STATE OF MICHIGAN

COURT OF APPEALS

NANCY MILLER, as Personal Representative of the Estate of WILLIAM MILLER,

Plaintiff-Appellant,

v

GHAUS MALIK, M.D., SUSAN E. OSHNOCK, PA-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

No. 277952
Oakland Circuit Court
LC No. 2006-072158-NH

Advance Sheets Version

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

O'CONNELL, J. (*dissenting*).

I respectfully dissent. I would hold that plaintiff's notice of intent and affidavits of merit, with the exception of one, were sufficient and would reverse and remand.

According to plaintiff, on August 12, 2003, William Miller (Miller) had surgery at William Beaumont Hospital (Beaumont). Defendant Ghaus Malik, M.D., performed the cervical diskectomy. After the surgery, Miller experienced lower extremity numbness. On August 19, 2003, Miller was transferred to the rehabilitation unit for therapy and discharged on August 27, 2003. Even with rehabilitation, Miller spent a great deal of time in bed.

At home, Miller experienced lower extremity numbness and had fallen. His legs were red, shiny, and swollen. Plaintiff contacted defendant Malik's office for an appointment, but was told by defendant Susan E. Oshnock, defendant Malik's physician's assistant, that Miller did not need to see defendant Malik. Plaintiff then called Miller's primary care physician, defendant Ashok Prasad. Defendant Prasad agreed to see Miller about four days after he was initially contacted. On September 19, 2003, while at defendant Prasad's office, Miller went into cardiac arrest and was pronounced dead at Botsford General Hospital. An autopsy concluded that a pulmonary embolism was the cause of death.

On April 22, 2005, plaintiff sent a notice of intent to defendants. She then filed her complaint in October 2005, along with the affidavits of merit. Defendants filed for summary

disposition, alleging the documents lacked the specificity required in their proximate causation statements. The trial court agreed and granted summary disposition and dismissed the action with prejudice.

MCL 600.2912b(4) provides the requirements for a notice of intent:

> 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.
>
> (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 care professionals and health facilities the claimant is notifying under this section in relation to the claim. [Emphasis added.]

The claimant's statements need not be correct, but a good faith effort must be made to "'set forth [the information] with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them.'" *Boodt v Borgess Med Ctr*, 272 Mich App 621, 626; 728 NW2d 471 (2006) (*Boodt I*), rev'd in part on other grounds 481 Mich 558 (2008) (*Boodt II*), quoting *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 701; 684 NW2d 711 (2002) (*Roberts II*) (alteration in *Boodt*). Because discovery has not commenced at the time the notice is required, the details provided within the notice need only "allow the potential defendants to understand the claimed basis of the impending malpractice action . . . ." *Roberts II*, *supra* at 691, 692 n 7.

Defendants' argument and the trial court's holding both rely on the fact that the paragraph following the heading, "THE MANNER IN WHICH THE BREACH WAS A PROXIMATE CAUSE OF THE CLAIMED INJURY," in the notice of intent reads in its entirety: "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." However, the issue is not whether any particular section heading contains the required information, but whether, reviewing the notice in its entirety, the information is contained somewhere in the document. *Boodt I*, *supra* at 628. "Our analysis examines whether the *notice* contains the required information, not whether any specific portion of the notice does." *Id.* (emphasis in original).

Reviewing the notice of intent as a whole reveals that defendant Malik initially recognized that Miller was at risk for deep vein thrombosis (DVT), as evidenced by the ordering of Thrombo-Embolic Deterrent (TED) hose and pneumatic compression devices, but the TED hose were too small and caused a breakdown in Miller's legs, causing the hose to be removed, and the pneumatic compression devices were never applied by the nurses. Defendant Malik failed to examine Miller at "appropriate intervals" to make certain his risk of DVT was being addressed, which resulted in Miller's developing DVT. Miller was at an increased risk for DVT because of orthopedic surgery, being sedentary, and having fallen at home, but Miller's discharge orders did not include DVT prophylaxis or instructions regarding the signs and symptoms of DVT. Miller exhibited classic symptoms of DVT as his legs were red, shiny, and swollen,[1] and such symptoms were described to defendants Malik, Oshnock, and Prasad, who should have easily recognized them as DVT symptoms in light of Miller's history and risk factors, but their failure to timely diagnose and treat Miller's DVT resulted in his death from a pulmonary embolism.[2]

In *Tousey v Brennan*, 275 Mich App 535, 539-542; 739 NW2d 128 (2007), this Court found a notice of intent sufficient even though its proximate cause statement was as follows: "Due to the negligence and/or breaches of the . . . standard of care or practice by [defendant, the decedent] suffered a life ending myocardial infarction." The notice of intent provided that the defendant doctor had failed to hospitalize the decedent and obtain an angiogram and consultation, to begin using aspirin, heparin, and beta blockers, and to send a blood sample for testing. *Id.* at 541-542. The defendant doctor had seen the decedent for chest pains, drawn blood, and performed an electrocardiogram, and he concluded that the decedent had suffered a minor heart attack, scheduled an appointment with a cardiologist for four days out, and sent the decedent home, where he died two days later. *Id.* at 541.

This is similar to the present case, where plaintiff's notice of intent alleges that defendants Malik, Oshnock, and Prasad's failure to perform various examination and diagnostic tests resulted in Miller's being sent home with an undiagnosed condition that resulted in his death before he was able to ultimately make his appointment with defendant Prasad. The factual information, viewed in conjunction with the statement that defendants breached their applicable standard of care by failing to adequately assess and address Miller's risk of DVT, failing to adequately prevent Miller from developing DVT after his operation through the use of DVT prophylaxes, and failing to examine Miller or recommend emergency care in conjunction with failing to recognize the common symptoms of DVT in a patient clearly at high risk for developing such a condition, "fulfills the purpose of MCL 600.2912b by informing defendants of plaintiff's belief that [defendants'] failure to do these things resulted in [decedent's death]." *Id.* at 542.

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[1] Although DVT can be symptomless, the symptoms include swelling in one or both legs, pain or tenderness in one or both legs, warmth in the skin of the affected leg, red or discolored skin in the affected leg, visible surface veins, and leg fatigue.

[2] It is common knowledge within the medical community that untreated DVT can result in pulmonary embolism.

That the chain of causation in this case involves multiple errors that combined to create the result does not render the notice of intent invalid. It is clear from the notice of intent that plaintiff is alleging that the failure to prevent DVT initially, combined with the later failure to diagnose and treat Miller's DVT, resulted in Miller's death from pulmonary embolism, a known result of untreated DVT. There "is no real guesswork" required to come to the conclusions that the notice of intent asserts: (1) defendant Malik should have known that Miller was at an increased risk for DVT, and the failure to use replacement DVT preventive measures for the TED hose, as well as the failure of defendant Beaumont's nurses to use the compression devices, would and did result in Miller's developing DVT; and (2) defendants Malik, Oshnock, and Prasad's failure to recognize both the obvious symptoms of DVT and Miller's increased risk of developing DVT, and their complete failure to diagnose and provide any treatment for Miller's DVT or even tell plaintiff that Miller ought to seek emergency care, resulted in Miller's DVT going untreated and getting worse until the blood clot broke free, resulting in Miller's death from a pulmonary embolism. Defendants clearly understand the nature of the suit against them after reading the notice of intent here. *Roberts II*, *supra* at 701.

Contrary to the majority's position, this case is distinguishable from *Boodt II*, as the present notice of intent contains a statement of "[t]he 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 561, quoting MCL 600.2912b(4)(e). The statement in *Boodt II* stated, "If the standard of care has been followed [the decedent] would not have died on October 11, 2001." *Id.* at 560. The statement contained in the present notice of intent goes further. It states, "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." Thus, the notice specifically stated the "manner in which [the failure to follow the standard of care] was the proximate cause of the injury claimed in the notice"—namely, failing to follow the standard of care resulted in Miller's developing DVT and in the DVT going undiagnosed and untreated, resulting in the pulmonary embolism what killed him. See *id.* at 560 n 1. Accordingly, I would conclude that the trial court erred by finding plaintiff's notice of intent insufficient.

Plaintiff also argues that the trial court erred by concluding that the proximate cause statements in her affidavits of merit were also insufficient. I agree. This Court has held that the specificity requirements for a notice of intent under MCL 600.2912b, as set forth in *Roberts II*, *supra* at 691-692, are applicable to affidavit of merit requirements under MCL 600.2912d. *King v Reed*, 278 Mich App 504, 516-517; 751 NW2d 525 (2008). To the extent that the affidavits of merit contain the same information as the notice of intent, reviewing the affidavits of merit as a whole, they also contain a sufficient statement of proximate cause. However, the affidavit of Loretta Mathews, R.N., does not contain a proximate causation statement as required by MCL 600.2912d(1)(d), making it deficient. Accordingly, the trial court also erred by ruling that plaintiff's affidavits of merit were insufficient, except for that of Mathews.

Because I determined that Mathews's affidavit was insufficient, I also address whether the trial court properly dismissed plaintiff's claims with prejudice. In *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), the Michigan Supreme Court held that "if a defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If that challenge is successful, the proper remedy is dismissal *without* prejudice." *Id.* at 586 (emphasis added). To

the extent that any of plaintiff's claims remain dismissed as a result of Mathews's insufficient affidavit, I would reverse the trial court's dismissal with prejudice and instruct the trial court to enter an order dismissing those claims without prejudice, pursuant to *Kirkaldy*.

Because I conclude that the notice of intent and affidavits of merit are sufficient, and that, to the extent Mathews's insufficient affidavit resulted in the dismissal of plaintiff's claims, the proper remedy was dismissal without prejudice, I would reverse and remand.

/s/ Peter D. O'Connell