STATE OF MICHIGAN

IN THE SUPREME COURT

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

Plaintiff-Appellee/Cross-Appellant,

v

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

Defendants/Cross-Appellees,

and

MICHAEL ANDREW LAURER, M.D.;

Defendant-Appellant.

Supreme Court No. 266217

Court of Appeals No. 266217

Lower Ct. No. C03-0318-NH

132688 reply/ans X App

DEFENDANT-APPELLANTS MICHAEL LAURER, M.D.'S REPLY BRIEF, AND HEART CENTER FOR EXCELLENCE, P.C.'S RESPONSE TO PLAINTIFF'S CROSS-APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

FILED
FEB 6 2007
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

BY: James L. Dalton (P30252)
Matthew K. Payok (P64776)
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

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

ARGUMENT 1

I. PLAINTIFF FAILS TO OFFER AN INTERPRETATION OF MCL 600.2912b THAT WOULD ALLOW HER SEVEN ONE-SENTENCE ASSERTIONS TO SATISFY §§ 2912b(4)(b)-(d)'S THREE SEPARATE AND DISTINCT REQUIREMENTS. 2

II. PLAINTIFF FAILS TO EXPLAIN HOW OR WHY HER CLAIMS IN THIS CASE WERE "OBVIOUS" OR "SIMPLE," SINCE EVEN THE TRIAL COURT RECOGNIZED THAT "BAD OUTCOMES CAN OCCUR EVEN FOLLOWING STANDARDS OF [CARE] . . ." 4

CONCLUSION AND RELIEF REQUESTED 7

INDEX OF AUTHORITIES

Cases

Jones v Porretta, 428 Mich 132, 152;
405 NW2d 863 (1987) 1, 4

Koontz v Ameritech Services, Inc, 466 Mich 304, 312;
645 NW2d 34 (2002) 3

Roberts v Atkins (After Remand) ("*Roberts II*"), 470 Mich 679, 686;
684 NW2d 711 (2004) . . . . . *passim*

Wickens v Oakwood Healthcare Sys, 465 Mich 53, 60;
631 NW2d 686 (2001) 1

Statutes

MCL 600.2912 . . . . . *passim*

ARGUMENT

Plaintiff appears to believe that if she continues to repeat an assertion, it will become true by repetition alone. To this end, she continually repeats that her NOI in this case is not like the NOI this Court found to be insufficient in *Roberts v Atkins (After Remand)* ("*Roberts II*"), 470 Mich 679, 686; 684 NW2d 711 (2004), and that it provides all the information that MCL 600.2912b requires. She fails, however, to explain the basis for these assertions, and they lack any force or effect as a result.

She also fails to acknowledge the two fundamental errors that are fatal to her position. The first is her improper assumption that she can provide notice of her malpractice claim simply by asserting that the decedent died during the procedure, leading to her assertion that the claims in this matter are somehow "obvious." Cardiac catheterization, however, is an inherently dangerous procedure, and perforation of arteries absolutely *can and does occur* in the absence of negligence. Contrary to plaintiff's unsupported assertion, the "standard of care" does not simply require the physician to perform the procedure without leading to "a bad result." *Jones v Porretta*, 428 Mich 132, 152; 405 NW2d 863 (1987).

Second, and most importantly, is plaintiff's inability to comprehend that MCL 600.2912b has *six separate and distinct requirements* for the information that a NOI must contain. These requirements must call for *separate and distinct* information or else some of the requirements would be rendered nugatory. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). While a claimant is free to allege statements in the negative or to follow whatever format she chooses, in the end the NOI must provide "particularized" information regarding each of these six requirements. The seven one-

sentence assertions the Court of Appeals identified here simply do not provide such information regarding standard of care, manner of breaching the standard, and the action that should have been taken to meet the standard. There is no basis to conclude otherwise.

Defendant-appellant Michael Laurer, M.D., and defendant/cross-appellee Heart Center for Excellence, P.C. ("defendants") will not needlessly repeat the assertions set out in Dr. Laurer's application for leave to appeal, and incorporate those assertions here in opposition to plaintiff's application for leave to cross-appeal. Defendants also concur with and adopt co-defendant-appellee Borgess Medical Center's response opposing plaintiff's cross-application for leave to appeal, and assert that the criticisms of plaintiff's NOI expressed there reinforce why the NOI is defective as to all defendants here. Nevertheless, defendants will address the fundamental errors in plaintiff's assertions below.

I. PLAINTIFF FAILS TO OFFER AN INTERPRETATION OF MCL 600.2912b THAT WOULD ALLOW HER SEVEN ONE-SENTENCE ASSERTIONS TO SATISFY §§ 2912b(4)(b)-(d)'S THREE SEPARATE AND DISTINCT REQUIREMENTS.

Plaintiff carefully avoids discussing § 2912b and its requirements, preferring to monotonously rely on assertions that her claims are "obvious" and that her NOI is different than the *Roberts II* NOI. As a result, she fails to explain or even address how the seven one-sentence assertions she relies on can possibly satisfy three separate and distinct statutory requirements that ask for three different kinds of information. Specifically, §§ 2912b(4)(b)-(d) require the NOI to provide statements of *"at least* the following":

> (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.

As defendants explained in their application, the standard of care requirement *must* require distinct information from the manner of breach requirement, or else § 2912b(4) would have one requirement for subsections (b) and (c) instead of two. See, e.g., *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). The same is true for § 2912(b)(4)(d). Regardless of the statutory structure, the substance of the requirements is separate and distinct, as defendants also explained in their application. The standard of care is not the same as the actions that breached it. The actions that should have been taken to meet the standard of care are not the same as the breaches.

While it is conceivable that in some circumstances one set of statements could satisfy §§ 2912b(4)(b)-(d) – or indeed all of § 2912b(4)'s requirements – that absolutely did not occur here. Plaintiff correctly asserts that § 2912b(4) does not require the claimant to follow a specific format, and it is possible that a NOI could simply contain narrative paragraphs and comply with the statutory requirements. But the allegedly compliant portion of plaintiff's NOI is nothing more than seven single sentences. The sentences do not and cannot provide all the information §§ 2912b(4)(b)-(d) require. And the NOI is fatally defective for that reason.

Plaintiff's failings under §§ 2912b(4)(b)-(d) do not tell the whole story. As Dr. Laurer explained in his application, the NOI's statement of facts and proximate cause statement were also insufficient under §§ 2912b(4)(a) and (e). But both defendants and co-defendant Borgess have already explained the reasons for this, and defendants will not repeat those assertions here. In summary, however, plaintiff's NOI is wholly deficient under § 2912b(4) – in every category and against all defendants – and nothing plaintiff has asserted here changes that result.

II. PLAINTIFF FAILS TO EXPLAIN HOW OR WHY HER CLAIMS IN THIS CASE WERE "OBVIOUS" OR "SIMPLE," SINCE EVEN THE TRIAL COURT RECOGNIZED THAT "BAD OUTCOMES CAN OCCUR EVEN FOLLOWING STANDARDS OF [CARE] . . ."

The bulk of plaintiff's brief is made up of the continuous assertions that her claims should have been "obvious" from her NOI. For instance, she asserts that " the claims brought . . . are such that it is obvious that the standard of care would require the physician to perform the surgery without perforating the patient's artery . . . ." (**Plaintiff's Response, p vi**). But that is little more than stating that the standard of care requires a physician to avoid a bad result, which Michigan courts have repeatedly acknowledged is incorrect. See, e.g., *Jones*, 428 Mich at 154 (" . . . in a normal professional negligence case, a bad result, *of itself*, is not evidence of negligence sufficient to raise an issue for the jury.") (italics original).[1]

The trial court acknowledged this rule, and noted that the plaintiff's NOI presumed that a bad result was all that had to be alleged:

> 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. . [**Exhibit A to Defendant's Application, pp 5-7**.]

---

[1] The Court of Appeals apparently accepted plaintiff's assertion that she was not required to prove anything more than a bad result, holding "that there is no real guesswork involved in coming to the conclusion that Dr. [Laurer] poked a hole an artery, causing massive bleeding that was not stopped in time to prevent the decedent's death." This is inconsistent with *Jones*, and provides another example of why the Court of Appeals' analysis was incorrect.

So the assertion that plaintiff's malpractice claims are "obvious" simply because a perforation occurred is ill-founded because perforations can and do occur in the course of the procedure defendants performed in the absence of negligence. Simply alleging the "bad result" of perforation in the NOI was therefore insufficient to put defendants on notice of the nature of the claims because it does not explain what defendants did to cause the perforation that was allegedly below the standard of care.

As co-defendant Borgess Medical Center asserts in its response brief, the "bad result" rule is also one reason why plaintiff's statement regarding proximate causation was deficient under *Roberts II* and § 2912b(4)(e). The statute requires the claimant to identify *the manner in which* the claimant alleges the purported breaches of the standard of care caused the injury. *Roberts II*, 470 Mich at 700 n 16. Again, however, plaintiff simply set forth a one-sentence conclusory assertion: "If the standard of care had been followed, Mr. Waltz would not have died on October 11, 2001." This is indistinguishable from the statement this Court found deficient in *Roberts II*, and is similarly fatal to this NOI.

Moreover, although plaintiff asserts otherwise, it is not "clear" – from either the NOI or the following complaint – that all of defendant's claims against defendants other than Dr. Laurer were "vicarious." For instance, as Dr. Laurer stated in his initial application, the physician is *not* the person who secures the wire when performing the procedure. An assistant or technician secures the wire, and so allegations regarding securing the wire would not be expected to apply to Dr. Laurer. And although plaintiff relies on the NOI's statement that the notice applies to all named healthcare providers as somehow relevant here, that statement does not clear up the confusion regarding which defendant was allegedly responsible for which action or inaction.

Plaintiff's complaint also alleges some independent duties of Borgess Medical Center, such as the duty to select medical staff and to keep records, and well as to "furnish" plaintiff with "competent, qualified, and licensed . . .nurses . . . and other employees." (**Complaint, ¶¶ 7-8**). In later paragraphs, it simply refers to "defendants" when discussing the alleged tortious conduct. (**Complaint, ¶¶ 18-20**). So the complaint does not confirm the NOI's allegations, as plaintiff alleges. Nor did it provide any tool to assist in interpreting the NOI, since it was filed months after defendants received the NOI.

Plaintiff also uses deposition testimony to establish that the NOI is clear on its face. The first and rather glaring inconsistency here is that if the NOI is clear on its face, nothing else should be needed to interpret it. Second, that a potential defendant may able to later reconstruct what a claimant actually meant in a NOI through discovery after the case has been filed and discovery begins does not make the NOI any less deficient *at the time it was served*. The purpose of § 2912b's NOI requirement is that a potential defendant have notice of the claims against him *in the notice*, not later after litigation ensues. If subsequent deposition testimony is necessary to interpret the NOI, it should be obvious that the NOI itself is deficient.

As a result, nothing about plaintiff's claims against the defendants is "clear" or "obvious" from the NOI. Interpreting the notice requires substantial "guesswork" by all defendants, contrary to what the Court of Appeals held. Plaintiff's assertions fail in this regard as well.

CONCLUSION AND RELIEF REQUESTED

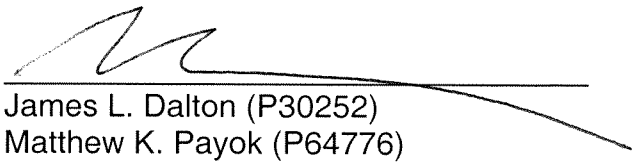
Plaintiff's attempts to justify both her NOI and the published Court of Appeals decision at issue fail for the reasons stated above. The Court of Appeals decision is both a rejection of the *Roberts II* analysis and of § 2912b(4)'s plain language. Seven conclusory, one-sentence assertions cannot satisfy §§ 2912b(4)(b)-(d) on their own terms or as interpreted in *Roberts II*. These statements – and the NOI generally – also failed to differentiate between defendants in any manner, failed to specifically identify any standards of care, and failed to provide a coherent statement regarding causation.

For all these reasons, and the reasons set out in their application and in co-defendant Borgess Medical Center's response, defendants ask this Court to peremptorily reverse the Court of Appeals decision and reinstate the trial court's opinion, or in the alternative, grant leave to appeal the Court of Appeals' ruling regarding the NOI as applied to Dr. Laurer. For the same reasons, defendants ask this Court to deny plaintiff's cross-application.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

Dated: February 5, 2007

BY: 

James L. Dalton (P30252)
Matthew K. Payok (P64776)
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

I:\Team_c\ProNational\97714 Waltz\SupremeCourt\97714applv (response).wpd

STATE OF MICHIGAN

IN THE SUPREME COURT

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

Plaintiff-Appellee/Cross-Appellant,

v

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

Defendants/Cross-Appellees,

and

MICHAEL ANDREW LAURER, M.D.;

Defendant-Appellant.

Supreme Court No. 266217

Court of Appeals No. 266217

Lower Ct. No. C03-0318-NH

PROOF OF MAILING

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

BY: James L. Dalton (P30252)
Curtis R. Hadley (P32160)
Matthew K. Payok (P64776)
Attorneys for Defendants-Appellants 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

On the date below I mailed copies of Defendant-Appellants Michael Laurer, M.D.'s Reply Brief and Heart Center for Excellence, P.C.'s Response to Plaintiff's Cross-Application for Leave to Appeal and this Proof of Mailing to the following:

Matthew Turner
TURNER & TURNER, P.C.
26000 12 Mile
Southfield, MI 48034

Carol D. Carlson
SMITH, HAUGHEY, RICE & ROEGGE, P.C.
200 Calder Plaza Building
Grand Rapids, MI 49503

and by placing said documents into envelopes plainly addressed as stated above, and by depositing said envelopes into a United States mail receptacle located in the City of East Lansing, Michigan with the first class postage fully prepaid.

I declare the statements above are true to the best of my information, knowledge, and belief.

Dated: February 5, 2007

Betsey J. Taack

Betsey J. Taack

I:\Team_c\ProNational\97714 Waltz\SupremeCourt\97714pom.wpd

Willingham & Coté, P.C.
attorneys & counselors at law

333 Albert Avenue, Suite 500, East Lansing, MI 48823-4394
(517)351-6200 Fax (517)351-1195
www.willinghamcote.com

February 5, 2007

Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: *Boodt v Borgess Medical Center, et al*
Supreme Court No.:
Ct. of Appeals No.: 266217
Lower Ct. No.: C03-0318-NH
Our File No.: 2933-97714

Dear Clerk:

Enclosed for filing with the Court, please find original and seven copies of Defendant-Appellants Michael Laurer, M.D.'s Reply Brief and Heart Center for Excellence, P.C.'s Response to Plaintiff's Cross-Application for Leave to Appeal and Proof of Mailing in the above referenced matter.

Thank you.

Sincerely,

Betsey J. Taack

Betsey J. Taack
Secretary to Curtis R. Hadley

:bjt
Enclosures
cc w/encs: Mr. Matthew Turner
Ms. Carol D. Carlson

I:\Team_c\ProNational\97714 Waltz\SupremeCourt\97714ct.ltr.wpd

RECEIVED
FEB 6 2007
CORBIN R. DAVIS
CLERK SUPREME COURT