

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,

Supreme Court Docket No. 132688

Plaintiff-Appellee/Cross-Appellant,

Court of Appeals Docket No. 266217

v

MICHAEL ANDREW LAUER, M.D.,

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

Defendant-Appellant/Cross-Appellee,

-and-

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

**SUPPLEMENTAL BRIEF OF**  
**DEFENDANT/CROSS-APPELLEE**  
**BORGESS MEDICAL CENTER -**  
**ORAL ARGUMENT REQUESTED**

Defendants-/Cross-Appellees.

132688  
SUPPL

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## INTRODUCTION

Defendant Borgess Medical Center submits this brief as a supplement to its Response to Plaintiff's Application for Leave to Appeal as Cross-Appellant. This Court's Order dated October 12, 2007, permitted the filing of supplemental briefs within 42 days from that date.

There is little more to say of additional substance, beyond what this defendant has already provided in its response to the Plaintiff's Application for Leave to Appeal as Cross-Appellant. This brief, however, attempts to further develop those arguments, and offers the context of numerous unpublished decisions of the Court of Appeals construing this Court's decision in *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004)—the seminal case construing the notice of intent requirements set forth in MCL 600.2912b(4). This defendant respectfully requests that this Court deny the Plaintiff's Application for Leave to Appeal as Cross-Appellant.

**QUESTION PRESENTED FOR REVIEW**

**I. WHETHER THE PLAINTIFF'S NOTICE OF INTENT SATISFIED THE REQUIREMENTS OF MCL 600.2912b(4) AS TO DEFENDANT-CROSS-APPELLEE BORGESS MEDICAL CENTER?**

Plaintiff/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

This defendant's Response to Plaintiff's Application for Leave to Appeal as Cross-Appellant contains a detailed counter-statement of facts with record references. What follows here may assist the Court by reducing those facts to the few most necessary for acting on the plaintiff's application as cross-appellant. Defendant adopts by reference, however, the more detailed Counter-Statement of Facts set forth in its response brief.

Plaintiff filed a Notice of Intent on January 13, 2003, followed by a Complaint on June 19, 2003. All of the defendants moved to dismiss the Complaint due to the plaintiff's failure to serve a Notice of Intent that complied with MCL 600.2912b.

After oral argument, the Circuit Court granted summary disposition to the defendants. The Court noted that the Notice of Intent identified several defendants, but nevertheless took a generic "shotgun" approach that ultimately did nothing to specify what standard of care, or theory of recovery, applied to each defendant. Regarding the corporate defendants, the Court concluded that "plaintiff's notice has 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 to Defendant's Response Brief, at 47).

On appeal, the Court of Appeals issued a published Opinion and Order affirming the Circuit Court's dismissal of the corporate defendants with prejudice, but reversing the Circuit Court's dismissal of the individual defendant. The Court of Appeals decision was fractured on certain issues, but 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 600.2912b(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.

On October 12, 2007, this Court entered an Order directing the Clerk to schedule oral argument on whether to grant the applications or take other peremptory action. The Order indicates that at oral argument the parties shall address “whether the Court of Appeals erred in reversing the trial court in holding that the notice of intent met the requirements of MCL 600.2912b *with regard to defendant Lauer.*” (Emphasis added.)<sup>1</sup>

### ARGUMENT

#### **I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY DISPOSITION TO BORGESS MEDICAL CENTER BASED ON THE PLAINTIFF’S INSUFFICIENT NOTICE OF INTENT**

MCL 600.2912b(1) provides that a medical malpractice plaintiff is precluded from commencing suit against a health professional or health facility unless the plaintiff provides “written notice” to the health professional or health facility before the action is commenced. The

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<sup>1</sup> The language indicating that the oral argument shall address only the issues pertaining to defendant Lauer suggests that this Court does not intend to address whether the Court of Appeals decision concerning the corporate defendants was erroneous. Notwithstanding, because the Order also states that the Court is considering whether to grant or take other action on the “applications,” and because the plaintiff’s application as cross-appellant only concerns the corporate defendants, defendant Borgess Medical Center files this brief in the event that the Court intends to hear argument pertaining to the corporate defendants.

“written notice,” must specify the factual and legal bases for the plaintiff’s claim. MCL 600.2912b(4). The notice must contain the following information:

- (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.

MCL 600.2912b(4).

It is the plaintiff’s burden to comply with MCL 600.2912b. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 691; 684 NW2d 711 (2004). The purpose of a notice of intent is to “set forth [the information sought by MCL 600.2912b(4)] with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them.” *Id.* at 701. A plaintiff 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). The plaintiff is not required to craft her notice “with omniscience.” *Id.* at 691. As stated by the Court of Appeals here, “[t]he important principle is that a defendant must not be forced ‘to guess upon what grounds plaintiff believes recovery is justified,’ but at the same time plaintiffs should not be subject to the ‘straightjacket’ of ‘[e]xtreme formalism . . . .’” *Boodt v Borgess Med Ctr*, 272 Mich App 621, 627; 728 NW2d 471 (2006) (internal citations omitted).

**A. The Factual Statement in the Notice of Intent is Inadequate**

Concerning the corporate defendants, the Court of Appeals noted that 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.” (Emphasis in original). The Court’s observations are correct.

The factual basis for the claim identified in the notice of intent comprises two sentences: “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’ death.” This statement identifies no defendant by name, much less makes any good faith effort to distinguish between the defendants. In fact, the only place in the entire notice of intent in which Borgess Medical Center is mentioned is at the very top of the first page, in the line identifying to which defendants the notice is directed. The words “Borgess Medical Center” do not appear at any other place in the notice. In short, the notice reflects no effort whatsoever—much less any good-faith effort—to distinguish between any of the four named defendants, or to explain how the underlying events relate to any of the defendants.

Plaintiff claims now that the because her theory of liability against Borgess Medical Center is limited to vicarious liability for the actions of Dr. Lauer, that the notice automatically satisfies the statutory requirements as to Borgess if it satisfies them as to Dr. Lauer. This reasoning is invalid. Irrespective of what plaintiff says now, the question is whether the Notice conveyed the information. Nothing about this Notice informed defendant Borgess Medical Center that the plaintiff’s theory of liability against it was solely based on its alleged vicarious liability for the actions of Dr. Lauer.

Plaintiff has claimed that the vicarious nature of her claim against Borgess Medical Center should be evident from the statement contained at the top of the notice of intent that “This Notice is intended to apply to the above health care professionals, entities, and/or facilities as well as their employees or agents, actual or ostensible, thereof, who were involved in the treatment of the patient, DAVID WALTZ, Deceased.” Contrary to the plaintiff’s suggestion, at most that statement suggests in a generic way that the plaintiff’s claims may encompass both direct and vicarious liability. Nothing whatsoever about that statement reflects any good-faith effort to distinguish between the four listed defendants. Is plaintiff claiming that Borgess Medical Center is vicariously liable for the acts of Dr. Lauer, or that Heart Center for Excellence is vicariously liable for the actions of Dr. Lauer, or that Borgess Medical Center is not vicariously liable for the actions of Dr. Lauer, but is vicariously liable for the actions of its employees or agents? The simple fact is that one cannot read this Notice of Intent and arrive at any understanding of how the plaintiff’s claims relate to any individual defendant. That is the minimal requirement of *Roberts*, and the plaintiff’s failure to satisfy that requirement deems the Notice of Intent insufficient.

**B. Plaintiff’s Statement of the Applicable Standard of Care or Practice, Statement of the Manner of Breach, and Statement of Actions That Should Have Been Taken Are Inadequate**

The plaintiff’s Notice of Intent was intended to apply to four different defendants. Notwithstanding, there is nothing in the plaintiff’s statement of the applicable standard of care or practice, statement of the manner the applicable standard of practice or care was breached, or statement of the actions that should have been taken, which even minimally attempts to differentiate between any of the defendants. The plaintiff’s statement of the applicable standard of care or practice is a three-word reference to the manner the applicable standard of practice or

care was breached. Obviously, that statement by itself provides no substantive information whatsoever.

Moreover, even following the instructions to refer to a statement of the manner the applicable standard of practice or care was breached, there is nothing in any of those allegations to distinguish between the various defendants. Which defendants are alleged to have failed to “keep informed of current techniques and literature regarding recognized standards of good medical practice?” Which defendants are alleged to have failed “to conduct such tests and examinations as were necessary?” Which defendants are alleged to have failed to “properly take, record, examine, review, or evaluate the medical history of the patient?” Which defendants are alleged to have failed to “employ sufficient and competent physicians, nurses, and other employees?” Which defendants are alleged to have failed to “establish and enforce or reasonably comply with Federal, State, industry, and professional standard, bylaws, procedures, rules, and regulations? For each of the twenty-eight allegations contained in Section C of the Notice, these same questions can be asked because the notice itself mentions no defendant by name and makes no effort to identify which actions are attributable to which defendants.

Nor does the statement of the actions that should have been taken add any information or bring any clarity: it, too, is merely a three word reference to the statement of the manner of breach.

The Michigan Court of Appeals, dealing with notices which similarly fail to distinguish between multiple defendants, has affirmed dismissal of the actions. In *Kwasniewski v Harrington*, unpublished opinion per curiam of the Court of Appeals, decided July 3, 2007 (Docket No. 268774) (Ex. 1), the Court of Appeals affirmed the dismissal of a plaintiff’s action

where the notice of intent did not reflect a good-faith effort to distinguish between the standards of care alleged to have applied to multiple defendants. The Court stated:

In this case, defendants were Dr. Harrington, a cardiothoracic surgeon, a professional corporation, and a hospital. Dr. App was a resident general surgeon. The standards of care for these individuals and entities are not the same. Yet the NOIs did not identify the standard of care specifically applicable to Dr. App. Furthermore, the statement in the NOI regarding the breach of the applicable standards of care merely stated that '[t]he above-described individuals, entities, and agents thereof, failed to do all those measures outlined in the above section . . . . Thus, like the NOI in *Roberts*, the NOIs lumped the duties of all the defendants together and failed to specify which actions Dr. App was required to take in order to satisfy the standard of care that applied to her.'

*Id.* at \*5.

Similarly, in *Zunich v Family Medicine Associates of Midland*, unpublished opinion per curiam of the Court of Appeals, decided May 15, 2007 (Docket Nos. 265027, 265028) (Ex. 2), the Court affirmed dismissal of a plaintiff's medical malpractice case for the reason that although the notice did allege certain standards of care with some specificity, it failed to pair each alleged breach with a particular defendant. *Id.* at \*2.

In *Watson v Detroit Receiving Hosp & University Health Ctr*, unpublished opinion per curiam of the Court of Appeals, decided April 24, 2007 (Docket No. 273643) (Ex. 3), the Court of Appeals affirmed the dismissal of a medical malpractice action for the reason that the plaintiff's notice of intent combined the statement of the applicable standard of practice or care with the statement of the manner in which it is claimed that the applicable standard of practice or care was breached, and also with the alleged action that should have been taken to comply with the standard, without differentiating or distinguishing among the named defendants. The Court conceded that the "plaintiff's notice of intent did specify how the standards of care were breached *in general*, and what actions should have been taken *in the aggregate* to comply with

those standards of care.” However, the Court identified the fundamental problem with the plaintiff’s notice as its failure to “otherwise differentiate among the various defendants.” Nor, the Court observed, did the “notice of intent indicate whether the standard of practice required each named defendant to take all of the listed actions, or in contrast whether the standard of practice required each named defendant to take only some of the listed actions.” *Id.*

In *Gray v Bronson Methodist Hosp*, unpublished opinion per curiam of the Court of Appeals, decided February 22, 2005 (Docket No. 252719) (Ex. 4), the Court of Appeals affirmed the dismissal of a medical malpractice action for the reason that the plaintiff’s various written notices, even read together, did not include a statement of the particular standard of care applicable to each defendant, did not include a statement regarding the manner in which defendants breached those alleged standards of care, did not include a statement setting forth the actions that should have been taken by the defendants, and did not include a statement regarding the manner in which defendants’ breaches of the standard of care proximately caused plaintiff’s injury.

In contrast, the Court of Appeals reversed the grant of summary disposition to the defense in *Estate of Stoyka v Mt Clemens Gen Hosp*, unpublished opinion per curiam of the Court of Appeals, decided April 19, 2007 (Docket No. 271970) (Ex. 5). However, the Court did so because:

In contrast to the statements at issue in *Roberts*, the notices of intent at issue here set forth standards of care specifically tailored to the particular facts of this case. Rather than merely indicate that defendants failed to “properly care for” or “assist” Elena, the notice of intent mailed by plaintiffs to MCGH and several of the doctors who treated Elena at that hospital, including Dr. Kitto, explicitly indicated that “the child’s airway was not properly monitored or managed.” The notice also expressly indicated that MCGH was liable for Elena’s death either vicariously, based on the negligence of MCGH staff members who treated Elena, or

through its own direct negligence in the hiring, supervision, and training of its staff.

The Notice of Intent mailed to Dr. Faber and several of the other health care providers who had treated Elena on the day before her death was similarly particular in its allegations. Indeed, the notice expressly indicated that the standard of care applicable to these individuals on that date required that Elena be admitted to the hospital for treatment or kept under observation for a longer period of time. The notice also indicated that the standard of care required these individuals to administer steroid treatment to Elena before discharging her, rather than merely providing Elena with a prescription for the steroid.

Finally, the notice of intent provided to MECP, the entity that employed Dr. Faber when he treated Elena, restated that malpractice alleged to have occurred on that date and indicated that MEC was to be sued for its direct negligence in failing to properly select and train its staff, as well as for its vicarious liability to plaintiffs for the alleged negligence of it [sic] agents, servants, and employees.

Therefore, the Notices of Intent at issue in the *Stoyka* case clearly reflected a good-faith effort to provide particular facts and allegations applicable to each of the different defendants, and moreover expressly indicated whether a defendant was alleged to be directly or vicariously liable.

The notice here is insufficient for the same reason the notices in *Gray*, *Watson*, *Zunich* and *Kwasniewski* were deemed insufficient. The lower courts reached the correct result in this regard and must be affirmed.

**C. The Plaintiff's Statement of Causation is Inadequate**

Plaintiff's statement of causation states merely: "If the standard of care had been followed, Mr. Waltz would not have died on October 11, 2001." This statement is nothing more than an assertion that something bad happened to the decedent. This Court addressed that exact scenario in *Roberts*, where it held that § 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*, 470 Mich App at 700 n16 (emphasis in original). The plaintiff’s statement of the manner of breach in this case makes no effort at all to suggest the “manner” in which it is alleged that the breach proximately caused the injury. Nor, for that matter, does the statement differentiate between any of the named defendants.

The mere correlation between alleged malpractice and an injury is insufficient to show proximate cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86-88; 684 NW2d 296 (2004). Proximate cause is a legal term of art that incorporates both cause in fact and legal (proximate) cause. *Id.* at 86. The cause in fact element generally requires showing that but for the defendant's actions, the plaintiff's injury would not have occurred. *Id.* at 86-87. Legal (proximate) cause normally involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for such consequences. *Id.* at 87.

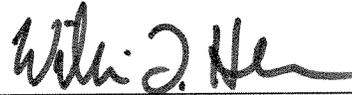
Even reading this notice as a whole, plaintiff’s statement of causation says nothing about the “manner” in which the alleged breach caused the injury. Referring to plaintiff’s statement of the manner of breach, there are twenty-eight allegations running the gamut from failing to “keep informed of current techniques and literature regarding recognized standards of good medical practice,” to failing to “conduct such tests and examinations as were necessary,” to failing to “properly take, record, examine, review, or evaluate the medical history of the patient.” The question left unanswered by plaintiff’s causation statement is *how* the alleged breaches caused the injury. How did failing to perform the necessary tests and examinations (indeed, what tests or examinations?) cause the injury? How did failing to keep abreast of current techniques and literature cause the injury? The same question goes unanswered repeatedly.

For these reasons, the lower courts reached the correct result.

**RELIEF REQUESTED**

WHEREFORE, for the foregoing reasons and authorities, defendant/cross-appellee Borgess Medical Center respectfully requests that this Court deny Plaintiff's Application for Leave to Appeal as Cross-Appellant, and otherwise deny peremptory action on Plaintiff's Application.

DATED: November 26, 2007



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