

STATE OF MICHIGAN  
IN THE SUPREME COURT

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

Plaintiff-Appellee,

v

BORGESS MEDICAL CENTER,

Defendant, -Appellee

and

MICHAEL ANDREW LAURER, M.D.;  
HEART CENTER FOR EXCELLENCE, P.C.,  
Jointly and severally,

Defendants-Appellants.

*and Michael Andrew Laurer, M.D., P.C., Defendant.*

Supreme Court No.

Court of Appeals No. 266217

*Cpu 1/31/06*

Lower Ct. No. C03-0318-NH

*Kalman  
P. Schaefer*

*OK*

*132688*

*APPL*

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

*49*

*30689*

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

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

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## STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant-appellees Michael Laurer, M.D., and Heart Center for Excellence, P.C. (“defendants”) seek leave to appeal the Court of Appeals’ October 31, 2006 opinion reversing the trial court’s decision that plaintiff Melissa Boodt’s (“plaintiff”) Notice of Intent (“NOI”) to file a medical malpractice action was sufficient under MCL 600.2912b as to Dr. Laurer. The published opinion largely eviscerates this Court’s § 2912b analysis as set out in *Roberts v Atkins (After Remand)* (“*Roberts II*”), 470 Mich 679, 686; 684 NW2d 711 (2004), and will now control all subsequent Court of Appeals panels under MCR 7.215(J). The opinion also negates part of § 2912b because it holds that the same information can satisfy three different statutory requirements, which effectively rewrites the statute to have only one requirement. As a result, defendants seek peremptory reversal of the Court of Appeals decision as inconsistent with *Roberts II* and reinstatement of the trial court’s ruling, or in the alternative, leave to appeal.

**STATEMENT OF QUESTION INVOLVED**

- I. **SHOULD THIS COURT PEREMPTORILY REVERSE THE COURT OF APPEALS DECISION AND REINSTATE THE TRIAL COURT'S JUDGMENT, OR IN THE ALTERNATIVE, GRANT LEAVE TO APPEAL BECAUSE THE COURT OF APPEALS DECISION EVISCERATED *ROBERTS II* BY HOLDING THAT READING THE NOI "AS A WHOLE" COULD EXCUSE SPECIFIC COMPLIANCE WITH THE STATUTORY REQUIREMENTS, AND BECAUSE IT IMPROPERLY REWROTE MCL 600.2912b TO COMBINE THREE SEPARATE REQUIREMENTS INTO ONE FOR THE SOLE PURPOSE OF VALIDATING THE NOI AT ISSUE?**

Plaintiff would answer "No."

Defendants answer "Yes."

## GROUNDINGS FOR GRANTING LEAVE TO APPEAL

This matter is of major significance to the state's jurisprudence because the Court of Appeals decision – which is published and binding on all subsequent panels under MCR 7.215(J) – effectively overrules this Court's decision in *Roberts II* and rewrites § 2912b(4). While paying lip service to this Court's analysis in that *Roberts II*, the Court of Appeals then ignored it and adopted the same rationale the Court of Appeals panel in *Roberts II* did: that a potential defendant was required to dissect and then reconstruct a NOI to divine the claims against him or her under the auspices of reading the NOI “as a whole.”

This Court explicitly rejected that approach in *Roberts II* when it reversed the panel's decision in that case. Specifically, this Court stated that it “**disagree[d] with the panel's conclusion that the required information need not be ‘separately . . . identified.’**” Certainly, the statement must identify, in a readily ascertainable manner, the specific information mandated by § 2912b(4).” *Roberts II*, 470 Mich at 696 (emphasis added). The *Roberts II* panel continually used the “as a whole” justification to rationalize non-compliance with § 2912b(4), and this Court continually rejected it.

And yet the Court of Appeals here ignored this Court's mandate and re-adopted the “as a whole” justification as though this Court had never addressed the issue. It then held that plaintiff's single set of conclusory statements satisfied three of § 2912b(4)'s six requirements, essentially rewriting these parts of the statute to make one requirement. As defendants will establish below, this was improper both under *Roberts II* and under the general tenets of statutory interpretation.

Importantly, this is not a situation where the claimant supplied all of the required information in an unconventional format. Instead, the NOI has limited information from

which the Court of Appeals required defendants to draw deductions and infer by negative reasoning. Under § 2912b, deciphering an NOI should not require the use of reasoning tools from an undergraduate course in logic to determine what the allegations are and to whom they apply.

The undeniable conclusion of *Roberts II* is that the NOI's information need not be totally accurate or complete nor follow a specific format, but all of it *must be there* in some form or another. Plaintiff's NOI here flatly fails to contain the necessary information. There was no rational basis for the Court of Appeals conclusion to the contrary.

**There is no basis for placing a burden on a potential defendant to decipher the NOI**

The Court of Appeals also impermissibly placed the onus of deconstructing a NOI on the potential defendant. This is inconsistent with this Court's holding that "it is [the] plaintiff's burden to establish compliance with § 2912b . . ." *Roberts II*, 470 Mich at 691. But more importantly, it is inconsistent with logic. The plaintiff is the party bringing the suit and seeking a remedy. The plaintiff therefore has the burden of explaining the specifics of the action to the parties she is claiming did wrong.

This is merely a factor of the roles plaintiffs and defendants play in a civil action. The plaintiff is the party seeking relief, and the plaintiff therefore has the burden to commence the action. MCR 2.101; MCR 2.201; MCL 600.1901. The plaintiff also has the burden of commencing the action within the statutory limitation period. *Ayres v Hubbard*, 71 Mich 594, 599; 40 NW 10 (1888);<sup>1</sup> *Oole v Oosting*, 82 Mich App 291, 297; 266 NW2d

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<sup>1</sup> "The rule, however, is well settled that, under a plea of the statute of limitations, the burden is on the plaintiffs to show the commencement of action within the statutory period."

795 (1978)<sup>2</sup> (“A statute of limitation is one which **requires a person who has a cause of action to bring suit within a specified period of time.**”) (emphasis added). If the plaintiff fails to properly commence the action, the action does not exist.<sup>3</sup>

The defendant, on the other hand, has no analogous duty because the defendant is not prosecuting the case. The defendant seeks no relief and has no burden to commence the action or to comply with any statute of limitations. The NOI requirement is similarly a prerequisite to commencing a medical malpractice action, and it only makes sense that the burden of complying with it falls on the plaintiff. Stating that a defendant must examine the NOI “as a whole” to parse out the information applicable to it shifts the burden of providing notice to the defendant, since it is then the defendant that determines what the claims against it are. And if the defendant fails to accurately reconstruct the plaintiff’s thought process, then it has had no real notice at all of the actual claims against it.

### **Peremptory reversal and reinstatement of the trial court’s decision is appropriate**

The Court of Appeals opinion in this matter thus presents not only error, but a complete negation of this Court’s decision in *Roberts II*. This Court has held that a NOI must “aver the specific standard of care that she is claiming to be applicable to each

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<sup>2</sup> Aff’d sub nom *O’Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980).

<sup>3</sup> If the action is never “commenced”, there is no civil action at all. The action itself is a nullity, and it can be said the court never acquires jurisdiction over the case, or alternatively, that jurisdiction never attaches. *Fox v Martin*, 287 Mich 147, 152; 283 NW 9 (1938) (dealing with a mechanic’s lien) (“the court could acquire no jurisdiction where on the face of the bill of complaint, it appeared that the rights sought to be enforced, were not only not provided for in such statute but were nonexistent.”); *Millard v Lenawee Circuit Judge*, 107 Mich 134, 135; 64 NW 1046 (1895) (dealing with an affidavit requirement for garnishments) (“Where the affidavit is made upon the same day with the commencement of suit, the court acquires jurisdiction.”).

particular professional or facility.” *Roberts II*, 470 Mich at 692. The Court of Appeals has now essentially held that a claimant need not do so.<sup>4</sup> This creates a substantial conflict that requires resolution. The Court of Appeals decision is published, and will pave the way for lower courts to refuse to apply *Roberts II* if this Court does not act. As a result, this case presents a significant issue for Michigan jurisprudence that this Court should resolve by peremptory action reinstating the trial court’s decision and reaffirming *Roberts II*, or in the alternative, by granting leave to consider the matter.

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<sup>4</sup> Moreover, the Court of Appeals inexplicably adopted a “notice” pleading standard when discussing the specificity § 2912b requires. (**Exhibit A, p 3 n 2**) ( . . . we only hold that a notice of intent requires no greater specificity than a pleading, especially given that the notice of intent does not itself even commence a suit.). The application of a common law standard to a statutory requirement is a further error, as the Legislature can require whatever degree of specificity it deems appropriate. This Court has already held that a NOI must have information that is “separately . . . identified ‘ . . . in a readily ascertainable manner, the specific information mandated by § 2912b(4).” *Roberts II*, 470 Mich at 696. So a notice pleading standard is insufficient if it does not meet this requirement.

## STATEMENT OF FACTS & PROCEEDINGS

Other than plaintiff's January 13, 2003 Notice of Intent ("NOI"), the facts of this matter are primarily irrelevant to this application. Plaintiff – on behalf of her decedent, David Waltz – filed this action on June 19, 2003. Under *Roberts II*, plaintiff's ability to bring the action was dependent on whether his NOI satisfied MCL 600.2912b's requirements. Because the trial court correctly held that the NOI was defective as to *both* the professional corporation and Dr. Laurer, it correctly dismissed the action against them. The Court of Appeals erred when it reversed this decision, and this Court should act here to reaffirm *Roberts II*, which the panel effectively negated.

### The NOI

Plaintiff's NOI was addressed to multiple defendants: Borgess Medical Center, Dr. Michael Andrew Laurer, Dr. Michael Andrew Laurer, M.D., P.C., and Heart Center for Excellence, P.C.. (**Exhibit B, 1/13/03 NOI, p 1**). Regarding the specifics of the claim, the NOI provided the following information:

**A. FACTUAL BASIS FOR 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' [sic] death.

**B. THE APPLICABLE STANDARD OF CARE OR PRACTICE ALLEGED:**

See paragraph C.

**C. THE MANNER THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED:**

- a. Failed to diagnose, treat, and/or advise the patient to seek proper medical care, when they knew or should have known such medical care was necessary for a person in the patient's condition;

- 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;
- c. Failed, despite the patient's apparent and objective symptoms, to properly/timely diagnose and discover the patient's condition or properly treat the patient;
- d. Failed to conduct proper or complete examinations of the patient, which examinations would have disclosed the patient's condition;
- e. Failed to keep informed of current techniques and literature regarding recognized standards of good medical practice for the treatment and care of patients in the patient's condition;
- f. Failed to properly observe and report the condition of the patient;
- g. Failed to properly disclose to and inform the patient of all material elements of the risks involved in connection with \*his/her care and treatment, including the nature and possible consequences of the treatment, the prospects of success, the prognosis if the procedures were not performed, and alternative methods of treatment available;
- h. Failed to conduct such tests and examinations as were necessary to the proper diagnosis and care of the patient;
- i. After they knew or should have known of the patient's condition, failed to provide the patient with reasonably prudent and proper medical care, treatment and services;
- j. Failed to pursue accepted forms of conservative treatment which should have been performed before they undertook a course of treatment which, at that time, was not medically justified;
- 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;
- l. Failed to timely provide, and/or adequately carry out, procedures for consultation with other members of the medical staff regarding treatment of patients in the patient's condition;
- m. Failed to properly take, record, examine, review or evaluate the medical history of the patient;

- n. Failed to diagnose, care for, treat, and/or discover the patient's condition;
- o. Failed to employ sufficient and competent physicians, nurses and other employees with which to provide reasonably prudent and proper medical care and service to the patient;
- p. Failed to establish and enforce or reasonably comply with Federal, State, industry, and professional standards, bylaws, procedures, rules, and regulations reasonably designed for the care of its' (sic) patients, and/or failed to comply with, or require compliance with its' (sic) own standards, bylaws, rules and regulations for the care of patients in the patient's condition;
- q. Failed to assure that all employees and physicians were at all times fully apprised of the patient's condition and requirements for the patient's care;
- r. Failed to keep, complete, detailed and specific records concerning the progress, symptoms, and complaints demonstrated by the patient, so as to apprise treating physicians of the detailed and precise condition of the patient;
- s. Failed to ascertain the skill or qualification 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 establish rules relating to the care and safety of persons in the patient's condition;
- u. Failed to provide the patient with reasonably prudent and proper medical care, treatment and services, and/or establish reasonable procedures for the care and protection of the patient.
- v. Failed to earlier terminate the procedure when the lesion could not be initially crossed with the wire;
- w. Failed to timely recognize the perforation and stop the anticoagulation and order an echocardiogram;
- x. Failed to timely insert a balloon pump after the perforation was recognized;
- y. Failed to timely perform a pericardiocentesis once the perforation was recognized;

- z. Failed to perform repeat attempts of pericardiocentesis after the first failed;
- aa. Failed to timely contact a surgeon once the perforation was recognized;
- bb. Failed to keep the LAD wire in place in order to maintain access to that vessel.

**D. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE:**

See Paragraph C above.

**E. THE MANNER IN WHICH THE BREACH OF THE STANDARD OF PRACTICE OR CARE WAS THE PROXIMATE CAUSE OF THE INJURY CLAIMED IN THE NOTICE:**

If the standard of care had been followed, Mr. Waltz would not have died on October 11, 2001. [Exhibit B, pp 1-4.]

Plainly, the NOI failed to differentiate between the different standards of care that would apply to the defendants, or even identify any single standard of care. It failed to identify what each defendant allegedly did or for what it was allegedly responsible. It failed to explain what any of the defendants should have done to meet the standard of care. And, as the trial court correctly identified, it failed to make any coherent statement regarding how the alleged acts caused the decedent's death.

**Proceedings before the trial court**

Because the NOI failed to provide sufficient information to satisfy § 2912b, defendants filed a motion to dismiss under *Roberts v Atkins (After Remand)* ("*Roberts II*"), 470 Mich 679, 686; 684 NW2d 711 (2004), on February 10, 2005. As a result of adjournments and a change in judges, the trial court did not hear the motion until July 14, 2005. (Exhibit C, Hearing TR, 7/14/05). Specifically, the trial court ruled that the NOI failed to adequately delineate the standards of care at issue – both in terms specificity and in terms of differentiating between defendants – and the causal connection required:

**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.**

\* \* \* \*

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 [Borgess] 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. [Exhibit C, pp 44-47; emphasis added.]**

On August 2, 2005, plaintiff moved for reconsideration of the trial court's decision.

The motion included eight exhibits that were not part of the record at the time the trial court decided the original motion.<sup>5</sup> The court denied the motion on October 10, 2005.

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<sup>5</sup> Specifically, plaintiff attached various medical records, an excerpt from an article called "Cardiac Catheterization, Angiography, and Intervention, two excerpts from Dr. Laurer's deposition, and several excerpts from Dr. William Gifford's deposition. None of this was properly in the record when analyzing the motion for summary disposition.

## Proceedings before the Court of Appeals

Plaintiff then filed a claim of appeal. The parties briefed the NOI issue among others, and the Court of Appeals heard the matter on April 4, 2006. On October 31, 2006, the Court issued three separate opinions that all agreed regarding the NOI issue. (**Exhibit A, COA Opinion, 10/31/06**). In summary, the Court upheld the trial court's decision regarding the professional corporation and the hospital, indicating that the NOI was insufficient regarding 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). [**Exhibit A, p 5; italics original.**]

At the same time, however, the court reversed the trial court's decision regarding Dr. Laurer individually, and held that the NOI was sufficient regarding the claims against him:

Conversely, as to Dr. [Laurer], the notice states that "the factual basis for the claim" is that "On October 6, 2001, Mr. Waltz presented to defendants for an elective PTCA. During the procedure, the defendant caused a perforation which lead to Mr. Waltz' death." There is no guesswork involved in deducing that "the defendant" refers to the only named defendant who is an individual in his own right and, therefore, physically capable of taking the actions resulting in the perforation. A layperson might not know what "an elective PTCA" is, but it is highly unlikely that medical professionals would not understand their own abbreviations simply because they are placed in a legal context. Therefore, the notice of intent adequately notifies defendant Dr. [Laurer] of the factual basis of the claim alleged against him.

The paragraphs purporting to state the applicable standard of care and the actions that should have been taken to comply with the standard of care both merely refer the reader to the paragraph containing the manner in

which the standard of care was breached. . . . The format of the notice of intent here merely purports to combine requirements (b), (c), and (d) under MCL 600.2912b(4) into a single paragraph. Although this might be a risky practice that lends itself to misconstruction and appeals, it is not an inherently fatal deficiency. Again, we review the notice as a whole.

The referenced paragraph in the notice contains twenty-eight individual assertions of wrongdoing by defendant . . . [but] seven of the subparagraphs set forth specific actions that defendant allegedly failed to take, thereby breaching the applicable standard of care. These seven subparagraphs [¶¶ v-bb, above] are distinct, cleanly phrased, and, even though they follow boilerplate language, they are not in any way hidden. 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.

Although these subparagraphs are phrased in the negative, i.e., stating what actions defendant failed to take, there is no reason to presume that a putative medical defendant would be forced to guess at the alleged standard of care, or at the actions he allegedly should have taken to comply with the standard of care, from these negatively-phrased statements. . . . Here, the standard of care explicitly refers to the negatively-phrased statements. In this case, no guesswork is required to appreciate that the standard of care is to have taken the actions defendant allegedly failed to take. For the same reason, it is obvious that plaintiff alleges defendant should have taken those actions in order to comply with the standard of care.

Finally, the notice of intent states, "if the standard of care had been followed, Mr. Waltz would not have died on October 11, 2001." This perfunctory statement, taken by itself, would be insufficient to explain how defendant's alleged violations of the standard of care resulted in the death, as required by MCL 600.2912b(4)(e). However, it must be viewed in the context of the entire document, the facts underlying the case, and the proper pleading standard. The notice of intent, as a whole, reveals that Dr. [Laurer] was conducting a procedure on a major blood vessel that involved inserting a wire into that vessel, and during the procedure Dr. [Laurer] perforated the blood vessel. Dr. [Laurer] then failed to take steps that might have permitted himself or a surgeon to repair the vessel, such as stopping an anticoagulant, performing a pericardiocentesis, notifying a surgeon, and maintaining access to the blood vessel.

Although much of the terminology would make sense only to someone knowledgeable about medicine or a medical professional, defendants are, in fact, all medical professionals or medical facilities operated by medical

professionals. In any event, 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. Finally, the purpose of the notice of intent is to give notice of a claim against the specified parties. Defendants, as medical professionals, presumably keep records of their medical procedures and undoubtedly recall any unusual mishaps with their patients. Before discovery has begun, it is defendants who have the most ready access to essentially all of the information about a given case. Under the pleading standard we have articulated, a medical malpractice plaintiff is only obligated to provide defendants with notice of the claims against them at a pre-suit stage of the proceedings. The defendants have in their possession most of the pertinent facts from their own records. It strains credulity to conclude that they would not understand the nature of the suit against them on the basis of the notice of intent here. Therefore, this notice of intent meets all of the requirements of MCL 600.2912b(4) as to Dr. [Laurer]. **[Exhibit A, pp 5-7.]**

Defendants now ask this Court to review this aspect of the Court of Appeals decision and either take peremptory action or grant leave to appeal.

## ARGUMENT

As is evident from the preceding facts, plaintiff's NOI failed to comply with § 2912b under this Court's analysis in *Roberts II*. It failed to differentiate between defendants in any manner, failed to specifically identify any standards of care, failed to provide a coherent statement regarding causation, and so was wholly defective. And yet despite the similarities between the NOI here and the one this Court rejected in *Roberts II*, the Court of Appeals remarkably held that Dr. Laurer had an obligation to parse through the bland generalities of plaintiff's NOI and discern those statements that applied only to him. In effect, the Court of Appeals held that Dr. Laurer had a duty to redact plaintiff's NOI and construct plaintiff's case against him. And if Dr. Laurer later found out that he had misinterpreted the NOI and the case against him was not what he thought it was, he had to live with his own failure to put the pieces together in the right order.

This is the exact opposite of the result § 2912b requires, and it is precisely what this Court held that a defendant *is not* required to do in *Roberts II*. If allowed to stand, the Court of Appeals decision will remove the burden of complying with § 2912b from potential plaintiffs and require multiple defendants to dissect the NOI to determine who allegedly did what, and what statements apply to each of them. And unless this Court acts, the published Court of Appeals decision will bind future panel and lower courts to continue this improper inversion of the statutory requirements. For these reasons, 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.

- I. THE COURT OF APPEALS DECISION EVISCERATED *ROBERTS II* BY HOLDING THAT READING THE NOI “AS A WHOLE” COULD EXCUSE SPECIFIC COMPLIANCE WITH THE STATUTORY REQUIREMENTS, AND IMPROPERLY REWROTE MCL 600.2912b TO COMBINE THREE SEPARATE REQUIREMENTS INTO ONE FOR THE SOLE PURPOSE OF VALIDATING THE NOI AT ISSUE. AS A RESULT, THIS COURT SHOULD PEREMPTORILY REVERSE THE COURT OF APPEALS DECISION AND REINSTATE THE TRIAL COURT’S JUDGMENT, OR IN THE ALTERNATIVE, GRANT LEAVE TO CORRECT THESE ERRORS.

MCL 600.2912b, as interpreted by this Court in *Roberts II*, requires a potential claimant to file a written NOI that satisfies *all* of its requirements. 470 Mich at 690. Most importantly, this includes identifying the appropriate standard of care that applies to each of the potential claims. Plaintiff’s NOI failed to do this, among other things, and so it failed to comply with § 2912b under *Roberts II*. The trial correctly so concluded, and the Court of Appeals improperly failed to actually apply *Roberts II* when it reversed the trial court’s decision. Instead, the Court of Appeals cited *Roberts II*, and then went on to discuss the NOI before it as though it had never actually looked at this Court’s decision. The Court of Appeals decision is thus utterly antithetical to both *Roberts II* and § 2912b, and this Court should reverse it as such.

**A. Standard of review**

This Court “review[s] de novo lower court decisions on a motion for summary disposition.” *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003). Issues of statutory interpretation are also subject to de novo review. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004).

**B. The NOI requirement**

1993 PA 78 created several procedural requirements for medical malpractice actions. One of those requirements is MCL 600.2912b(1), which requires that a potential claimant

file a written NOI providing specific information to all potential defendants. Specifically, § 2912b(1) provides:

(1) Except as otherwise provided in this section, a person **shall not commence** an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility notice under this section not less than 182 days before the action is commenced. [Emphasis added].

Filing a valid NOI is a prerequisite to a medical malpractice claim because doing so tolls the two-year limitations period on such actions. *Roberts II*, 470 Mich at 686 (“ . . . in order to toll the limitation period under [MCL 600.]5856(d), the claimant is required to comply with all the requirements of § 2912b . . .”). If the claimant’s NOI does not satisfy *all* of § 2912b’s requirements, the subsequent action is subject to dismissal with prejudice if the limitations period has expired. *Roberts II*, 470 Mich at 690.<sup>6</sup> It is also solely the plaintiff’s burden to comply with the statute. *Id.*

Section 2912b(4) provides that a NOI must contain six specific elements to be valid:

(4) The notice given to a health professional of health facility under this section **shall contain a statement of at least 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.**

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<sup>6</sup> The *Roberts II* Court dismissed the action before it with prejudice because the limitation period had expired, noting that “[a]lthough the notices satisfy some of the requirements of § 2912b, they do not satisfy all of those requirements.” *Id.* (emphasis added).

(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 professional and health facilities the claimant is notifying under this section in relation to the claim. [Emphasis added].

The purported purpose of the NOI requirement is to facilitate settlement, and so it only makes sense that an NOI must contain sufficient information to do so. How can a potential defendant seriously consider settling a claim when it is not clear from the NOI what he or she should have done and why? If the NOI presents specific and appropriate information, a potential defendant can examine its own conduct accordingly and determine whether settling is in its best interests. If, however, the NOI is simply a rote recitation of statements taken from some common source, and looked upon as nothing more than a necessary prerequisite to filing the action, it will never facilitate settlement. And yet that is how the Court of Appeals treated the NOI in this case: as a prelude to a lawsuit.

**C. *Roberts II* confirmed that § 2912b(4) requires statements of the standard of care for each potential defendant.**

In *Roberts II*, this Court determined that the plaintiffs' NOIs did not satisfy § 2912b's requirements after a lengthy analysis. In that case, the plaintiffs filed two separate NOIs naming multiple defendants. This Court concluded that the NOIs "primarily set forth facts demonstrating an unfavorable outcome ---- the fact that plaintiff had suffered an ectopic pregnancy and a ruptured 'left tube' that was not diagnosed by defendants. Although the notices satisfy some of the requirements of § 2912b, they do not satisfy all of those requirements." *Roberts II*, 470 Mich at 690.

No less than four of § 2912b's six requirements reference the "standard of practice or care." Accordingly, in *Roberts II*, 470 Mich at 692 n 8, our Supreme Court explained:

The phrase “standard of practice or care” is a term of art in the malpractice context, and **the unique standard applicable to a particular defendant is an element of a medical malpractice claim that must be alleged and proven.** *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 10; 651 NW2d 356 (2002). The applicable standard is governed either by statute (see, for example, MCL 600.2912a(1), which sets forth the particular proofs that a malpractice plaintiff must present with respect to a defendant's “standard of practice or care,” depending on whether the defendant is a general practitioner or a specialist) or, in the absence of a statutory standard, by the common law. *Cox, supra* at 5, 20. **The standard of practice or care that is applicable, for example, to a surgeon would likely differ in a given set of circumstances from the standard applicable to an OB/GYN or to a nurse.** [Emphasis added.]

Each defendant in a medical malpractice action therefore has an individual standard of care that is fashioned to the defendant’s nature, training, and experience.<sup>7</sup> As this Court stated a “claimant is not required to craft her notice with omniscience. However, what is required is that **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.**” *Id.* at 690.

Accordingly, the *Roberts II* Court concluded that § 2912b(4) requires a potential claimant to state an individual standard of care for each potential defendant in order to comply with § 2912b(4)’s requirements because “the standard applicable to one defendant is not necessarily the same standard applicable to another defendant.” *Id.* at 694 n 11. So **“general averments [regarding the standard of care in a NOI] are not adequately responsive to the statutory requirement that the claimant allege an applicable standard of practice or care relevant to the defendant.”** *Id.* at 694.

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<sup>7</sup> Unless, of course, two or more defendants have the same nature, training and experience.

Specifically, in *Roberts II*, 470 Mich at 692, the potential defendants included a hospital, a physician’s assistant and an obstetrician. While the NOIs contained a detailed statement of facts, they failed to identify standards of care specific to each defendant as § 2912b(4) requires. Instead, the plaintiff made general statements that grouped all the defendants together regarding the appropriate standard of care, breach of the standard of care, the action that should have been taken by the defendants and causation.<sup>8</sup> The *Roberts II* defendants sought dismissal of the case based on the defective NOI, and the trial court granted their motion. The Court of Appeals reversed the trial court’s decision and held that the NOI satisfied the statutory requirements.

This Court reversed the Court of Appeals and held that §2912b(4) requires a plaintiff to “**aver the specific standard of care that she is claiming to be applicable to each**

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<sup>8</sup> That a person against whom the plaintiff is making a claim of negligence is not a named defendant is irrelevant to this inquiry. In *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 487; 679 NW2d 98 (2004), the plaintiff’s “notice of intent was silent with regard to any breach of the standard of care during the administration of anesthesia.” The subsequently-filed complaint, however:

... also raised claims based on the anesthesia that was administered during the surgical procedure. **Although the individuals charged with administration of the anesthesia were not named as defendants, it was alleged that they were "agents in fact or by estoppel" of defendant hospital** . . . . [*Gulley-Reaves*, 260 Mich App at 481; emphasis added.]

The defendants argued that the NOI was deficient because it failed to allege a standard of care or breaches regarding anesthesia. The plaintiff argued that the allegations concerning the “surgical team” were sufficient to have put the defendants on notice of the claims. The Court of Appeals rejected the plaintiff’s argument, holding that the “**plain and mandatory language**” of the statute required specific notice of each individual claim. *Id.* at 490. The Court also noted that the statutory scheme clearly anticipated multiple notices in the event a plaintiff discovered new claims. *Id.* at 486. Because the plaintiff’s NOI did not list the anesthesia claim against the defendant and because the plaintiff did not file an additional NOI, the Court reversed the trial court’s refusal to dismiss the action as time-barred.

**particular professional or facility.**” *Roberts*, 470 Mich at 692 (emphasis added). The NOI’s allegations must be as “particularized” as possible given the stage of the proceedings, and “an ‘inference’ is not sufficient to meet the statutory requirement that plaintiff provide a statement of the manner in which each defendant breached the applicable standard of care.” *Id.* at 701, 697. Any allegation that forces a defendant to “guess” at what the plaintiff alleges the defendant should have done is insufficient. *Id.* at 698.

**D. Sections 2912b(b), (c), and (d) cannot be satisfied by the same information or two of the three would be rendered meaningless.**

Moreover, it is plainly impossible for one set of statements to satisfy §§ 2912b(b), (c), and (d) because they present three separate requirements. One deals with the standard of care, one deals with breaching that standard, and one deals with the actions that should have been taken. When interpreting a statute, every word and phrase should be given meaning, and courts must avoid a construction that “would render any part of the statute surplusage or nugatory.” *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). So each one of these requirements must have a different meaning, or else two of them would be rendered surplusage. In other words, if the same information could satisfy all three requirements, there is really only one requirement, and the statute has been re-written.

Looking at the requirements one by one, it is clear that they do seek different information. The standard of care, for instance, is not simply a failure to do a specific thing at a specific time. It requires that a physician act reasonably under the circumstances, which could include taking a number of different steps, any of which may be reasonable and within the standard of care. It is insufficient, therefore, to state that the standard of care

requires a physician to take x action at y time because other actions may be within the standard of care. *Roberts II*, 470 Mich at 692 n 8.

On the other hand, stating the actions that should have been taken does require specific information, including what should have been done and when. It is insufficient, then, to assert that “fail[ing] to timely recognize a perforation,” as plaintiff did here, is a statement of the actions that should have been taken. When should the perforation have been recognized? How? By whom? All of this information is essential to satisfying the requirement of what should have been done, and it cannot be the same as that used to delineate the breach.

**E. Plaintiff’s NOI fails to meet § 2912b’s requirements pursuant to *Roberts II*, and fails to provide information that could possibly satisfy 2912b(b), (c), and (d) without negating two of the requirements.**

Here, plaintiff’s NOI suffers from the same flaws as did the notices in *Roberts II* regarding the standards of care. Specifically, although it contains a statement of facts that names specific providers, the NOI fails to identify the standard of care, the manner in which the standard of care was breached or what action should have been taken by each different provider named. It does not differentiate between Dr. Laurer and the professional corporation. Instead, the NOI provides one generic statement to satisfy *all* requirements – even though the allegations against Dr. Laurer, the professional corporation, and the hospital must by nature be distinct.

Our Supreme Court noted the same deficiencies in *Roberts II*:

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, **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 in response to § 2912b(4)(b) . . .

With respect to the hospital and the professional corporation, **this statement does not allege a standard applicable specifically to a hospital or professional corporation as opposed to any other healthcare professional or facility.** Moreover, this statement fails to indicate whether plaintiff was alleging that these defendants were vicariously or directly liable to her. **Although it appears from plaintiff's complaint that she is claiming that the hospital and the professional corporation are vicariously liable for the negligence of their agents, the notices of intent implied that plaintiff alleged direct negligence against these defendants for negligently hiring** or negligently granting staff privileges to the individual defendants. Thus, plaintiff's notices neither alleged a standard specifically applicable to the defendant facilities, nor did they serve as adequate notice to these defendants that plaintiff planned to proceed under a vicarious liability theory at trial. [470 Mich at 692-693; emphasis added.]

Similarly, Dr. Laurer is a physician who is board-certified in cardiology; he is not a hospital or a professional corporation. He clearly had duties and responsibilities regarding the decedent's care that differed from those of the hospital or the professional corporation, and vice versa. The NOI's allegations against him simply do not suffice as allegations against the other allegedly negligent persons and entities, and vice versa.

The NOI also fails to indicate whether it contemplates direct or vicarious liability against the professional corporation or the hospital. Moreover, the NOI provides *absolutely no information* regarding a standard of care specific to any of the defendants, and simply focusing on the last seven paragraphs alone does not cure this defect for Dr. Laurer because it is not at all clear that these apply solely to him. For example, subparagraph bb alleges that the defendant “[f]ailed to keep the LAD wire in place in order to maintain access to that vessel.” Contrary to the Court of Appeals’ assertion that this clearly applied to Dr. Laurer, the physician is *not* the person who secures the wire when performing the procedure. An assistant or technician secures the wire. And so the assertion that Dr. Laurer should have been able to reconstruct the allegations against him from these last seven statements alone is incorrect.

Regarding the actions that should have been taken, plaintiffs' NOI simply refers to the statements regarding the alleged breaches. It does not provide, for example, *how* Dr. Laurer should have performed the procedure to conform with the standard. It does not provide what the necessary action was when it alleges that the providers failed to take necessary action. It does not say *how* Dr. Laurer or the corporation should have supervised or instructed the personnel, what the personnel should have done, which duties were the cardiologist's duties, whether just staff or other doctors should have been involved, and so on. Defendants cannot even *infer* this from the NOI, and it is beyond dispute that defendants cannot adequately assess the claims against them unless they *know what it is that the claimant alleges they should have done*. It is precisely this type of mystery that the NOI requirement is designed to avoid.

Moreover, although plaintiff alleged below that they "substantially" complied with § 2912b, that is insufficient. The statute used the term "shall," which "[is] unambiguous and denote[s] a mandatory, rather than discretionary action." *Roberts v Mecosta Co General Hospital ("Roberts I")*, 466 Mich 57, 65; 642 NW2d 663 (2002). "Substantial compliance" is merely a euphemism for "failure to comply" with an mandatory requirement. Section 2912b is unequivocal, and courts effectively repeal these notice requirements when they refuse to enforce them. As this Court noted in *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000), excusing a party's failure to comply with an imperative clause in a statute "completely subverts the [statutory] requirement."

Thus, plaintiff's NOI contains the same "general averments" as did the *Roberts II* NOI, lacks any "particularized" statements directed at the applicable standards of care for Dr. Laurer, the hospital, or the corporation, and lacks any statements whatsoever regarding

what any of the defendants should have done. As the *Roberts II* Court held, this is insufficient because:

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 plaintiff's notices fail to comply with § 2912b(4)(b) with respect to each defendant.** [*Roberts*, 470 Mich at 692-695; emphasis added.]

Finally, the conclusory statement regarding proximate cause is also insufficient and wrong. Perforation is a known risk of the catheterization procedure that the decedent underwent. It could have occurred in the absence of any breach of the standard of care. He could have died in the absence of any such breach. As the trial court noted, simply alleging a “bad outcome” is not enough because bad outcomes do occur in the normal course of treatment. There are no “particularized” assertions regarding what specific breaches caused the death and how. So the NOI fails in this respect as well.

**1. Plaintiff's single set of conclusory allegations cannot satisfy the three separate statutory requirements of § 2912b(2), (3) and (4).**

Regardless of *Roberts II*, the Court of Appeals decision cannot stand under § 2912b itself because it allows one set of statements to satisfy three separate statutory requirements. As noted, courts cannot render any part of a statute meaningless through interpretation. *Wickens*, 465 Mich at 60; *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002); *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). But by holding that the same information satisfies all three requirements, the Court of Appeals effectively rewrote the statute to require only one thing.

Essentially, if §§ 2912b(2), (3), and (4) all require the same thing, then why are there three different requirements?

Moreover, the single set of statements at issue is not broad enough to cover all three requirements under any circumstances, as noted above. They say nothing about the standard of care and nothing about what the defendants should have done. All they discuss is the defendants' "failures" to do specific things, which may be sufficient to describe breaches, but cannot provide notice of anything else. So the Court of Appeals decision flies in the face of § 2912b itself, and this Court should reverse it for that reason as well.

**F. Because the limitation period expired before plaintiffs filed this action, the trial court correctly dismissed this action with prejudice.**

As noted, a claimant must comply with *all* § 2912b's requirements in order to toll the limitation period under MCL 600.5856(d). When a plaintiff fails to give proper notice, pursuant to § 2912b, the appropriate remedy is dismissal without prejudice so long as the applicable limitation period has not expired. See, e.g., *Morrison v Dickinson*, 217 Mich App 308, 318; 551 NW2d 449 (1996); *Neal v Oakwood Hosp. Corp.*, 226 Mich App 701, 715; 575 NW2d 68, 75 (1997).

In this case, however, the limitation period expired at the latest on November 15, 2002. As a result, dismissal with prejudice was the only possible disposition. *Roberts II*, 470 Mich at 702 (reinstating the trial court's dismissal of the action as time-barred); *Gulley-Reaves*, 260 Mich App at 491; *Rheaume v Vandenberg*, 232 Mich App 417, 423; 591 NW2d 331, 334 (1998); *Burton v Reed City Hospital*, 471 Mich 745; 691 NW2d 424 (2005). As a result, the trial court properly dismissed this case with prejudice as time-barred, and this Court should reverse the Court of Appeals and affirm that decision.

## CONCLUSION

The Court of Appeals decision at issue is published and therefore significant in its essential rejection of the *Roberts II* analysis and of § 2912b(4) plain language. If allowed to stand, conclusory and generalized NOIs – such as plaintiff's in this case – will be rendered sufficient and allowed to stand. This will effectively negate the NOI as a tool to settle cases before a lawsuit is actually filed because claimants will continue to treat the NOI as just another piece of paper that must be filed before the complaint. If defendants are required to dissect and deconstruct a NOI to deduce the specific allegations them, there will be no possibility of settlement, and the notice period will simply be a waste of time.

Plaintiff's NOI here is wholly insufficient under *Roberts II* and § 2912b. It failed to differentiate between defendants in any manner, failed to specifically identify any standards of care, failed to provide a coherent statement regarding causation, and only contained one set of statements that would have to be construed to satisfy three separate statutory requirements. And despite all this, the Court of Appeals held that the NOI was sufficient as to Dr. Laurer.

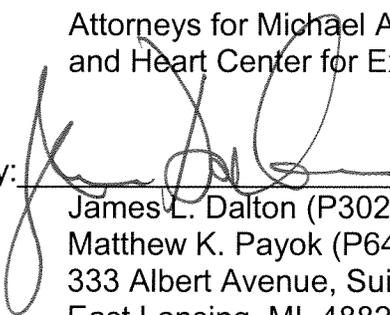
*Roberts II* and § 2912b do not allow this result to stand. It removes the burden of complying with § 2912b from potential plaintiffs and requires multiple defendants to parse the NOI to determine who allegedly did what, and what statements apply to each of them, which the exact opposite of the result this Court reached in *Roberts II*. For all these reasons, 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.

Respectfully submitted,

**WILLINGHAM & COTÉ, P.C.**

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

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By: 

James L. Dalton (P30252)  
Matthew K. Payok (P64776)  
333 Albert Avenue, Suite 500  
East Lansing, MI 48823  
(517) 351-6200  
Fax: (517) 351-1195

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