STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY LAJOICE, as Personal Representative of the Estate of KERIN LAJOICE, Deceased,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

UNPUBLISHED
October 28, 2008

No. 277587
Emmet Circuit Court
LC No. 06-009165-NH

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of this medical malpractice action on the grounds that the notice of intent to sue and the affidavits of merit did not comply with the requirements of MCL 600.2912(b)(4) and (d)(1). We affirm.

On April 16, 2002, thirty-nine-year-old Kerin LaJoice was transferred to the emergency department at Northern Michigan Hospitals from Mackinaw Straits Hospital with a diagnosis of acute left pneumonitis and possible sepsis. There she was treated by Dr. Daniel McDonnell, a pulmonologist/internist, and Dr. Brad Vazales, a thoracic surgeon. Various procedures to drain fluid and pus from Kerin's lungs were performed during her hospital stay. On May 4, 2002, Kerin was discharged from the hospital but she was "still experiencing significant chest and back pain and incessant coughing." Her request for a home health nurse was denied by Dr. McDonnell.

On May 7, 2002, Kerin contacted Dr. Vazales' office to advise that she was coughing up blood and still experiencing chest and back pain. She was told that "everything was fine" and that she should simply keep her appointment with the doctor the following week. The next day, Kerin contacted Dr. Vazales' office again and was connected to his home by the office's answering service. She spoke with Dr. Vazales regarding the facts that she was coughing up blood and a large blood clot filled her entire ostomy bag—which had been attached prior to her

discharge from the hospital. Dr. Vazales admonished Kerin for bothering him at home, and instructed her to call his office in the morning.

As instructed, on May 9, 2002, she called Dr. Vazales' office. She was given permission to visit his office at the Mackinaw Straits Hospital. The drainage from her chest was a different color and smelled bad. She was too weak to stand. After a chest x-ray revealed a "small pneumothorax and a suspicious cavity," she was sent home by Dr. Vazales. After being home for a short time, too weak to move and coughing up blood, an ambulance was called and she was taken to a hospital where she was diagnosed with "acute progressive hemoptysis" and "R/O sepsis." She was then transferred to Northern Michigan Hospitals. Shortly after being admitted, Kerin suffered a cardiopulmonary arrest. Although able to be resuscitated, she suffered brain death, and was removed from life support.

On August 1, 2005, plaintiff sent a notice of intent to file claim addressed to all defendants named in this action. On January 31, 2006, plaintiff filed a complaint, an affidavit of merit signed by a board certified cardiothoracic surgeon, Dr. Peter Sanfelippo, and an affidavit of merit signed by Dr. John Sherman, who was board certified in internal medicine and pulmonology.

On March 31, 2006, defendant Northern Michigan Hospitals filed a motion for summary disposition under MCR 2.116(C)(8), arguing that the "notice of intent, complaint, and affidavits of merit all contain vague, non-specific allegations regarding the standard of care and alleged breaches." Specifically, it argued, first, the notice of intent "did not provide notice of the applicable standard of care, or the manner in which such standard of care was alleged to have been breached" as required by MCL 600.2912b. Second, the affidavits of merit were not individualized, and were vague as well as indefinite. They failed to set forth as to each defendant the applicable standard of care and the manner in which each defendant breached that standard. Defendant argued that:

> Plaintiff's Affidavits of Merit are little more than form documents which do not suggest what diagnosis should have been made, what treatment was required, what examinations or tests were required, whether observation and reporting on the patient's condition was at issue, what risks were involved in the treatment and what, if any, consequences or risks were not explained properly to the patient, what tests or examinations were required, and what conditions should have been diagnosed or treated. Plaintiff's affidavits of merit literally allege everything, and in so doing, allege nothing.

On April 3, 2006, the McDonnell defendants filed a motion for summary disposition. First, they argued that plaintiff's notice of intent did not comply with the requirements of MCL 600.2912b because the purported "standard of care" set forth was not differentiated or particularized as to each individual defendant. Second, plaintiff's claim as to the manner in which the standard of care was breached simply referred back to those vague, non-specific assertions. Third, plaintiff's affidavits of merit were insufficient under MCL 600.2912d because they also failed to differentiate between the alleged misconduct of the individual defendants. On April 7, 2006, defendants Vazales and Great Lakes Cardiothoracic filed a motion for summary disposition under MCR 2.116(C)(8), which basically repeated the other defendants' arguments.

On March 5, 2007, oral arguments were held on the motions for summary dismissal. The hearing concluded with the trial court granting the motions. Relying on *Roberts v Mecosta Co Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004) (*Roberts II*), the court held that different standards of care apply to each defendant facility and to physicians with different specialties. Thus a statement particularized as to each defendant must be articulated in the notice of intent and affidavits of merit. With regard to all defendants in this case, the trial court held that plaintiff's notice of intent merely set forth generic or boilerplate allegations with regard to the standards of care and the purported manner in which those standards were breached. No particularized allegations as to what actions should have been taken by which doctor or the hospital to comply with the standard of care were set forth either. The allegations made against defendants were "vague, general, and conclusory;" "they allege everything and, therefore, allege nothing." Accordingly, the court held that the notice of intent did not provide reasonable notice to defendants as to the nature of the claims against them. With regard to the affidavits of merit, the trial court concluded that they too suffered from the same fatal defects as the notice of intent—they lacked particularity. Because the statute of limitations had run on the case, the court dismissed it with prejudice. A motion for reconsideration was denied and this appeal followed.

Plaintiff first argues that the notice of intent did, in fact, comply with MCL 600.2912b(4); thus, summary dismissal was erroneous. After review de novo of the trial court's grant of summary disposition, we disagree. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

MCL 600.2912b(4) provides:

> 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.

In *Roberts II*, our Supreme Court explained:

> Under MCL 600.2912b(4), a medical malpractice claimant is required to provide potential defendants with notice that includes a "statement" of each of the

> statutorily enumerated categories of information. Although it is reasonable to expect that some of the particulars of the information supplied by the claimant will evolve as discovery and litigation proceed, the 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. The information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them. [*Id*. at 700-701 (emphasis in original).]

In that case, the plaintiff failed to identify a specific standard of care that was applicable to each of the defendants, which included an obstetrician, an emergency room doctor, and a physician's assistant. *Id*. at 701. In addition, the *Roberts II* Court noted that the plaintiff had simply alleged that the standards of care were breached, rather than indicating the manner in which they were breached: "Although the factual recitations in the notices indicate that plaintiff suffered an adverse medical result, this result is not connected in any meaningful way with the conduct of any defendant. Accordingly, plaintiff did not fulfill her obligation under § 2912b . . . ." *Id*. at 701-702.

Here, plaintiff argues that the notice of intent statute only requires that a "statement" of the six designated factors be made; it does not mandate a full, complete, or detailed statement of these factors. Plaintiff claims to have set forth an adequate "statement" of the six designated factors with regard to each defendant. Thus we turn to the notice of intent.

Defendant Northern Michigan Hospitals

With regard to defendant Northern Michigan Hospitals, review of the notice of intent reveals that plaintiff made various allegations with regard to the standard of care which included, for example, (a) that the hospital was required to "refrain from permitting physicians to practice . . . in its hospital when it knew, or in the exercise of due diligence, should have known, that said physicians were incompetent to do so," and (b) that the hospital "should forbid its employees and/or agents . . . from assaulting, battering, verbally abusing, berating and/or badgering its patients and/or other agents and/or employees." There are numerous other allegations of the standard of practice, many of which relate to nurses and physician assistants—although persons of neither profession are named defendants in this action. Even if we assume without deciding that these allegations are sufficient to state "[t]he applicable standard of practice or care alleged by the claimant," MCL 600.2912b(4)(b), plaintiff has failed to fulfill its obligation under the statute.

Turning to the statement in the notice of intent that pertains to "[t]he manner in which it is claimed that the applicable standard of practice or care was breached by the . . . health facility," MCL 600.2912b(4)(c), we find only the conclusory statement "[t]he applicable standard of practice and care was breached as evidenced by the failure to do those things set forth [in the standard of care section] above." Similarly, the statement that pertains to "[t]he alleged action that should have been taken to achieve compliance with the alleged standard or practice or care," MCL 600.2912b(4)(d), we find the conclusory statement "[t]he action that should have been taken to achieve compliance with the standard of care should have been those things set forth [in the standard of care section] above." Likewise, the statement that pertains to

"[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," MCL 600.2912b(4)(e), we find the conclusory statement "[a]s 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."

The "statements" that were purportedly responsive to the requirements of MCL 600.2912b(4)(c) and (4)(d) merely refer to the standard of care section of the notice of intent just like the "statements" rejected by the *Roberts II* Court. See *id*. at 696. These "statements" are merely indicating that defendant breached the standard of care by breaching the standard of care and the alleged action that should have been taken to achieve compliance with the alleged standard of care was to provide the standard of care. In other words, these "statements" wholly fail to provide the requisite notice.

For example, plaintiff contends that the standard of care is that hospitals "should forbid its employees and/or agents . . . from assaulting, battering, verbally abusing, berating and/or badgering its patients . . . ." And, according to plaintiff's "statement," this "standard was breached as evidenced by the hospital's failure to" "forbid its employees and/or agents . . . from assaulting, battering, verbally abusing, berating and/or badgering its patients." But merely restating the purported standard of care does not indicate the manner in which it is claimed to have been breached, e.g., which employee(s) or agent(s), did what, when, where, how is it known that the hospital did not forbid such behavior, how is it known that the employee or agent did not act in violation of a hospital policy, etc. In other words, contrary to plaintiff's claim—denoted by the phrase "as evidenced by"—there is no evidence that the hospital failed to forbid its employees and agents from perpetrating these acts against patients. The same defect exists with respect to all of plaintiff's allegations of the standard of care; the manner in which they were breached was not provided and the actions that could have been taken to comply with such standards were not set forth. Further, the "statement" that was purportedly responsive to the requirement of MCL 600.2912b(4)(e) did not indicate "the manner in which it is alleged that the breach was a proximate cause of the injury." See *Roberts II*, *supra* at 700 n 16.

In summary, these "statements" are not "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*. at 700-701. The information in the notice of intent was not set forth with any degree of specificity that would put this defendant on notice as to the nature of the claim against it. See *id*. Thus, the trial court properly held that the notice of intent with regard to defendant Northern Michigan Hospitals was insufficient.

Defendants Dr. Brad E. Vazales & Dr. Daniel E. McDonnell "and their actual and/or ostensible principals, agents and/or employees"

Plaintiff argues first that the statement of the standard of care as to defendant physicians was sufficient and the trial court's ruling that it was required to set forth a separate statement as to the standard of care applicable to each defendant was "categorically wrong." Plaintiff explains that "there is absolutely nothing in the text of §2912b(4)(b) which supports the conclusion that a notice of intent must include a statement of the standard of care particularized as to each defendant." And, nevertheless, plaintiff continues, it is alleged that both of these

doctors breached the standard of care in the same way—they failed to respond to Kerin's increasingly perilous medical condition.

We first address plaintiff's position that a statement of the standard of care particularized as to each defendant is not required by the notice of intent statute. In its brief on appeal, plaintiff opines that the *Roberts II* majority "judicially engrafted such a requirement onto the statute . . . ." We disagree. Plaintiff has asserted a claim against each defendant, seeking a recovery from each defendant, on the ground that each individual defendant committed medical malpractice. See, e.g., MCL 600.2912. And each named defendant is required to respond to the notice of intent. MCL 600.2912b(7). As such, each defendant is entitled to notice of the nature of plaintiff's claim against him, her or it and, thus, plaintiff is required to articulate statements that are particularized as to each defendant.

Next, it appears plaintiff is contending either that (1) because Vazales and McDonnell are both physicians, or (2) because both are specialists in treating lung conditions, the same standard of care is applicable to both of them and, thus, the statement in this regard is sufficient. Portions of the statement of the applicable standard of care in plaintiff's notice of intent are as follows:

> Acceptable standards of practice and care require defendants to understand and recognize that lungs allow oxygen to be carried to the entire body and that any interference with taking an appropriate amount of oxygen into the body is a life-threatening situation. Defendants should understand . . . that loculations, tissue scarring and fibrinogen coagulation and collection within the chest tube will cause abscesses, which in turn, will interfere with the body's ability to take in an appropriate amount of oxygen. . . . Defendants should be vigilant in their attempts to ensure adequate monitoring, including but not limited to, regularly assessing quality and quantity of chest tube drainage until the aforementioned patient's drainage has stopped. Defendants should ensure that any and all findings should be related to the pulmonologist and/or the cardiothoracic surgeon, and if neither chooses to . . . appropriately respond, then defendants are required to proceed up their respective chain of command in order to protect the patient.
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> * * *
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> Acceptable standards of practice and care require defendants to treat each and every patient with dignity and respect, regardless of the method of reimbursement for care and treatment.
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> * * *
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> Acceptable standards of practice and care require defendants to timely, adequately and appropriately document clinical findings, care and treatment.
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> * * *
>
> Acceptable standards of practice and care require defendants to understand the ramifications of substandard, albeit just plain sloppy and careless, treatment of a Mother of two very young Sons.

* * *

> Acceptable standards of practice and care require defendants to insert an appropriately-sized, e.g., 36-40 French, chest tube at the time of the initial thoracentesis in order to maximize the flow and rate of drainage, prevent loculations, tissue scarring and fibrinogen coagulation and collection within the chest tube.

There are numerous other allegations of the standard of practice that, for the sake of brevity, we need not repeat here. Even if we assume without deciding that these allegations are sufficient to state "[t]he applicable standard of practice or care alleged by the claimant," MCL 600.2912b(4)(b), plaintiff has failed to fulfill its obligation under the statute.

When we turn to the statement in the notice of intent that pertains to "[t]he manner in which it is claimed that the applicable standard of practice or care was breached by the health professional . . . ." MCL 600.2912b(4)(c), we find only the conclusory statement "[t]he applicable standard of practice and care was breached as evidenced by the failure to do those things set forth [in the standard of care section] above." Plaintiff's statement that pertains to "[t]he alleged action that should have been taken to achieve compliance with the alleged standard or practice or care," MCL 600.2912b(4)(d), is the conclusory statement "[t]he action that should have been taken to achieve compliance with the standard of care should have been those things set forth [in the standard of care section] above." And the statement that pertains to "[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," MCL 600.2912b(4)(e), is "[a]s 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."

For the same reasons that we held the "statements" pertaining to defendant Northern Michigan Hospitals were insufficient, we also conclude that these "statements" are insufficient. Again, even reading the notice of intent as a whole, it wholly fails to provide the requisite notice. See *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). The "statements" that were purportedly responsive to the requirements of MCL 600.2912b(4)(c) and (4)(d) merely refer to the standard of care section of the notice of intent just like the "statements" rejected by the *Roberts II* Court. See *id*. at 696. These "statements" are merely indicating that defendants breached the standard of care by breaching the standard of care and the alleged action that should have been taken to achieve compliance with the alleged standard of care was to provide the standard of care. These "statements" are not responsive to the information sought by the statute.

For example, plaintiff contends that the standard of care required "defendants to understand and recognize that lungs allow oxygen to be carried to the entire body and that any interference with taking an appropriate amount of oxygen into the body is a life-threatening situation." And plaintiff contends that it "was breached as evidenced by the failure" of "defendants to understand and recognize that lungs allow oxygen to be carried to the entire body and that any interference with taking an appropriate amount of oxygen into the body is a life-threatening situation." But merely restating the purported applicable standard of care does not indicate the manner in which plaintiff claims it was breached, e.g., what evidence is there that these physicians, who specialize in treating lung problems, did not "understand and recognize"

the oxygen-carrying capacity of lungs—a fact that most elementary school children know. In other words, contrary to plaintiff's claim—denoted by the phrase "as evidenced by"—there is no evidence that these defendants failed to understand and recognize the oxygen-carrying capacity of lungs. The same defect exists with respect to all of plaintiff's allegations of the standard of care; the manner in which they were allegedly breached was not provided and the actions that purportedly could have been taken to comply with such standards were not set forth. Further, the "statement" that was purportedly responsive to the requirement of MCL 600.2912b(4)(e) did not indicate "the manner in which it is alleged that the breach was a proximate cause of the injury." See *Roberts II*, *supra* at 700 n 16.

In summary, these "statements" are not "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." See *Roberts II*, *supra* at 700-701. Nor does the information in the notice of intent set forth with any degree of specificity that would put these defendants on notice as to the nature of the claims against them. See *id*. Thus, the trial court properly held that the notice of intent with regard to these defendants was insufficient.

Plaintiff next argues that, even if the trial court properly concluded that the notice of intent was insufficient, the court erred in concluding that the appropriate remedy was the dismissal of the case with prejudice. We disagree. Our Supreme Court in *Boodt v Borgess Med Ctr*, 481 Mich 558, 561; 751 NW2d 44 (2008) (*Boodt II*), recently held that an insufficient notice of intent does not toll the limitations period. Here, plaintiff argues that the filing of its complaint and two affidavits of merit tolled the statute. But, because the notice of intent was defective, plaintiff was not authorized to commence the lawsuit by filing a complaint and affidavits of merit; thus, no tolling occurred. See *id*. at 563. Accordingly, the trial court properly held that, because the statute of limitation had expired, dismissal with prejudice was warranted.

Next, plaintiff argues that the trial court should have allowed the notice of intent to be amended pursuant to MCL 600.2301, which allows the court to permit the amendment of "any process, pleading or proceeding." We disagree and note, first, that plaintiff never requested permission to amend the notice of intent thus this issue is not preserved for review. See *Napier v Jacobs*, 429 Mich 222, 227; 414 NW2d 862 (1987). Second, the majority of our Supreme Court in *Boodt II*, rejected this argument of the dissenting opinion holding that MCL 600.2301 only applies to pending actions and, because the notice of intent was deficient, no action was pending. *Boodt II*, *supra* at 563 n 4. The Court further rejected the position that a notice of intent constitutes a "proceeding" within the contemplation of that statute. *Id*.

In light of our conclusion that the notice of intent was insufficient as to all defendants, and thus plaintiff was not authorized to file the complaint and affidavits of merit, we need not consider plaintiff's arguments pertaining to the trial court's ruling on the affidavits of merits. And because summary disposition was proper as to all of these defendants, we need not consider plaintiff's argument pertaining to the trial court's decision on a motion in limine.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra