STATE OF MICHIGAN

COURT OF APPEALS

BRUCE ESSELMAN, as Personal Representative of the Estate of DAVID ESSELMAN, Deceased,

Plaintiff-Appellee,

v

GARDEN CITY HOSPITAL,

Defendant,

and

DAVID J. FERTEL, D.O., DAVID FERTEL, D.O., P.L.L.C., and D. FERTEL, D.O., P.C.,

Defendants-Appellants.

FOR PUBLICATION
June 4, 2009

No. 280723
Wayne Circuit Court
LC No. 06-609170-NH

Advance Sheets Version

BRUCE ESSELMAN, as Personal Representative of the Estate of DAVID ESSELMAN, Deceased,

Plaintiff-Appellee,

v

GARDEN CITY HOSPITAL,

Defendant-Appellant,

and

DAVID J. FERTEL, D.O., DAVID FERTEL, D.O., P.L.L.C., and D. FERTEL, D.O., P.C.,

Defendants.

No. 280816
Wayne Circuit Court
LC No. 06-609170-NH

Before: Saad, C.J., and Davis and Servitto, JJ.

SAAD, C.J. (*dissenting*).

I. Introduction

The legislation that comprehensively regulates the prerequisites for and the filing of medical malpractice claims in Michigan places significant obligations on plaintiffs and defendants that are not found in ordinary, garden-variety tort actions. The mutual obligations imposed by the Legislature are designed to streamline and settle medical malpractice disputes, even before they become lawsuits. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997). Indeed, as a predicate to filing the litigation, a claimant must detail the factual basis for the claim, the applicable standard of practice or care, the manner in which the plaintiff claims the health professional breached that standard, what action the health professional should have taken to comply with the standard, and how the alleged breach caused the injury. After an exchange of medical records, the health professional must, in turn, respond to the plaintiff's detailed assertions by providing the factual basis for his or her defense, the standard of care the health professional believes applies, the manner in which the health professional complied with that standard, and the manner in which he or she believes that the claimed negligence did not proximately cause the alleged injury. Because medical malpractice claims may involve more than one health professional, including doctors and nurses in various specialties with different degrees of contact and control over the patient's care, our Supreme Court has, correctly in my view, held that these mutual obligations must be detailed with regard to each health professional. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004). This obligation exists for the obvious reason that the facts, standards of care, and complex medical questions will vary widely from doctor to nurse and from generalist to specialist. But today, in direct contradiction of the clear statutory mandate and the Supreme Court's ruling in *Roberts*, the majority dispenses with the obligation of a claimant to set forth this important information with regard to each health professional and holds, instead, that a general narrative about the patient's hospital stay suffices.

The majority conveniently ignores how 18 health professionals in this case, including resident doctors, surgeons, and nurses, should respond to this narrative in order to meet their individual statutory obligations to reply with applicable facts, the appropriate standard of care, and causation. Indeed, the majority justified its reasoning with the incorrect and spurious assertion that the health care professionals have the records. But, just as the majority ignores the reciprocal nature of the notice of intent requirements, it similarly ignores the mutual obligations of the claimant and health care providers to produce and exchange all relevant medical records before the litigation is commenced in order to further narrow the issues and the parties and to settle medical malpractice disputes. Moreover, the majority's studied refusal to acknowledge the rest of the statute also ignores another important feature of this legislation. After the detailing of facts, standards, and causation by the claimant and health care professionals and after the exchange of medical records, the claimant and health care professionals must produce affidavits from qualified medical experts swearing to the merits or defenses regarding duty, breach, and causation. Of course, this entire sequential and mutual statutory scheme falls apart if, as here, our Court holds that, at the first step of this multi-step process, all a claimant must do is describe a series of events, without articulating what was required of each health care professional, how the professional breached that standard of care, and how that breach caused the injuries in issue.

II. Analysis

Our Supreme Court specifically held in *Roberts* that a plaintiff's notice of intent must comply with MCL 600.2912b(4)(b) "with respect to *each defendant.*" *Roberts*, *supra* at 695 (emphasis added).[1] Subsequent cases have similarly held that "[t]he alleged standard [of practice or care] must be particularized for each of the professionals and facilities named in the notices." *Bush v Shabahang*, 278 Mich App 703, 711; 753 NW2d 271 (2008). The common sense rule comports with the clear mandate of the statute. The statute, § 2912b(4), sets forth the requirements with which the notice of intent must comply:

> 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 professionals and health facilities the claimant is notifying under this section in relation to the claim. [MCL 600.2912b(4).][2]

Plaintiff's notice of intent did not meet these statutory requirements because, although the notice includes some standards of care, it does not state which standards apply to which health professional or facility. As the Court in *Roberts* explained, "what is required is that the claimant make a good-faith effort to aver the specific standard of care that she is claiming to be applicable to each particular professional or facility that is named in the notice." *Roberts*, *supra* at 691-692

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[1] Though the Court in *Roberts* specifically addressed the notice of intent requirement for the standard of care, its holding clearly applies to the other obligations in MCL 600.2912b(4), which require a claimant to also specify, with regard to each medical professional or facility, how the health professional or facility breached the applicable standard of care, what the professional or facility should have done to comply with the standard of care, and how the particular health professional or facility's alleged breach proximately caused the claimed injury.

[2] By definition, the statute contemplates that the claimant must give all health professionals the names of all other health professionals notified under MCL 600.2912b(4), thus clearly stating that *each* health professional must be individually notified of *each* subcategory under § 2912b(4).

(emphasis deleted). In finding the notice of intent inadequate in *Roberts*, the Court further observed:

> Here, several different medical caregivers were alleged to have engaged in medical malpractice. Yet, rather than stating an alleged standard of practice or care for each of the various defendants—a hospital, a professional corporation, an obstetrician, a physician's assistant, and an emergency room physician—plaintiff's notices of intent allege an identical statement applicable to all defendants . . . . [*Id*. at 692.]

Here, the notice of intent merely sets forth a series of names followed by a series of standards and allegations and, contrary to the explicit holding in *Roberts*, plaintiff did not match the names to any of the standards of care, state how each health professional breached the applicable standard, and state how that breach caused harm to plaintiff's decedent.

In excusing this deficiency, the majority reasons that the *Roberts* Court merely warned that the standard of care set forth in the notice of intent may not be tautological and unresponsive, and that plaintiff made a good faith effort to set forth the applicable standards to satisfy the statutory requirements. But *Roberts* unequivocally states that a claimant is "required to make a good-faith averment of *some* particularized standard for each of the professionals and facilities named in the notices." *Id*. at 694 (emphasis in original). This rule stems from the plain language of the statute itself, which provides that a party may not commence a malpractice action until he or she has given "*the* health professional or health facility written notice" that includes the applicable standard of care and "[t]he manner in which it is claimed that the applicable standard of practice or care was breached by *the* health professional or health facility," and what the professional should have done differently. MCL 600.2912b(1),[3] and (4)(c) (emphasis added). In other words, each health professional called to defend a medical malpractice claim is entitled to specific notice of the recognized standard of acceptable professional practice or care in the community for his or her area of practice, specialty, or subspecialty, how the conduct of that health professional allegedly breached that standard, and what the plaintiff alleges the health professional should have done to comply with the applicable standard. A health facility is entitled to the same notice and, if vicarious liability is alleged, it stands to reason that the facility is entitled to notice of the specific standards, breaches, and what alleged action should have been taken by each medical professional.

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[3] MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

Here, while plaintiff set forth a recitation of facts about the decedent's hospitalization, he made no effort to provide notice of which standard of care applied to or was breached by each named health professional or facility, a list that includes medical practices and professionals of varying types, training, and specialties. Indeed, plaintiff's notice of intent is directed to 18 separate health professionals and entities, including a cardiovascular surgeon, a doctor of internal medicine, two cardiovascular thoracic surgical residents, a gastroenterologist, a coronary vascular thoracic surgical resident, an anesthesiologist, a certified registered nurse anesthetist, four registered nurses, and several private medical entities, including Garden City Hospital and various medical groups. As the *Roberts* Court observed:

> The phrase "standard of practice or care" is a term of art in the malpractice context, and the unique standard applicable to a particular defendant is an element of a medical malpractice claim that must be alleged and proven. *Cox v Flint Bd of Hosp Mgrs,* 467 Mich 1, 10; 651 NW2d 356 (2002). The applicable standard is governed either by statute (see, for example, MCL 600.2912a[1], which sets forth the particular proofs that a malpractice plaintiff must present with respect to a defendant's "standard of practice or care," depending on whether the defendant is a general practitioner or a specialist) or, in the absence of a statutory standard, by the common law. *Cox, supra* at 5, 20. The standard of practice or care that is applicable, for example, to a surgeon would likely differ in a given set of circumstances from the standard applicable to an OB/GYN [obstetrician/gynecologist] or to a nurse. [*Roberts, supra* at 692 n 8.]

Later in the *Roberts* opinion, our Supreme Court further explained:

> The dissent argues that nowhere in § 2912b(4) does the Legislature require that a plaintiff allege a "standard applicable specifically" to each defendant and, therefore, neither should this Court. However, as explained . . . the phrase "standard of practice or care" is a term of art. Proof of the standard of care is required in every medical malpractice lawsuit, and the Legislature has chosen to require a plaintiff to address standard of care issues in the notice of intent. Under a proper understanding of this term, the standard applicable to one defendant is not necessarily the same standard applicable to another defendant. Thus, we are attempting to do nothing more than interpret the Legislature's requirement in § 2912b(4)(b)—that a plaintiff provide a "statement" regarding the applicable "standard of practice or care" alleged. [*Roberts*, *supra* at 694 n 11 (citations omitted).]

Again, *Roberts* makes clear that a plaintiff's notice must comply with § 2912b(4)(b) "with respect to *each defendant*." *Roberts*, *supra* at 695 (emphasis added). Here, plaintiff's notice of intent contains assertions regarding what, as a group, the "physicians, residents, nurses, etc. and entities" did or failed to do for Mr. Esselman, but contains no particularization of which listed actions or what alleged standards of care for health care providers apply to any one of the

listed health professionals. Thus, the notice is insufficient to inform any one of the myriad specialists, interns, or nurses of what they "did not do or should have done to comply with the applicable standard of care." *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309, 324; 760 NW2d 699 (2008).[4] As noted, different standards apply to different classes of health professionals and, without some specific indication of the standards applicable to each named health professional or facility, even a lengthy factual narrative like plaintiff's simply fails to reasonably communicate to each professional or facility the nature of the claim plaintiff intends to pursue.

Importantly, "[t]he purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims . . . ." *Neal, supra* at 705, citing Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993. For this reason, the allegations in the notice must be sufficiently specific to allow the health professional or facility to determine the basis of the plaintiff's claim against him, her, or it and decide whether to negotiate a settlement. Here, the lack of particularized information about what standard applies and what each health professional or facility did to breach the applicable standard prevents each from ascertaining the nature, scope, and substance of the allegations against him, her, or it and from engaging in any meaningful analysis or discussion about settling the case. Despite clear differences in their occupations, practices, and specialties, plaintiff's notice asserts that the various doctors and nurses were equally required to take certain actions and equally at fault for certain aspects of Mr. Esselman's care. This does not allow any of the health professionals or facilities to understand the specific contentions about their allegedly negligent conduct and it clearly does not advance the important policy objective of promoting a fruitful settlement process.

The majority's decision advocates a buckshot approach to asserting a medical malpractice claim, which further ignores that the notice of intent provision is interconnected with the other statutory sections addressing the commencement of a claim. By minimizing the complainant's responsibilities under § 2912b(4)(b), it undermines the mutual obligations imposed by the remainder of the statutory scheme. Not only must the health professional specifically respond to the claimant's allegations with regard to the applicable duty, breach, and causation elements, he or she must provide the claimant with access to all medical records. MCL 600.2912b(5),[5] (7).[6] Thereafter, on the basis of all the foregoing documentation, a plaintiff must

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[4] The majority makes the inconsistent assertion that this Court should not apply *Shember* if *Shember* creates any more rigorous requirements than those in *Roberts*, but it then concludes that *Shember* did not expand on the requirements set forth in *Roberts*. The latter statement is correct. *Shember* simply applied the law as it has been promulgated by our courts since *Roberts*. Moreover, to the extent the majority implies that *Shember* is distinguishable because it involved "a medical malpractice suit against a number of defendants," *ante* at ___, this case, too, involves a large number of defendants—18 health professionals and entities—and plaintiff's failure to articulate the appropriate standards of care applicable to each. Accordingly, pursuant to both *Roberts* and *Shember*, plaintiff's notice of intent was insufficient.

[5] MCL 600.2912b(5) states:

(continued…)

file an affidavit of merit from an appropriate medical professional to further narrow the issues by setting forth the applicable standard of care, an opinion about how that standard of case was breached, what actions should have been taken to comply with the standard of care, and how the alleged breach proximately caused the injury. MCL 600.2912d.[7] In turn, the health care

(…continued)

> Within 56 days after giving notice under this section, the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. Subject to [MCL 600.6013(9)], within 56 days after receipt of notice under this section, the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility. This subsection does not restrict a health professional or health facility receiving notice under this section from communicating with other health professionals or health facilities and acquiring medical records as permitted in [MCL 600.2912f]. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law.

[6] MCL 600.2912b(7) states:

> Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:
>
> (a) The factual basis for the defense to the claim.
>
> (b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.
>
> (c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.
>
> (d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage.

[7] MCL 600.2912d provides:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

(continued…)

defendant must file an affidavit of meritorious defense from a qualified medical professional and include specific facts and medical information to refute the plaintiff's claim. MCL 600.2912e. Without a fair understanding of the specific allegations against the health professional or entity, it defies explanation how an expert could properly assess the merits of the claims or how any of the individual medical caregivers could adequately respond, let alone weigh whether the claims should prompt serious settlement negotiations. Thus, it also does a serious disservice to the claimant to fail to comply with the statute and the well-established caselaw.

Moreover, while the majority states that the health professionals are in a better position to sort out who must have engaged in negligent conduct, this is not an ordinary negligence case and the statute contains specific requirements reflecting the difference. The statutory scheme is clearly intended to require more rigor in the litigation of medical malpractice cases in order to narrow the issues and to encourage settlement. The majority's reasoning ignores the plaintiff's obligations under the statutes and presumes the existence of a negligent act that will reveal itself once the health professional reviews his or her own records. This is entirely at odds with the comprehensive legislative scheme and ignores that, in addition to the plaintiff's obligation to provide specific assertions about a health professional's duty, how the duty was breached, and how the breach caused the injury, medical malpractice defendants have the equal and corresponding obligation to provide the very records the majority implies are entirely within the defendants' control.

(…continued)

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.
>
> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).
>
> (3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in [MCL 600.2912b(6)], the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

III. Conclusion

For the above reasons, I would hold that, under the statute and our caselaw, plaintiff's notice of intent is simply insufficient "[b]ecause the notice examined in its entirety does not comport with plaintiff's responsibility to make a good-faith averment of all the requirements of the statute pertaining to" each health care provider. *Shember, supra* at 324. Accordingly, I would hold that the trial court should have granted defendants' motions for summary disposition.

/s/ Henry William Saad