

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
White, P.J., Whitbeck, C.J., and Davis, J.

MELISSA BOODT, as Personal Representative of the
Estate of DAVID WALTZ, Deceased,

Plaintiff-Appellee/Cross-Appellant,

v

MICHAEL ANDREW LAUER, M.D.,

Defendant-Appellant,

-and-

BORGESS MEDICAL CENTER; HEART CENTER
FOR EXCELLENCE, P.C.,

Defendants/Cross-Appellees.

Supreme Court Docket No. 132688

Court of Appeals Docket No. 266217

Kalamazoo County Circuit Court
Case No. C03-0318-NH

**RESPONSE TO PLAINTIFF'S
APPLICATION FOR LEAVE TO
APPEAL AS CROSS-APPELLANT**

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INTRODUCTION

This is a medical malpractice action brought by the plaintiff pursuant to the wrongful death act, alleging that defendant Dr. Lauer negligently performed a cardiac catheterization procedure conducted at Borgess Medical Center on October 6, 2001. Plaintiff alleges that as a result of that professional negligence, plaintiff's decedent, David Waltz, died on October 11, 2001.

The Complaint contains no independent claim against defendant Borgess Medical Center. Rather, it alleges solely that Dr. Lauer, the cardiologist who performed the catheterization procedure, was the actual or ostensible agent of defendant Borgess, and that Borgess is therefore vicariously liable for any negligence on Dr. Lauer's part.

The Circuit Court granted summary disposition to the defendants on the basis that the plaintiff failed to properly commence the medical malpractice action by filing a Notice of Intent sufficient to satisfy the statutory requirements of MCL 600.2912b. Because the limitation period had expired on the plaintiff's claim, the Court granted summary disposition with prejudice.

In a published decision, the Court of Appeals affirmed the trial court's dismissal as to the corporate defendants, but reversed dismissal as to Dr. Lauer. Although the Opinion was fractured on the issue of whether a conflict panel should be convened to examine the irreconcilable differences between *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005) and *Verbrughe v Select Specialty Hosp*, 270 Mich App 383; 715 NW2d 72 (2006), all three Court of Appeals judges—Judge Davis, Judge White and Judge Whitbeck—agreed that the Notice of Intent did not satisfy the statutory criteria with regard to the corporate defendants.

The decisions of the lower courts dismissing Borgess Medical Center are correct. The Notice of Intent supplied by the plaintiff did not satisfy the statutory requirements as construed by this Court in *Roberts v Mecosta Co Gen Hosp* (After Remand), 470 Mich 679, 691; 684 NW2d, 711, 718 (2004) ("Roberts II"). Therefore, plaintiff's Application for Leave to Appeal as Cross-Appellant should be denied.

COUNTER-STATEMENT OF BASIS OF
APPELLATE JURISDICTION

This Court has jurisdiction to review a case by cross-appeal after decision by the Court of Appeals. MCR 7.301(A)(2); MCR 7.302(D)(2).

COUNTER-STATEMENT OF QUESTION PRESENTED

Plaintiff has filed a combined brief in opposition to defendant-appellant Michael Andrew Lauer, M.D.'s Application for Leave to Appeal, along with the plaintiff's own Application for Leave to Appeal as cross-appellant. Only one of the issues identified in the plaintiff's combined brief applies to the cross-appeal. Therefore, this defendant responds only to that issue. The question to be presented in the Application for Leave to Appeal as cross-appellant is, therefore:

- I. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING DISMISSAL OF THE CLAIMS AGAINST BORGESS MEDICAL CENTER WHERE THE NOTICE OF INTENT DOES NOT CONTAIN ANY INDICATION OF HOW BORGESS MEDICAL CENTER HAD ANY FACTUAL INVOLVEMENT IN THE UNDERLYING EVENTS, DOES NOT INDICATE HOW THE THREE NAMED DEFENDANTS ARE RELATED, AND LEAVES EVEN A MEDICALLY SOPHISTICATED READER TO GUESS AT THE FACTUAL BASIS FOR THE CLAIM.**

Plaintiff-appellee/cross-appellant says, "Yes."

The Circuit Court said, "No."

The Court of Appeals majority and partial concurrence both said, "No."

Defendant Borgess Medical Center says, "No."

COUNTER-STATEMENT OF FACTS

Plaintiff filed a Notice of Intent on January 13, 2003, followed by a Complaint on June 19, 2003. In the course of the ensuing litigation, defendants Dr. Lauer and Heart Center for Excellence moved to dismiss the claim due to the plaintiff's failure to serve a Notice of Intent that complied with MCL 600.2912b. (Ex. 1). Defendant Borgess Medical Center joined in the co-defendants' motion. (Ex. 2). Plaintiff filed a response. (Ex. 3). Oral argument occurred on July 14, 2005. (Ex. 4). At that hearing, the Court explained in detail the multiple reasons why summary disposition was mandated:

THE COURT: Let me just—I'm gong to proceed to decide this motion.

* * *

I think we can approach this a—as basically a (C)(7) motion, although (C)(8) is tangentially involved and, perhaps less so, (C)(10).

MCL 600.2912b sets forth the—some of the procedural requirements prior to initiation of a medical malpractice suit, specifically provides in general that no malpractice suit alleging medical misconduct can be commenced unless the healthcare provider is served with a notice 182 days before the action is commenced.

The effect of the filing of the notice is to—just to toll the statutory period—the statutory limitation period.

In subsection (4) of that statute, the statute delineates six specific statements that are required to be in the notice of intent:

- “(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.”

And “(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.”

Now there’ve been a number of cases dealing with this whole area of notice of intent. But I think that a fair reading of the case law compels the conclusion that the appellate courts have—have required a fairly strict compliance with the requirements of the statute. And this—this goes back not only in terms of *Roberts*—which is a 2004 decision—but as early as—as *Rheaume v Vandenberg* at 232 Mich App 417 where it was noted that, again, a notice of intent to sue a health professional or health facility must strictly comply with the requirements of the statute requiring notice in order for the two-year statute of limitations to be tolled during the pre-suit notice period.

I think it’s fair to state, also, in this file that if the notice is invalid the statute of limitations has run; and I don’t think anybody disagrees with that—

* * *

Of course there have been a variety of cases—most unpublished but some published—that lead up to what is probably the current case that is most cited when challenges are made to the—to the notice of intent; and that, of course, is the well-known *Roberts v Mecosta County General Hospital (After Remand)*, 470 Mich 679, a 2004 decision.

Now here again, I can appreciate the dilemma that counsel face—both on the plaintiff’s side and defendant’s side—in drafting documents as—as the

law on the statutes tend to settle and the dust clears. It is—It is a challenge that I would not enjoy.

Nonetheless, we are as trial judges faced with making decisions based on what seems to be the applicable law and the standards that are applied.

In the *Roberts*' decision—And, of course, this was on—This was after remand.—there's an extensive review of the statute that I've cited. And basically—One of the holdings is that—In *Roberts*—And I quote at page 692 and this is the Michigan cite.

“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 or professional corporation, an obstetrician, a physician's assistant, and an emergency room physician—plaintiff's notice of intent alleges an identical statement applicable to all defendants.”

And, again, that came under pretty severe criticism.

“The Court then concluding, thus, plaintiff's notice has neither alleged a standard specifically applicable to defendant facilities nor did they serve as adequate notice to those defendants that plaintiff planned to proceed under a vicarious liability theory at trial.”

Now plaintiffs argue, well, that's apparent in our situation by who we named and who we identified. It may or may not be apparent. All I'm suggesting is that when I looked at this, you know, I saw at least initially four potential defendants. I had no idea who the various PCs were. I could probably make some intelligible guesses; but basically, again, in Roberts, they were highly critical of the shotgun approach—if you will—to—to—to these—to these types of notices.

Now in this case the notice here in question, basically, (A), the factual basis was—And I

quote.—on October 6, 2001, Mr. Waltz presented to defendants for an elective PTCA, period. During the procedure the defendants caused a perforation which led to Mr. Waltz's death—end of—end of quote. That states a fact. He presented for some type of procedure—a PTCA. There was a perforation. He died. Those are the basic facts.

Frankly, you probably could have enlarged that a little bit because I think you knew at that point there was a wire involved, the perforation, there was some bleeding that probably occurred that shouldn't have occurred; but, in any event—

Under (B), the applicable standard of care or practice alleged, it says, see paragraph (C).

Now curiously under paragraph (C) where the—which talks about the breach—In essence what your notice says that the applicable standard of care, you stated in the negative. By referring you to subparagraph (C), you're saying you failed to diagnose. I don't think that's the—the—the standard of care is a failure to diagnose.

But, again, I don't think we're hypertechnical about these readings necessarily, but it's just a curious way. And I realize the courts have said that no particular format is noted; but, technically, there is no standard of care stated if you want to be really technical because you make reference to paragraph (C), which is all in the negative or the failure to—to do certain things.

Frankly, it isn't the way I would have done it; but let's move on.

The action that should have been taken—under (D)—the action that should have been taken to achieve compliance with the standard of practice or care. It says see paragraph above.

That basically says the action that should have been taken—if you want to be technical—was a failure to do certain things rather than to do certain things.

But again, I suppose if you're a doctor and you're getting this notice, you could probably read this and

say, well, I have some idea about what they're—they're complaining. The hospital may not, the PC may not. Again, now I'm kind of looking with hindsight.

Again, the—the manner in which the standard of care, proximate cause of the injury, it simply says if the standard of care—which is stated in the negative—had been followed, Mr. Waltz would not have died on October 11, 2001.

Here, again, had I done it I would have said had the standard—First of all, I would have stated that standard of care, definitely. But, secondly, I would have stated had the standard of care been adhered to, the perforation would not have occurred, the bleeding would not have resulted, and—something that shows causation. *In other words, what was the breach, what happened as a result of the breach, and why was it different than just a bad outcome that we know does occur in medical procedures?*

I mean we all know that bad outcomes can occur even following standards of conduct—following/adhering to standards of care. There are bad outcomes. That's just the nature of the beast in terms of dealing with the human condition.

But it's the linkage from what is the standard of care to how it was breached and to what—how that—what the cause was.

Now you can say there was a perforation that led to death. That's largely conclusory, and maybe it's satisfactory; but in light of the technical requirements that seem to be applied by the appellate courts these days to these notices, I don't think it passes muster.

I don't think you can allege the standard of care in terms of a negative. I don't think you can allege a—a causation by saying if they had followed the standard of care which is already stated in the negative he would not have died. Well, thus we wouldn't have a med mal claim either. But the reality is—Maybe I'm being, again, too technical, perhaps too hypertechnical.

When I was in private practice I dealt in—in matters where I was required to be fairly specific in my draftsmanship. I drafted a lot of ordinances where I was trying to define what behavior was acceptable and unacceptable, and it was important to be specific.

I don't think I would have needed *Roberts* or *Heaume* [sic] or any of these to draft a notice of intent—an NOI, if you will; I would have done—If there were four identified parties, I would have done four different ones, each one specific as to the person or entity in question. And I certainly wouldn't have stated the standard of care in a negative by referring you to a section that says the failure. I think I would have cited the standard of care.

Again, you're simply—It's a notice. You're not required to be omniscient per *Roberts*. It's simply a notice. And while—while we're not being hypertechnical, I don't think you can come in—And I would liken it to firing a shotgun shell at three birds and not knowing which pellets are going to hit which bird. I don't think you can be that broad in your—in your analysis and your identification of the issues.

And so I think given the status of the current state of the law as I understand it—And, again, I apply the law as I believe it to exist.—I believe that the notice was invalid and so hold. Therefore, the statute of limitations has clearly run, I believe.

Moreover, because of that, I believe there's been a failure to state a claim upon which relief can be granted; and so the motion for summary disposition should be granted as to both subsection (C)(7) and (C)(8). It probably would not survive a (C)(10), but I don't need—I don't want to get into that whole analysis.

I might also say that I've also reviewed a case—which is unpublished—But, again, a lot of times when we're trying to look for guidance we look at unpublished opinions.—but *Hartzell v City of Warren*, which is at—I only have the Lexis cite.

It's 2005 Mich App Lexis 1147.—where once again they note:

In the present case, like in *Roberts*, plaintiff provides the standard of care without specifically providing who the standard is applicable to. Plaintiff simply includes a list of names of defendants including CMS and does not specifically—and does not specify what the standard or theory—what standard or theory is applicable. Thus, plaintiff's notices neither alleged a standard specifically applicable to defendant facilities, nor did they serve as adequate notice to the defendants that plaintiff planned to proceed under a vicarious liability theory at trial.

(Ex. 4 at 34-47) (emphases added). The Court entered an Order dismissing the case on July 27, 2005. (Ex. 5).

Plaintiff moved for reconsideration. (Ex. 6). The Court requested that the defendants file response briefs. Defendant Borgess Medical Center filed its response on or about September 20, 2005. (Ex. 7). The Circuit Court entered an Order denying Plaintiff's Motion for Reconsideration on October 10, 2005. (Ex. 8).

On appeal, the Court of Appeals issued a published Opinion and Order affirming the Circuit Court's dismissal of the corporate defendants, but reversing the Circuit Court's dismissal of the individual defendant. Three separate opinions were authored. Judge Davis drafted the principal opinion, in which Judge White concurred, but wrote separately to provide additional thoughts regarding the irreconcilable treatment of successor personal representatives in *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005) and *Verbrugghe v Select Specialty Hosp*, 270 Mich App 383; 715 NW2d 72 (2006). Both Judges Davis and White stated that they agreed with the reasoning of *Verbrugghe*, but conceded that they were bound by *McLean*. Judge Whitbeck also wrote separately, concurring with Judges Davis and White on all issues except

whether *McLean* or *Verbrugghe* should be the controlling precedent. Judge Whitbeck expressed the view that *McLean* was correctly decided and therefore should be the controlling precedent.

Regarding the corporate defendants, all three judges agreed that the Notice of Intent was not sufficient as to them:

A careful reading of the notice of intent fails to reveal *any* indication of how Borgess Medical Center or Heart Center for Excellence had any factual involvement in the underlying events. The notice of intent does not even indicate how the three named defendants are related. Even a medically sophisticated reader would have to guess at the factual basis for making a claim against Borgess Medical Center or Heart Center for Excellence. Therefore, the Notice of Intent necessarily fails as to Borgess Medical Center and Heart Center for Excellence, P.C., for failing to set forth a statement of the factual basis for the claim against them, pursuant to MCL 600.2912(b)(4)(a).

(Emphasis in original).

Plaintiff-appellee/cross-appellant has now filed an Application for Leave to Appeal as cross-appellant, arguing that the Court of Appeals decision affirming dismissal of the corporate defendants should be overturned. Plaintiff's argument must fail, however.

ARGUMENT

I. STANDARD OF REVIEW

The trial court's grant or denial of summary disposition is reviewed *de novo*. *Stone v Michigan*, 467 Mich 288, 291; 651 NW2d 64 (2002). The issues before the Court also present questions of statutory construction, which are questions of law that receive *de novo* review, as well. *Cruz v State Farm Automobile Ins Co*, 468 Mich 588, 594; 648 NW2d 591 (2002).

Defendants titled their motion as a "Motion to Dismiss," but at the hearing clarified that the challenge to the sufficiency of the Notice of Intent was either pursuant to MCR 2.116(C)(8) or MCR 2.116(C)(10).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. The trial court may grant the motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits and other documentary evidence, when viewed in a light most favorable to the non-movant show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Initially, the moving party has the burden of supporting its position with documentary evidence, and if self supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto*, 451 Mich at 362. “Where the burden of proof at trial and a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of fact exists.” *Quinto*, 451 Mich at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id* at 363.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff’s Complaint. The motion should be granted if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. The sufficiency of the claim is tested by the pleadings alone. *Patterson v Klienman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY DISPOSITION TO BORGESS MEDICAL CENTER BASED ON THE PLAINTIFF'S INSUFFICIENT NOTICE OF INTENT, WHICH DOES NOT CONTAIN ANY INDICATION OF HOW BORGESS MEDICAL CENTER HAD ANY FACTUAL INVOLVEMENT IN THE UNDERLYING EVENTS, DOES NOT INDICATE HOW THE THREE NAMED DEFENDANTS ARE RELATED, AND LEAVES EVEN A MEDICALLY SOPHISTICATED READER TO GUESS AT THE FACTUAL BASIS FOR THE CLAIM.

The Circuit Court dismissed the plaintiff's Complaint on the basis that the Notice of Intent did not comply with the requirements of MCL 600.2912b. The Court of Appeals affirmed the Circuit Court's decision with regard to the corporate defendants. These decisions are correct, and there is no need for this Court to grant leave on plaintiff's cross-appeal.

MCL 600.2912b(1) precludes a medical malpractice claimant from commencing suit against a health professional or health facility unless written notice is provided to that professional or facility before the action is commenced. After providing the written notice, the claimant must wait for the applicable notice period to pass before filing suit. The two-year limitation period for medical malpractice actions is tolled during the notice period "after the date notice is given *in compliance* with Section 2912b." MCL 600.5856(d) (emphasis added). In other words, to toll the limitation period under §5856(d), the claimant must comply with *all* the requirements of §2912b. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64; 642 NW2d 663 (2002) ("*Roberts I*").

MCL 600.2912b(4) lists the specific topics that the claimant is required to address in the written 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 professionals and health facilities the claimant is notifying under the section in relation to the claim.

Id. (emphasis added).

Case law has discussed the statutes and the burden that they impose upon a plaintiff who intends to commence a medical malpractice action. For example, in *Roberts v Mecosta County Gen Hosp* (After Remand), 470 Mich 679; 684 NW2d 711 (2004) (*Roberts II*), the Court rejected Notices of Intent that “primarily set forth facts demonstrating an unfavorable outcome,” rather than Notices that satisfied *all* of the requirements of §2912b. *Id* at 690. “[I]t is plaintiff’s burden to establish compliance with §2912b and, in turn, to establish entitlement to application of the notice tolling provision, §5856(d).” *Roberts II*, 470 Mich at 691. Although a plaintiff does not have to craft the Notice “with omniscience,” *id.*, a plaintiff must “set forth particular allegations and claims regarding the applicable standard of care, breach, etc. Accordingly, while the claimant must set forth allegations in good faith, in a manner that is responsive to the specific queries imposed by the statute, and with enough detail to allow the potential defendants to understand the claimed basis of the impending malpractice action, the claimant is not required ultimately to prove their statements are ‘correct’ in a legal sense.” *Roberts II*, 470 Mich at 691n7.

A. **The Statement of Facts Contained in the Notice of Intent Does Not Satisfy the § 2912b Requirements.**

The Notice of Intent filed by the plaintiff in this case contains a *two sentence* factual basis for the claim: “On October 6, 2001, Mr. Waltz presented to defendants for an elective PTCA. During the procedure, the defendant caused a perforation which lead [sic] to Mr. Waltz’s death.” (Ex. 9). This skeletal statement of the factual basis for the plaintiff’s claim does not satisfy § 2912b.

Pursuant to *Roberts II*, a plaintiff must make a good-faith effort to provide information that is “set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them.” *Roberts*, 470 Mich at 700-701. In this case, the two sentence statement of the factual basis for the plaintiff’s claim is so generic that it cannot be deemed to constitute a “good-faith” effort to provide the defendants with the notice required by the statute.

First, the factual statement identifies only that Mr. Waltz presented to the “defendants” for some sort of elective procedure¹, and suggests that during that procedure something became perforated and caused Mr. Waltz to die. This statement does not attempt to distinguish between the four defendants, or to explain how the underlying events relate to each defendant.

Second, the statement is confusing and possibly even contradictory in that it first states that the plaintiff presented to the “the defendants,” but then later states that “the defendant” caused the plaintiff’s death. Which defendant, and exactly how plaintiff claims the events unfolded is left to the defendants’ imaginations.

¹ The NOI identifies the elective procedure as a “PTCA.” However, at oral argument in the Circuit Court, plaintiff’s counsel clarified upon questioning from the Court that the acronym “PTCA” was not correct. Rather, according to plaintiff’s counsel, the plaintiff underwent an elective procedure known as a “PCI.” (Ex. 4 at 20). This exchange only shows that in addition

In short, this statement of facts does nothing to show anything other than a bad result. This is precisely the sort of generic statement that has been deemed *not* to satisfy the “good faith” requirement of the statute. *See Roberts*, 470 Mich at 699 n16 (holding that it is not sufficient for the proximate cause requirement to merely state that defendants’ alleged negligence caused an injury).

The Circuit Court’s own confusion regarding the plaintiff’s statement of factual basis underscores why this Notice of Intent does not satisfy the statutory requirements. At the hearing, the Circuit Court struggled with the vagueness of the plaintiff’s statement:

THE COURT: Counsel, what is a PTCA?

MS. BEARD: Umm –

THE COURT: This isn’t a quiz. I mean –

MR. HAMMOND: Percutaneous-What is it? Percutaneous –

MR. DALTON: It’s supposed to be percutaneous cardiac intervention, your Honor.

MS. BEARD: Yes.

MR. DALTON: So it’s PCI, actually, not PTCA, which is, perhaps, picking but...(inaudible)

THE COURT: The only reason I ask is when I first read this-And, again, I’m reading it fresh-

MS. BEARD: Uhm-hmm, of course.

THE COURT: -as fresh as it can be-

MS. BEARD: ...(inaudible), your Honor.

THE COURT: -when I first read it. And it said it caused a perforation which led-led is misspelled, but that’s –that’s okay. –unless you’re alleging lead

to being fatally generic, the statement of facts in the NOI must fail because it does not even identify the correct procedure alleged to have injured the plaintiff.

poisoning. But, in any event, which led to Mr. Waltz's death. I didn't know what was perforated.

MS. BEARD: His heart was perforated.

THE COURT: Well, I'm just saying just reading it first blush, I didn't know if it was a, you know, a bowel or a – or what.

(Ex. 4). Clearly, the Circuit Court's own confusion regarding the factual basis for the claim highlights the inadequacy of the statement in the Notice of Intent.

For these reasons, the lower courts' decisions were correct.

B. Plaintiff's Statement of the Applicable Standard of Care or Practice is Inadequate.

Regarding the applicable standard of care or practice, plaintiff's Notice of Intent states simply "See Paragraph C." (Ex. 9). This statement is insufficient to satisfy the *Roberts II* threshold.

First, it is not a statement of any applicable standard of care at all. It is rather merely a reference to another portion of the notice that concerns the alleged manner of breach. Moreover, even referring to Paragraph C as instructed, the reader is confronted with generic statements of what the defendants are alleged to have done wrong. These are simply not statements of the standard of care; they are statements of the alleged manner of breach. Additionally, most of the statements are so generic that they could literally be used in any medical malpractice cause of action regardless of the underlying facts. There is no way to conclude that these form book statements constitute a "good faith" averment of "some particularized standard for each of the professionals and facilities named in the notices." *See Roberts*, 470 Mich at 694.

Second, the statement does not make any attempt to differentiate between any of the four named defendants, three of which are entities, and one of which is an individual physician. This is true of Paragraphs B and C, even including the few allegations in Paragraph C that plaintiff

identifies as being somewhat unique to this particular case. This Court has made clear that a plaintiff must make at least a good faith effort to distinguish between the standard of care applicable to individual defendants:

Here, several different medical care givers were alleged to have been 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...

* * *

Again, plaintiff was not required to provide a statement of alleged standards of care or practice that might ultimately be proven, after discovery and trial, to be correct and accurate in every respect. ***However, plaintiff was required to make a good-faith averment of some particularized standard for each of the professionals and facilities named in the notices.*** We conclude that plaintiffs’ notices failed to comply with §2912b (4)(b) with respect to each defendant.

Roberts II, 470 Mich at 692, 694-695 (emphasis added).

This plaintiff’s statement of the applicable standard of care or practice alleged, by itself, does not cross the threshold created in *Roberts II*. It is simply a blanket reference to Paragraph C. Even looking to Paragraph C, however, there is absolutely nothing in the Notice to differentiate between any of the named defendants. Without at least some attempt to identify the standard of care applicable to each defendant, the defendants have no way—short of pure speculation—to determine what theories of liability, e.g., direct or vicarious, the plaintiff intends to pursue. Just as in *Roberts II*, this cannot, as a matter of law, be deemed a good-faith effort by the plaintiff to provide the reasonably specific and particularized information required by the statute.

For these reasons, the lower courts’ decisions were correct.

C. **The Plaintiff's Statement of the Manner in Which the Alleged Standard of Care Was Breached Does Not Comply With the Statutory Requirements**

Plaintiff's statement of the manner in which the alleged standard of care was breached contains twenty-eight allegations. Even now, plaintiff appears to be wavering on her characterization of those allegations. Although the plaintiff's brief in this Court describes those twenty-eight allegations as "specific," (Plf's Brief at 21), plaintiff conceded in her Court of Appeals brief that twenty-one of these allegations are "boilerplate or general allegations." (Plf's Court of Appeals Brf. at 8). Plaintiff's linguistic change of heart aside, the first twenty-one allegations are boilerplate, formbook allegations which do not satisfy the *Roberts II* mandate for a good-faith effort to aver reasonably specific and particularized information.

However, plaintiff contends—and the Court of Appeals agreed—that seven of these allegations comply with § 2912b. Specifically, Plaintiff argues that subsections v-bb are sufficiently particularized to satisfy the *Roberts II* standard. Even if it is true that these allegations are more specific to this case than mere formbook allegations, Plaintiff's argument fails because none of these allegations make any effort (much less a good-faith effort) to distinguish between the various defendants as required by *Roberts II*. For example, each allegation begins with the word, "failed," and then proceeds to aver that something was not done. However, none of the allegations suggest "who" is alleged to have "failed." This lack of any effort to distinguish between the defendants cannot, as a matter of law, satisfy the statutory criteria as interpreted in *Roberts II*.

Plaintiff seems to suggest that because Dr. Lauer was the only named individual, it should have been clear that he was the one accused of failing. This argument improperly shifts the focus of the inquiry away from this Court's pronouncement that it is the plaintiff who must make at least a good-faith effort to fully comply with the unambiguous requirements of § 2912b.

Roberts II, 470 Mich at 682-683. This includes identifying how each defendant is alleged to have breached the standard of care. *See Roberts II*, 470 Mich at 696. If the plaintiff has not met this initial “good-faith” burden, then the case must be dismissed. That is precisely the situation here. The question pursuant to *Roberts II* is not “what could the defendants have discerned,” but rather, “did the plaintiff put forth a good-faith effort to make particular and specific averments application to each defendant.” There can be no question here that plaintiff’s statement of the manner of breach is not specific or particular to each defendant; it does not distinguish between any of the defendants.

For these reasons, the lower courts’ decisions are correct.

D. The Plaintiff’s Statement of the Actions That Should Have Been Taken to Achieve Compliance With the Standard of Practice or Care Does Not Comply With the Statutory Requirements.

Plaintiff’s statement of the actions that should have been taken to achieve compliance with the standard of practice or care is simply another reference to the generic list of allegations alleged to constitute the manner in which the standard of practice or care was breached. Specifically, plaintiff states: “See Paragraph C above.” (Ex. 9).

Just as with the alleged standard of care, discussed in Subsection B, *supra*, and with the alleged manner of breach, discussed in Subsection C, *supra*, such a generic and vague reference cannot satisfy the *Roberts II* requirement for a good-faith effort to provide reasonably specific and particular allegations applicable to each defendant.

E. The Plaintiff’s Statement of Causation Does Not Satisfy the Statute

Plaintiff’s statement of causation does not constitute a “good faith” effort to satisfy the statutory requirements. It states: “If the standard of care had been followed, Mr. Waltz would

not have died on October 11, 2001.” (Ex. 9). This statement does nothing more than assert that something bad happened to the decedent. The *Roberts II* Court addressed this exact scenario:

Plaintiff’s Notices of Intent state that “as a result of [defendants’] negligence..., [Plaintiff] is now unable to have any children.” At first blush this may appear to satisfy the proximate causation requirement of § 2912b(4)(e). However, it is not sufficient under this provision to merely state that defendants’ alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was the proximate cause of the injury.

Roberts II, 470 Mich App at 700n16 (emphasis in original).

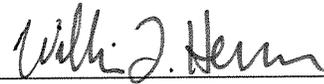
There is no way to distinguish the causation statement in this plaintiff’s Notice of Intent from the causation statement that the Supreme Court found inadequate in *Roberts II*. Just as in that case, this plaintiff simply stated that something bad happened to the decedent as a result of the defendants’ actions; namely, that the alleged negligence caused the decedent’s death. There is no effort at all, much less a good-faith effort, to state the *manner* in which the alleged negligence caused the injury. This is precisely what the Circuit Court commented upon in its ruling: “I mean we all know that bad outcomes can occur even following standards of conduct—following/adhering to standards of care. There are bad outcomes. That’s just the nature of the beast in terms of dealing with the human condition. But it’s the linkage from what is the standard of care to how it was breached and to what—how that—what the cause was.” (Ex. 4 at 44-45). Without at least a good-faith effort to provide reasonably specific and particularized information regarding the manner of causation beyond just that something bad happened, the Notice of Intent does not cross the *Roberts II* threshold.

For this reason, the lower courts’ decisions are correct.

RELIEF REQUESTED

For all the foregoing reasons and authorities, defendant/cross-appellee Borgess Medical Center respectfully requests that this Court deny the plaintiff's Application for Leave to Appeal as cross-appellant, thereby affirming the grant of summary disposition to Borgess Medical Center by the Circuit Court, as upheld by the Court of Appeals. Defendant/cross-appellee further respectfully requests any additional relief that the Court deems necessary, including, but not limited to, costs and fees incurred in this appeal.

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