and that plaintiff was not yet authorized to file the complaint and affidavit of merit, we need not address this issue.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William C. Whitbeck