

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff-Appellee/Cross-Appellant,

Supreme Court No. 132688

Court of Appeals No. 266217

Lower Ct. No. C03-0318-NH

v

MICHAEL ANDREW LAURER, M.D.,

Defendant-Appellant,

and

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

Defendants/Cross-Appellees.

**SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT MICHAEL LAURER, M.D. AND
DEFENDANT AND CROSS-APPELLEE HEART CENTER FOR EXCELLENCE, P.C.**

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

BY: James L. Dalton (P30252)
Curtis R. Hadley (P32160)
Attorneys for Michael Andrew Laurer, M.D.
and Heart Center for Excellence, P.C.
333 Albert Avenue, Suite 500
East Lansing, MI 48823
(517) 351-6200
Fax: (517) 351-1195

FILED

DEC 7 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

132688
Suppl

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

I. THE COURT OF APPEALS DID NOT READ THE NOI “AS A WHOLE”.
INSTEAD, THE COURT CONSIDERED ONLY SELECTIVE PARTS OF THE
NOI AND IGNORED THE VAST MAJORITY OF THE STATEMENTS IN THE
NOI WHICH DO NOT COMPLY WITH MCL 600.2912b(4) AS ANALYZED BY
THIS COURT IN *ROBERTS II*. 1

A. The NOI must be specific as to each defendant. 1

B. The Court of Appeals did not read the NOI as a whole, but did just the
opposite. 2

C. This Court should put the law back in line with *Roberts II*. 6

D. Since the NOI did not specify the standard of practice or care applicable
to each defendant, the NOI is fatally deficient as to Dr. Laurer as well as
to Borgess and Heart Center for Excellence. 7

II. REGARDLESS OF THE COURT OF APPEALS’ ANALYSIS, THE NOI’S
STATEMENT OF THE PROXIMATE CAUSE ELEMENT IS WHOLLY
INSUFFICIENT. 9

CONCLUSION 10

INDEX OF AUTHORITIES

Cases

Bond v Cooper, 2007 Mich App Lexis 1356 10

Roberts v Mecosta County Hospital (After Remand), 470 Mich 679, 691-692;
684 NW2d 711 (2004)(*Roberts II*) *passim*

Stoyka v Mt. Clemens General Hospital, 2007 Mich App Lexis 1069 6

Tousey v Brennan, 275 Mich App 535; 739 NW2d 128 (2007) 6

Statutes and Court Rules

MCL 600.2912b *passim*

This supplemental brief is filed pursuant to the Court's order entered October 12, 2007. It addresses the issue stated in the order, to wit., "whether the Court of Appeals erred in reversing the trial court and holding that the notice of intent met the requirements of MCL 600.2912b with regard to defendant Laurer." Defendants have made every effort to limit this brief to new matters not contained in the application.

I. THE COURT OF APPEALS DID NOT READ THE NOI "AS A WHOLE". INSTEAD, THE COURT CONSIDERED ONLY SELECTIVE PARTS OF THE NOI AND IGNORED THE VAST MAJORITY OF THE STATEMENTS IN THE NOI WHICH DO NOT COMPLY WITH MCL 600.2912b(4) AS ANALYZED BY THIS COURT IN *ROBERTS II*.

A. The NOI must be specific as to each defendant.

There can be no question that the NOI in this case does not identify any standard of practice or care applicable to any specific defendant. It lumps all defendants together. See Exhibit B to application, paragraphs B, C and D. That is contrary to *Roberts v Mecosta County Hospital (After Remand)*, 470 Mich 679, 691-692; 684 NW2d 711 (2004) ("*Roberts II*"):

[W]hat is required is 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.

Footnote omitted; italics in original.

The requirement that the standard of care be specifically stated as to each defendant is an inherent part of MCL 600.2912b(4), as this Court point out:

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. *Post* at 712. However, as explained in n 8, 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.

(Citation omitted.) 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 II, 470 Mich 679, 694, n 11.

B. The Court of Appeals did not read the NOI as a whole, but did just the opposite.

Plaintiff and the Court of Appeals have made a false assumption to evade the statutory requirements. Plaintiff says in her response to the application, pp. 8-9:

In the pending case there is only one health care provider whose care is at issue and therefore no need to differentiate regarding different standards of care.

Emphasis in original.

That is essentially the argument the Court of Appeals adopted when it found the NOI was sufficient as to Dr. Laurer because he could have figured out that the claims in the NOI, subsections C. v. through bb., alleged the standard of care applicable to him.

See Court of Appeals opinion, Davis J., Exhibit A to application, p. 5:

Any reader of the document could not help but become aware of the specific breaches being alleged against Dr. Laurer. Because the notice as a whole could only be construed as applying against the individual defendant, it is not necessary to name him for the reader to understand that these allegations are only leveled against him.

Emphasis added.

Reading the NOI “as a whole” does not solve the problem that most of the statements in the NOI clearly fail to satisfy MCL 600.2912b(4).

It is simply untrue that “the notice as a whole could only be construed as applying against the individual defendant”. *Id.* The Court of Appeals reached this conclusion by selectively considering only subsections C. v. through bb. of the NOI. The Court said those were the only significant allegations, and blithely dismissed the

statements in subsections C. a. through u. as “boilerplate”. Of course, Dr. Laurer, in reading the NOI, had no way to know the difference between irrelevant boilerplate and real claims. Reviewing the NOI “as a whole” requires considering the whole document, not just a few selected parts.

Reviewing the specific claims in section C. of the NOI reveals much ambiguity and uncertainty as to whether they were intended to apply to Dr. Laurer, the Heart Center for Excellence or Borgess Medical Center (or some or all of these). Consider, for example, subsection b.

b. Failed to ascertain and assure that trained and competent hospital personnel were and would be, caring for and administering to the patient, and allowed untrained and/or unqualified personnel to care for and treat the patient;

At first glance, this seems to be a claim against the hospital; yet, perhaps plaintiff is asserting Dr. Laurer wrongly allowed unqualified individuals to assist him in the procedure he was performing. If so, what is the standard of care applicable to Dr. Laurer, how was it breached, what should he have done differently to comply, and if there was a breach, how did it proximately cause harm to the plaintiff? None of that information can be found in the NOI.

The same gross deficiencies exist in most other parts of section C. of the NOI. For example:

d. Failed to conduct proper or complete examinations of the patient, which examinations would have disclosed the patient’s condition.

f. failed to properly observe and report the condition of the patient;

- g. failed to properly conduct such tests and examinations as were necessary to the proper diagnosis and care of the patient;

- k. failed to timely consult with, and/or refer, the patient to a qualified specialist to aid them in diagnosing and providing the medical care required by the patient;

Exhibit B to the application. Emphasis added.

Is plaintiff asserting Dr. Laurer failed in these regards? Or do these refer to unnamed hospital personnel? If the claims are intended to apply to Dr. Laurer, what proper or complete examination did he fail to perform that was required by the standard of care? If they are intended to apply to Dr. Laurer, what did he fail to properly observe and report, what necessary tests and examinations did he fail to conduct, and how did he fail to consult with and refer the patient to a specialist? What did the standards of practice or care require in these regards? What should Dr. Laurer have done to comply? And how did these claimed breaches, if they were intended to apply to Dr. Laurer, proximately cause harm to the patient? It is impossible to say from the NOI.

The majority of subsections C. a. through C. u. are unclear as to whether they apply to Dr. Laurer, the Heart Center for Excellence or the defendant hospital. Dr. Laurer had no way of knowing whether they were intended to apply to him or not. Those claims grossly fail to comply with MCL 600.2912b(4). If Dr. Laurer thought they might be intended to apply to him, he had no way of knowing what the claimed standard of practice or care was as to each of the allegations, how he supposedly breached the standards, what he should have done differently to comply with them, and how the patient was proximately damaged by the alleged failure to comply.

To simply cut these 21 claims out of the analysis – to dismiss them as boilerplate and act as though they did not exist – as the Court of Appeals did, is the antithesis of reading the NOI as a whole.¹

It appears what the Court of Appeals meant by “reading the NOI as a whole” is that if there are some claims in the NOI which in the context of the document are sufficient to meet MCL 600.2912b(4), then the NOI will be considered entirely sufficient. There are two telling points that this is what the Court of Appeals had in mind. The first is the way the Court treated subsections C. a. through u. The Court acted as though those claims were not even part of the NOI, apparently assuming it was unnecessary to consider them since plaintiff now admits they were insufficient to comply with *Roberts II*. But plaintiff did make them part of the NOI. They were part of what Dr. Laurer received and had to analyze. To say the NOI is sufficient because a few of the claims can be discerned, even though most of the stated claims do not comply with the statute, flies in the face of *Roberts II*, where this Court said:

Although the notices of intent in this case are not wholly deficient with regard to the above requirements, they are nonetheless not in full compliance with § 2912b because they fail to properly set forth allegations regarding the standard of practice or care applicable to each named defendant, allegations regarding the manner in which it was claimed that defendants breached the applicable standards of practice or care, the alleged actions that defendants should have taken in order to satisfy the alleged standards, or allegations of the manner in which defendants’ breaches of the standards constituted the proximate cause of plaintiff’s injury.

¹As indicated in the application, even the items the Court of Appeals selected fail to support the Court’s conclusion that “the notice as a whole could only be construed as applying to the individual defendant...”. Exhibit A, opinion of Davis, J., p. 5. For example, it is unclear whether subsection C. bb. applies to Dr. Laurer because it is the technician’s role, not Dr. Laurer’s, to keep the wire in place. The fact that the technician is not a named defendant is not relevant to analyzing the NOI. See application, p. 17.

Because plaintiff did not fully comply with the unambiguous requirements of § 2912b(4), we reverse the decision of the Court of Appeals and we reinstate the judgments of the trial court granting defendants' motions for summary disposition.

470 Mich 679, 682. Emphasis added.

The other telling point showing that the Court of Appeals has failed to follow the statute and the *Roberts II* analysis is the following:

In any event, there is no real guesswork involved in coming to the conclusion that [plaintiff claims] Dr. Laurer poked a hole [in] an artery, causing massive bleeding that was not stopped in time to prevent the decedent's death.

Exhibit A to application, opinion of Davis, J., p. 6.

Such a statement is a far cry from meeting the specific requirements of §6912b(4) as analyzed by this Court in *Roberts II*. Respectfully, the Court of Appeals' opinion resembles more a discussion of what the panel believes the law should require than it does a genuine effort to apply the *Roberts II* analysis to the NOI involved in this case.

C. This Court should put the law back in line with *Roberts II*.

As noted above, the “read as a whole” maxim was used by the Court of Appeals in this case as a euphemism for a new rule of law, to wit., if some of the statements in the NOI meet § 2912b(4)'s requirements the document as a whole will be deemed sufficient. That is clearly contrary to *Roberts II* and is likewise contrary to the statute.

Some subsequent panels of the Court of Appeals have latched on to the Court of Appeals' “read as a whole” analysis to avoid the stricter *Roberts II* analysis. See, *Tousey v Brennan*, 275 Mich App 535; 739 NW2d 128 (2007). See also, *Stoyka v Mt. Clemens General Hospital*, 2007 Mich App Lexis 1069, oral argument granted on

application October 12, 2007, appeal dismissed November 9, 2007. See Exhibit 1, attached.²

Respectfully, this Court should put the law back in line with *Roberts II*. The Court should reverse the decision of the Court of Appeals with respect to Dr. Laurer and reinstate the trial court's summary disposition order, or grant leave to appeal.

D. Since the NOI did not specify the standard of practice or care applicable to each defendant, the NOI is fatally deficient as to Dr. Laurer as well as to Borgess and Heart Center for Excellence.

Plaintiff asserts that all claims against Borgess Medical Center and the Heart Center for Excellence were vicarious only. She asserts this fact was apparent from the NOI as a whole, and therefore Dr. Laurer should have known the claims in the NOI were against him individually.³

Plaintiff is incorrect. Some of the claimed breaches in section C. of the NOI involve claims of negligence by a facility. See, e.g., subsections C. s. and t.

²Cf. the unpublished cases cited in Borgess Medical Center's supplemental brief, pp. 11-12.

³Plaintiff's response to the application, p. 9, states:

In the pending case there are no independent claims against the facilities. The plaintiff is only proceeding vicariously against Borgess Medical Center and the Heart Center for Excellence. The plaintiff's NOI specifically stated as such:

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.

This statement, along with reading the NOI as a whole put Borgess Medical Center and the Heart Center for Excellence on notice that the claims against them were vicarious in nature.

- s. Failed to ascertain the skill or qualifications of doctors who treated the patient and failed to provide, or adequately carry out through medical staff, reasonable procedures for the review, and/or supervision, of medical care furnished by doctors, to the patient;
- t. Failed to advise, instruct, and/or supervise nonphysician personnel regarding the proper care of the patient, and/or to ascertain the existence of, or established rules relating to the care and safety of persons in the patient's condition;

As noted above, other claims in section C. of the NOI can reasonably be read as applying to the facilities or against Dr. Laurer, or both.

The Court of Appeals correctly upheld summary disposition in favor of Borgess Medical Center and Heart Center for Excellence because the NOI "fails to reveal *any* indication of how [the facilities] had any factual involvement in the underlying events***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)." Exhibit A to application, Davis, J., p. 4.

As discussed above, the vast majority of the claims in section C. of the NOI, particularly subsections C. a. through u., fail to delineate the standard of practice or care applicable to each defendant. In fact, those subsections fail to comply with MCL 500.2912b(4)(a) through (e). Summary disposition was proper as to Borgess and Heart Center for Excellence because representatives of those facilities reading the NOI could not know which claims were intended to apply to which defendant, and since the NOI failed to state the standard of practice or care applicable to each defendant, how each defendant breached the standard, what each defendant should have done to comply, and how each defendant's alleged breach was the proximate cause of the harm.

The Court of Appeals erred in bifurcating its analysis of the NOI. The NOI was deficient across the board. The statements in the NOI were no less ambiguous, incomplete and insufficient as to Dr. Laurer than they were to the facilities. Summary disposition was proper as to Borgess and the Heart Center for Excellence. It was equally proper as to Dr. Laurer.

II. REGARDLESS OF THE COURT OF APPEALS' ANALYSIS, THE NOI'S STATEMENT OF THE PROXIMATE CAUSE ELEMENT IS WHOLLY INSUFFICIENT.

MCL 600.2912b(4)(e) requires the plaintiff to state in the NOI:

- (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.

Emphasis added.

The NOI in this case states with regard to that requirement:

If the standard of care had been followed, Mr. Waltz would not have died on October 11, 2001.

Exhibit B to application, p. 4.

That assertion plainly fails to comply with the statute. As noted in point I, there were numerous claims in the NOI which can reasonably be read as applying to Dr. Laurer and/or to the other defendants. If plaintiff is claiming Dr. Laurer breached (unidentified) standards of practice or care in failing to have qualified people assist him (b.); failing to conduct proper examinations (d.); failing to keep informed of current techniques (e.); failing to properly observe the patient (f.); failing to conduct tests (h.); failing to provide prudent medical care (i.); failing to pursue conservative treatment (j.); failing to timely consult with and/or refer to a specialist (k.); failing to follow consultation procedures (l.); failing to take, record and evaluate medical history (m.); failing to

diagnose care and treat (n.), etc., how did those alleged breaches cause the death of the decedent? The NOI does not say. It does not even offer a clue.

Even if we ignore the majority of the claims in the NOI and focus only on subsections C. v. through bb. as the Court of Appeals did, the NOI still grossly fails to comply with MCL 600.2912b(4)(e). Asserting the patient would not have died if defendants had complied with the standard of care says nothing. It is the kind of circular or tautological statement found insufficient in *Roberts II*. 470 Mich 679, 694. Simply stating that violations of the standard of care are a proximate cause of the damages does not fulfill the statutory requirement that the NOI state “the manner in which” the alleged breach was the proximate cause of the harm. See *Bond v Cooper*, 2007 Mich App Lexis 1356, copy attached as Exhibit 2, applying the *Roberts II* analysis to the affidavit of merit requirements.

CONCLUSION

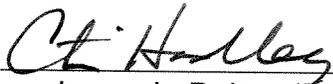
For all of the above reasons, defendants Michael Laurer, M.D. and Heart Center for Excellence respectfully request the Court to enter an order reversing the Court of Appeals’ decision with respect to Dr. Laurer, or to grant the application for leave.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

Attorneys for Michael Andrew Laurer, M.D.
and Heart Center for Excellence, P.C.

Dated: December 7, 2007

By: 
James L. Dalton (P30252)
Curtis R. Hadley (P32160)
333 Albert Avenue, Suite 500
East Lansing, MI 48823
(517) 351-6200/Fax: (517) 351-1195