

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff/Appellee/Cross-Appellant,

-vs-

**BORGESS MEDICAL CENTER and
HEART CENTER FOR EXCELLENCE, P.C.
Jointly and Severally,**

Defendants/Cross-Appellees,

and

MICHAEL ANDREW LAUER, M.D.

Defendant/Appellant.

Supreme Court No. 132688

Court of Appeals No. 266217

**Kalamazoo County Circuit Court
03-000318-NH**

**PLAINTIFF/APPELLEE/CROSS-APPELLANT'S
SUPPLEMENTAL BRIEF**

CERTIFICATE OF SERVICE

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STATEMENT OF FACTS

On October 5, 2001, David Waltz was admitted to Borgess Medical Center after experiencing chest pain. The following day, Mr. Waltz underwent a cardiac catheterization at Borgess Medical Center. That procedure was performed by Dr. Michael Lauer.

Attached hereto as Exhibit A is a copy of Dr. Lauer's Operative Report pertaining to Mr. Waltz's catheterization. In that Report, Dr. Lauer recorded that during the catheterization, he discovered Mr. Waltz's left anterior descending artery was 95% occluded by an 8 mm long lesion. Dr. Lauer's Operative Report indicated what he did after encountering this lesion:

Using an 8-French XB left anterior descending coronary artery guide catheter, attempts were made to cross the left anterior lesion without success. Further attempts to cross the left anterior descending coronary artery lesion with PT graphics and Cross-It wires were unsuccessful. Finally, the lesion was crossed with a Shinobi guide wire. A second guide wire, a BMW, was passed into the diagonal branch. Attempts to pass a 3.0/10 cutting balloon across the area of severe narrowing was unsuccessful, therefore, a 1.5/15 Maverick balloon was advanced across the severe narrowing and dilated to 8 atmospheres for 45 seconds. The balloon was then advanced with the distal left anterior descending coronary artery to exchange the Shinobi guide wire for a softer tipped guide wire.

Lauer Report (Exhibit A), p. 2.

Thus, Dr. Lauer made several attempts to cross the lesion, using a series of different instruments and finally succeeded with a Shinobi guide wire. Dr. Lauer attempted two types of balloon angioplasty to try to correct the stenosis. However, as he completed the second of these balloon procedures, he discovered that Mr. Waltz's left anterior descending artery was perforated:

After doing so and taking an angiogram, it was obvious that there was an area of perforation, approximately 1 cm beyond the area of stenosis. There was no flow to the distal left anterior descending coronary artery beyond the area of perforation. Attempts to wire the distal left anterior descending coronary artery with the BMW guide wire were unsuccessful. The patient was hemodynamically stable and was chest

pain-free.

Lauer Report (Exhibit A), p. 2.

Dr. Lauer contacted a cardiothoracic surgeon, Dr. Alphonse Delucia. While Dr. Lauer was discussing with Dr. Delucia the possibility of emergency bypass surgery, Mr. Waltz “suddenly had severe hypotension . . . and hypoxia.” *Id.* Dr. Lauer described what he did as Mr. Waltz became hypotensive and hypoxic:

Further attempts to place a guide wire to the distal left anterior descending coronary artery were unsuccessful. A balloon was inflated in the left anterior descending coronary artery into the diagonal to try to attempt stopping flow to the area of perforation. The patient continued to have progressive hypotension and anesthesia was called to intubate the patient. The subxyphoid area was prepped and draped and a Cook needle placed into the pericardial space with the return of a small amount of bloody fluid. The patient progressed to severe hypotension at [*sic*] EMD, and an intra-aortic balloon pump was placed via the left femoral artery and a transvenous pacemaker was advanced through the right femoral vein.

Id.

By the time these steps were taken, Dr. Delucia had arrived at the catheterization lab. He opened Mr. Waltz’s chest and relieved the cardiac tamponade, the acute compression of the heart due to the effusion of blood into the pericardial sac. Shortly thereafter Dr. Delucia performed emergency coronary bypass surgery on Mr. Waltz. However, by the time this surgery was performed, Mr. Waltz had suffered an anoxic brain injury. He died five days later on October 11, 2001.

Attached hereto as Exhibit B is a copy of the Clinical Resume and Death Summary which Dr. Delucia dictated on the date that Mr. Waltz died. In that summary, he succinctly summarized the events which led to Mr. Waltz’s death:

In the course of trying to perform percutaneous intervention, a perforation of the left anterior descending artery was sustained. The patient rapidly deteriorated, with both anterior ischemia and cardiac tamponade. An intra-aortic balloon pump was placed

and the patient was attempted to be resuscitated, including pericardiocentesis; however, he rapidly deteriorated, requiring cardiopulmonary resuscitation.

Death Summary (Exhibit B), p. 1.

The death certificate which Dr. Delucia prepared indicated that Mr. Waltz died as a consequence of the “left anterior descending coronary artery perforation,” which occurred six days before his death.

Mr. Waltz’s family retained an attorney who, on January 13, 2003, mailed a notice of intent to sue to three prospective defendants, Borgess Medical Center, Dr. Lauer and Heart Center for Excellence, PC. A copy of this notice of intent is attached hereto as Exhibit C.

After waiting the time period provided in MCL 600.2912b, Melissa Boodt, the Personal Representative of the Estate of David Waltz, filed this action in the Kalamazoo County Circuit Court on June 19, 2003. Ms. Boodt’s Complaint was accompanied by an affidavit of merit which was signed by Dr. William Gifford, who, like Dr. Lauer, is a specialist in cardiology.

In February 2005, twenty months after this case was instituted, the defendants filed motions for summary disposition. In their motions they claimed that plaintiff’s January 2003 notice of intent did not fully comply with MCL 600.2912b(4). In an order which was signed on July 27, 2005, the circuit court granted the defendants’ motion and dismissed Ms. Boodt’s case with prejudice.

Ms. Boodt appealed to the Michigan Court of Appeals. A panel of that Court issued a decision on October 31, 2006, affirming in part and reversing in part the circuit court’s ruling. *Boodt v Borgess Medical Center*, 272 Mich App 621; 728 NW2d 471 (2006). The Court of Appeals affirmed the dismissal of Ms. Boodt’s claims against Borgess Medical Center and Heart Center for Excellence, PC, concluding that the January 2003 notice of intent failed “to reveal how Borgess

Medical Center or Heart Center for Excellence, PC is involved in the underlying events.” 272 Mich App at 629. The panel, however, reversed the circuit court’s determination that the presuit notice did not comply with §2912b(4) with respect to plaintiff’s claims against Dr. Lauer.

Both Dr. Lauer and Ms. Boodt filed applications for leave to appeal in this Court, seeking review of the Court of Appeals’ October 31, 2006 decision.

On October 12, 2007, this Court issued an Order scheduling oral argument “on whether to grant the applications or take other peremptory action.” The Court’s order also allowed the parties to file supplemental briefs. This brief is being submitted by the plaintiff in response to the Court’s October 12, 2007 order.

ARGUMENT

I. INTRODUCTION

This Court has repeatedly reinforced in recent years that statutes are to be read and applied according to their literal text. *See e.g. Robertson v DaimlerChrysler*, 465 Mich 732, 748; 641 NW2d 567 (2002); *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 312; 645 NW2d 34 (2002); *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Thus, the text of §2912b is the appropriate place to start in considering the question of whether the notice of intent which was mailed by plaintiff's counsel in January 2003 met the requirements set out in §2912b.

Prior to filing a cause of action premised on medical malpractice, a claimant must give notice to potential defendants of his/her intent to sue pursuant to §2912b. MCL 600.2912b(4) describes the contents of such a notice. That statute provides:

The notice given to a health professional or health facility under this section shall contain *a statement* of at least all of the following:

- (a) The factual basis for the claim.
- (b) The applicable standard of practice or care alleged by the claimant.
- (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
- (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
- (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
- (f) The names of all health professional and health facilities the claimant is notifying under this section in relation to the claim.

Id. (emphasis added).

The text of §2912b provides some amount of insight into the requirements set out in that statute. First, as written, §2912b requires that a claimant provide in a notice of intent *a statement* of the six factors designated in §2912b(4). While §2912b(4) describes the information which a notice of intent must contain, it is silent as to the level of specificity with which that information must be conveyed. The statute indicates only that the notice must contain *a statement* of the six enumerated factors. In considering the scope of §2912b(4)'s requirement of "*a statement*" pertaining to the six factors identified therein, it is important to consider more specific qualifying language which the Michigan Legislature *could* have written into that subsection, *but did not*. A comparison of §2912b(4) with other Michigan statutes in which a person, entity or agency is compelled to make certain "statements" is, therefore, instructive.

For example, in other contexts the Michigan Legislature has written statutes which demand that a person provide certain facts "with specificity." *See e.g.* MCL 333.17015(10); MCL 333.22231(4); MCL 769.1a(8). *See also* MCL 38.416; ("stating specifically"); MCL 500.8133(3) (same). Obviously, the Legislature could have included similar language in §2912b(4), and demanded that a pre-suit notice of intent "state specifically" or "state with specificity" each of the six factors provided therein. But the Legislature did not do so. Clearly, a textual interpretation of §2912b(4) cannot support the conclusion that each and every statement made in a notice of intent must be made "with specificity."

Similarly, the Michigan Legislature has in numerous other statutes required the presentation of a "detailed statement" of certain facts. *See e.g.* MCL 38.14; MCL 125.1510(1); MCL 408.1027(2)(b); MCL 462.319(1)(a); MCL 600.557b(2); MCL 600.6461(2). In drafting §2912b(4), the Legislature clearly did not require a "detailed statement" of the various factors described in that

statute.

Moreover, in other circumstances the Legislature has mandated that parties prepare a “full statement,” *e.g.* MCL 224.25; MCL 491.920(3); MCL 500.424(2), or a “complete statement” of certain designated facts. MCL 14.283; MCL 462.2(2). There are, moreover, a number of statutes in which the Michigan Legislature has demanded a “full and complete statement” of certain facts. *See e.g.* MCL 247.172; MCL 324.51904; MCL 390.758. The Michigan Legislature is also fully capable of drafting a statute which requires a “complete statement in detail,” MCL 224.25, or a statute which requires a “complete and specific statement” of certain facts, MCL 324.20114(8). Had the Michigan Legislature incorporated such qualifying language into §2912b(4), the requirements for a notice of intent would have been markedly different. But these more exacting requirements are not a part of the text of §2912b(4).

What §2912b(4) requires, instead, is *a statement* of the six designated factors; it clearly does not mandate a full, complete or detailed statement of these factors. Indeed, it does not even require that the notice of intent provide information at a level which is commensurate with the information then available to the plaintiff. *Cf* MCL 324.20138(3) (requiring that a petition filed under the Environmental Protection Act set forth certain information “with as much specificity as possible.”)

There is one other adjective which notably does *not* appear in §2912b(4) - accurate. Unlike a number of other Michigan statutes which have required an “accurate statement” or a “complete and accurate statement” of specified facts, *see e.g.* MCL 288.575(a)(v); MCL 21.44a(1); MCL 289.1109(h)(v); MCL 440.2803(1)(g)(iii)(C), §2912b(4), does *not* require that the statement of the six factors listed in that subsection be objectively accurate.

This Court recognized in its decision in *Roberts v Mecosta County General Hospital (After*

Remand), 470 Mich 679; 684 NW2d 711 (2004) (hereinafter: “*Roberts II*”), that, because a notice of intent is mailed at the earliest stages of the litigation process before any discovery is taken, it is “anticipatable that plaintiff’s averments as to the applicable standard may prove to be ‘inaccurate’ or erroneous following formal discovery.” *Id.*, p. 691. Thus, it is clear that plaintiff’s notice of intent cannot be deemed defective for purposes of §2912b simply because the statements contained therein as to the standard of care, breach of the standard of care and proximate cause are deemed “inaccurate.”

As part of its commitment to a textual approach to the interpretation of statutes, this Court has emphasized in recent years that, in the course of interpreting a statute, a court is prohibited from adding language to that statute which the Legislature failed to include. *Omne Financial, Inc. v Shacks, Inc.*, 460 Mich 305, 311; 596 NW2d 591 (1999) (“nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.”); *Lesner v Liquid Disposal, Inc.*, 466 Mich 95, 101; 643 NW2d 553 (2002) (a court is to apply the statute “as enacted without addition, subtraction or modification.”) These cases demonstrate that, in interpreting and applying §2912b(4), a court may not add language to that statute which has the effect of requiring a claimant to provide a “specific statement”, “a detailed statement”, “a complete statement”, “a full statement” or “an accurate statement” of the six factors listed in that subsection.

As the Court held in *Roberts v Mecosta County General Hospital*, 466 Mich 57, 63; 642 NW2d 663 (2002) (hereinafter: *Roberts I*), a case interpreting the same statute as that involved in this case:

An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that the courts are to effect the intent of the Legislature. To do so, we begin with an examination of the language of the statute. If the statute’s language is clear and

unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.

Thus, what the literal text of §2912b(4) demands is *a statement* of the six factors listed therein. And as this Court recognized in its central decision on the adequacy of a notice of intent, *Roberts II*, compliance with §2912b(4)'s requirements "is not an onerous task." *Id.* at 701. The Court further observed in *Roberts II*, that, because of the timing of the pre-suit notice required by §2912b and because of the lack of information available at the time of its preparation, "the claimant is not required to craft her notice with omniscience." *Id.* at 691.

The foregoing discussion of the text of §2912(4) highlights one significant error in the Court of Appeals ruling in this case. That Court found that, "the specificity required for the notice of intent is fundamentally indistinguishable from the standard applicable to general civil complaints." 272 Mich App at 626. This statement is categorically wrong.

The requirements of §2912b(4) for a presuit notice differ markedly from the pleading requirements for a complaint in several respects. First, all that §2912b(4) requires is *a statement* of the applicable standard of care, *a statement* of how that standard was breached, *a statement* of the steps that should have been taken to comply with the standard of care and *a statement* of the manner in which the breach of the standard of care caused the injury being claimed. As noted previously, it does not require a *complete* or *full* statement of any of these factors. As written, this statute does not require that *each and every* violation of the standard of care be stated in the notice of intent, or that *each and every* breach of the standard of care be listed, that *each and every* act that should have been taken to comply with the standard of care be included or that *each and every* way in which the breach

caused injury be included in the notice.¹ Put somewhat differently, §2912b(4) requires notice of the claimant's *intent to sue*. It does not require notice of each and every claim of malpractice that the claimant intends to pursue.

By contrast, it is clear that in a medical malpractice case a complaint must allege each of the theories on which plaintiff wishes to proceed, and the failure to do so will prohibit such a claim from

¹This aspect of §2912b is dramatically demonstrated in statutory language which was before the Michigan Legislature when §2912b was enacted, *but which was not incorporated into the final version of that statute*. The notice of intent statute was passed in its present form in 1993 as part of a comprehensive package of bills addressing medical malpractice litigation. The original Michigan Senate version of this legislative package was contained in Senate Bill No. 270. Attached hereto as Exhibit D is a copy of 1993 Senate Bill 270. Under §2912f(2) of Senate Bill 270, the notice of intent had to be given to the defendant 180 days before the case was filed and that notice had to be accompanied by an affidavit of merit. *See* Senate Bill No. 270 (Exhibit D), pp. 14-15. The section of Senate Bill 270 which is of considerable importance here is that bill's version of §2912d. That section of the proposed bill specifically addressed what was to be done where a claim of malpractice was included in a complaint, but that same claim was not contained in the presuit notice required by §2912f. Senate Bill 270 included the following language in §2912d(2):

Except as otherwise provided in this subsection, in an action alleging medical malpractice, the court shall dismiss a claim not included in the notice required under section 2912f. This subsection does not apply to a claim that results from previously unknown information obtained during discovery.

Senate Bill 270 (Exhibit D), pp. 10-11.

Senate Bill 270 specifically provided that each claim asserted in a medical malpractice complaint had to "match" the claims presented in the presuit notice. That bill further provided that any claims not included in the presuit notice and affidavit of merit would be subject to dismissal. But, what is of obvious importance here is that the language in Senate Bill 270, *did not find its way into the final version of that statute*. There is, quite obviously, nothing in §2912b as finally adopted by the Michigan Legislature, which resembles the language which had been proposed in §2912d(2) of Senate Bill 270. The Court has on a number of occasions recognized the significance of this form of legislative history. *See In Re Certified Question*, 468 Mich 109, 115, n. 5; 659 NW2d 597 (2003); *Mayor of City of Lansing v Michigan Public Service Commission*, 470 Mich 154, 169-170; 680 NW2d 840 (2004); *In Re MCI Telecommunications Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999).

being tried. *See e.e. Dacon v Transue*, 441 Mich 315, 328-336; 490 NW2d 369 (1992).

The statutory requirements set out in §2912b(4) differ from those governing complaints in another respect. The Michigan Court Rules require that a complaint include “*specific* allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called upon to defend.” MCR 2.111(B)(1) (emphasis added); *cf. Simonelli v Cassidy*, 336 Mich 635; 59 NW2d 28 (1953). Pursuant to MCL 2.111(B)(1), a complaint must contain *specific* allegations. There is no textual support in §2912b(4) for the requirement of *specific* statements of the six factors provided therein. In addition, the court rule contains a functional requirement for the specificity of a complaint which is *not* contained in §2912b(4). A complaint must contain allegations with sufficient clarity “reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.” Again, there is nothing in the language chosen by the Michigan Legislature when it drafted §2912b to support the view that a presuit notice must be drafted with sufficient specificity to reasonably inform the health professional receiving that notice of the nature of the claims being asserted.² For all of these reasons, the Court of Appeals’ determination that the specificity required of a notice of intent is “functionally indistinguishable” from the standards applicable to a complaint must be rejected.

One final observation regarding the text of §2912b(4) is necessary. The statements required by that statute pertain to the elements of a potential malpractice claim *as viewed by the claimant*. Thus, a notice of intent must include a statement of the standard of care as *alleged* by the claimant,

²The distinction in the level of specificity required in a complaint is traceable to the fact that a defendant served with such a pleading is “called upon to defend” against a claim. MCR 2.111(B)(1). The same is not true with respect to a health professional served with a notice of intent.

the manner in which it is *claimed* that the standard of care was breached, the *alleged* action that should have been taken to comply with the standard of care and the manner in which the claimant *alleges* that the breach caused the injury being claimed. Thus, the focus of §2912b(4)(b)-(c) is on the substance of the action as viewed from the perspective of the claimant.

II. THE NOTICE OF INTENT MAILED TO DR. LAUER FULLY COMPLIED WITH §2912b(4).

This is an extraordinarily simple medical malpractice claim. Dr. Lauer treated plaintiff's decedent, David Waltz, on only one occasion, on October 6, 2001, when he performed a heart catheterization procedure. During that procedure, Dr. Lauer found Mr. Waltz's left anterior descending artery to be occluded and he attempted to cross that lesion by using several tools. While in the process of doing so, Dr. Lauer perforated Mr. Waltz's artery. Shortly thereafter, Mr. Waltz suffered an arrest and he never regained consciousness. He was pronounced dead five days later.

The first section of plaintiff's January 2003 notice of intent - the section of that notice addressed to the factual basis for the plaintiff's claim - reflected the uncomplicated character of the underlying events giving rise to this claim:

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 to Mr. Waltz' death.

Notice (Exhibit C), p. 1.

This single sentence, while admittedly brief, fully complied with §2912b(4)(a)'s requirement that a notice of intent contain a statement of the factual basis for the claim. This single sentence identified not only the name of Dr. Lauer's patient, Mr. Waltz, and the only date on which Dr. Lauer ever saw Mr. Waltz, October 6, 2001. This sentence also accurately described the medical procedure

which Dr. Lauer was engaged in on that date, a Percutaneous Transluminal Coronary Angioplasty (PTCA), and it also identified what went wrong during that procedure, Dr. Lauer perforated Mr. Waltz's artery. This single sentence also described the ultimate consequence of that perforation, Mr. Waltz died.

In his application for leave to appeal, Dr. Lauer does not challenge the Court of Appeals' conclusion that the January 2003 notice of intent contained a sufficient statement of the factual basis for the claim. This concession is significant. In not challenging compliance with §2912b(4)(a), Dr. Lauer has acknowledged that he was given sufficient information regarding the underlying basis for the plaintiff's claim. Dr. Lauer's own Operative Report (Exhibit A) demonstrates the obvious - he knew what this case was about when he received this notice. Dr. Lauer's Operative Report confirms that he knew he performed a heart catheterization on Mr. Waltz and that this catheterization went fatally wrong when Mr. Waltz's artery was perforated.

Dr. Lauer argues, however, that plaintiff's cause of action should have been dismissed because the presuit notice of intent did not comply with three other subsections of the notice of intent statute, §2912b(4)(b), (c) and (d). These portions of the statute which require a statement of the applicable standard of care alleged by the claimant, a statement of the manner in which the applicable standard of care was breached and a statement of the steps that should have been taken to comply with the standard of care.

Here, plaintiff's counsel complied with all three of these statutory requirements when he submitted twenty-eight separate paragraphs under the heading: "The Applicable Standard Of Practice Or Care Was Breached." Notice (Exhibit C), pp. 1-3. Included in these twenty-eight paragraphs were the following seven statements directly related to the events which occurred on October 6, 2001, when

Dr. Lauer perforated Mr. Waltz's artery during the heart catheterization:

- 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 one 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.

Notice of Intent (Exhibit C), p. 3.

In attacking the contents of plaintiff's presuit notice, Dr. Lauer raises several arguments in his application for leave as to why the notice does not comply with §2912b(4)(b), (c) and (d). These arguments will be addressed separately.

A. The Notice Of Intent Was Not Defective On The Ground That It Did Not Contain A Statement Of The Standard Of Care As To Each Defendant.

Dr. Lauer first argues that, under this Court's decision in *Roberts II*, plaintiff's notice of intent does not comply with §2912b(4)(b) because it fails to provide a separate statement of the standard of care as to each defendant. Lauer Application, pp. 12-15. As plaintiff has previously argued in response to Dr. Lauer's application, this case fundamentally differs from *Roberts II* in that there is only one physician whose negligence is involved in this case - Dr. Lauer. Since there was only one physician responsible for the acts of malpractice which led to Mr. Waltz's death, the defendants

reliance on this Court's ruling in *Roberts II* is misplaced.³

But, quite apart from this obvious basis for distinguishing this case from *Roberts II*, there are other reasons why Dr. Lauer's argument as to plaintiff's failure to comply with §2912b(4)(b) must be rejected.

The most basic error in his argument is that *there is absolutely nothing in the text of §2912b(4)(b) which supports the notion that a notice of intent must include a statement of the standard of care particularized as to each defendant.* There is nothing in the language of this subsection which indicates that plaintiff's counsel had to state one standard of care with respect to Dr. Lauer and another applicable to Borgess Medical Center or Heart Center For Excellence, P.C. All that the text of §2912b(4)(b) requires is *a statement* "of the applicable standard of practice or care alleged by the claimant." The statute says nothing about requiring *a separate* or a *different* statement of the standard of care as to *each* defendant.⁴

³The absurdity of Dr. Lauer's position that §2912b(4) requires a separate statement of the standard of care for both him and his professional corporation deserves special mention. According to the argument that defendant's counsel musters before this Court, plaintiff's notice of intent is defective because Dr. Lauer must be advised that it was he, *not his professional corporation*, who failed to recognize the perforation which he caused in Mr. Waltz's artery. And, if defendant is to be believed, Dr. Lauer must be informed in the notice that it was he, *not his professional corporation*, who timely failed to insert a balloon pump or to timely contact a surgeon when the perforation was discovered.

⁴Thus, in light of the unambiguous text of §2912b(4)(b), there is nothing in that statute which would have put plaintiff's counsel on notice that the presuit notice he prepared in January 2003 required a separate statement of the standard of care governing the conduct of Dr. Lauer and another statement of the standard applicable to the other potential defendants identified in that notice. As Dr. Lauer's argument demonstrates, to the extent such a requirement of a separate statement of the standard of care as to each defendant exists, that requirement is derived from this Court's July 2004 decision in *Roberts II*. Obviously, plaintiff's counsel did not access to this Court's July 2004 decision in *Roberts II* when he drafted the notice of intent which was sent in this case. What plaintiff's counsel had as of the time he prepared the notice was the text of §2912b and that text gave no inkling of the fact that his notice should include a separate

Thus, even if this case had involved more than one physician and even if those physicians practiced in different areas of specialty, there is nothing in §2912b(4)(b) which requires that a notice of intent contain a separate statement of the standard of care as to each physician. Such a result directly flows from the text of this provision of the notice of intent statute. MCL 600.2912b(4)(b) provides that the notice must contain a statement of the standard of care *as alleged by the plaintiff*. Thus, the question is not whether this standard of care asserted in the notice of intent is that which ultimately governs the action. *See Roberts*, 470 Mich at 691, 694. Rather, what §2912b(4)(b) compels is a statement of the standard of care as the plaintiff perceives that standard. Therefore, if the plaintiff asserts that the standard of care in a particular action requires the same thing of two doctors in two different specialties, there is nothing in §2912b(4)(b) which prevents such a statement.

Despite the fact that the text of §2912b(4)(b) provides no support for the conclusion that there must be a particularized statement of the standard of care as to each defendant, Dr. Lauer contends that such a result is dictated by this Court's ruling in *Roberts II*. Dr. Lauer seriously misreads the *Roberts II* decision.

In *Roberts II*, the plaintiff mailed two notices of intent. The first of these notices went to Mecosta County General Hospital. In an attempt to comply with §2912b(4)(b)'s requirement of a statement regarding the applicable standard of care, the plaintiff's notice to the hospital in *Roberts II* stated:

Claimant contends that the applicable standard of care required that Mecosta County

statement of the standard of care for each defendant, a separate statement of how the standard of care was breached for each defendant and a separate statement of the steps that should have been taken to comply with the standard of care for each defendant. To the extent this Court imposed such a requirement in its *Roberts II* decision, that requirement should not be applied to this case in which the notice of intent was prepared over two years before *Roberts II* was decided.

General Hospital provide the claimant with the services of competent, qualified and licensed staff of physicians, residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case and to render same in accordance with the applicable standard of care.

470 Mich at 687.

The second notice of intent which the plaintiff mailed in *Roberts II* was addressed to the negligence of three defendants whom plaintiff would later name, Dr. Gail DesNoyers, an obstetrician, Dr. DesNoyer's professional corporation, and Barb Davis, a physician's assistant. That notice of intent stated with respect to §2912b(4)(b):

Claimant contends that the applicable standard of care required that Obstetrics & Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC, provide the Claimant with the services of competent, qualified and licensed staff of physicians, residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case and to render same in accordance with the applicable standard of care.

470 Mich at 689.

What is notable about the notices involved in *Roberts II* is how generalized they were. In both of the notices of intent mailed in *Roberts II*, *the statement of the applicable standard of care contained no reference whatsoever to the specific acts of malpractice underlying the plaintiff's claim.* The notices simply stated that the standard of care required the defendants to "properly care for" the plaintiff and to "render competent advice and assistance" in the plaintiff's treatment. In short, the statement of the applicable standard of care contained in the *Roberts II* notices of intent was so generalized that it would have been applicable to *any* health care professional regardless of field or specialization, and to *any* fact situation giving rise to a malpractice claim. Thus, the Court in *Roberts II* was presented with what may properly be described as a "universal" notice of intent for purposes

of §2912b(4)(b), *i.e.* a statement of the standard of care so generic that it would apply to every health professional in every possible factual scenario giving rise to a claim of medical malpractice.

This Court concluded in *Roberts II* that the plaintiff's notice failed to comply with §2912b(4)(b). 470 Mich at 690-695. That notice simply stated that the applicable standard of care required the two individual defendants to "render competent advice and assistance in the care and treatment of [plaintiff's] case and to render same in accordance with the applicable standard of care."

This Court found that this statement insufficient to satisfy §2912b(4)(b):

Thus, in response to the statutory query, "What is the applicable standard or practice or care alleged by the claimant?", plaintiff has essentially answered in part: "The standard of care required that defendants adhere to the standard of care." Obviously, this statement is tautological and unresponsive, and it cannot be viewed as minimally compliant with §2912b(4)(b). The alleged standard also observes that defendants DesNoyers and Davis were required to "properly care for" plaintiff and to "render competent advice and assistance." Such general averments, however, are not adequately responsive to the statutory requirement that the claimant allege an applicable standard of practice or care relevant to the defendant.

470 Mich at 693-694.

Thus, while acknowledging that the statement of the standard of care contained in the notice of intent does not have to be "correct and accurate in every respect," the Court found in *Roberts II* that plaintiff's notices were lacking because they failed to provide "some particularized standard for each of the professionals and facilities named in the notices." *Id.*

This Court in *Roberts II* required *some particularized* statement of the standard of care with respect to each professional named in the notice; the *Roberts II* Court did *not* require *a different* statement of the standard of care for each of the professionals named. The notice involved in *Roberts II* was inadequate because it did not identify the particular standard of care applicable to each professional whose negligence was involved in the plaintiff's care. Here, by contrast, plaintiff's

notice specifically described the standard of care which applied to Dr. Lauer under the particular facts of this case. In this case, unlike *Roberts II*, the notice did not simply supply the tautological observation that the standard of care required that the defendants adhere to the standard of care. Instead, the notice in this case clearly conveyed the fact that the standard of care compelled Dr. Lauer to terminate the procedure when the lesion could not be initially crossed, that he timely recognize the perforation, stop anticoagulation and order an echocardiogram, that he insert a balloon pump when he realized that Mr. Waltz's artery was perforated, that he perform a pericardiocentesis, that he timely contact a surgeon once the perforation occurred and that he keep the LAD wire in place after the perforation occurred. Notice (Exhibit C), p. 3. All of these statements of the standard of care were tied to the specific events which took place on October 6, 2001.

As noted previously, there is nothing in the text of §2912b(4)(b) which requires that a plaintiff preparing a notice of intent must specify a *different* standard of care for each physician identified in a notice. If, in fact, the standard of practice or care demanded the same thing from a number of physicians and/or health care institutions, *there is no prohibition against identifying each of these defendants as being governed by the same standard of conduct.*

This point is completely reinforced in two different footnotes in the *Roberts II* majority opinion itself. In discussing the definition of standard of care in a medical malpractice case, the Court in *Roberts II* observed that, “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.” 470 Mich at 692, n. 8 (emphasis added). Notably, the majority opinion in *Roberts II* was prompted to write in footnote 8 that the standard of care applicable to two divergent medical specialists would *likely* differ. The *Roberts II* Court did not suggest, as Dr. Lauer appears

to argue, that these two specialists would *necessarily* be governed by different standards of care. The language used in footnote 8 of the *Roberts II* decision, therefore, completely supports the view that in a particular fact situation the standard of care *might* require the same response from two different defendants.

This same point was emphasized even more clearly in a later footnote in the *Roberts II* majority opinion. In footnote 11 of that opinion, the *Roberts II* Court reacted to an assertion in the dissenting opinion that §2912b(4)(b) does not require a statement of a standard of care specifically tailored to each defendant. The majority rejected the dissent's contention by observing that, "under a proper understanding of [the standard of practice or care], the standard applicable to one defendant *is not necessarily the same* standard applicable to another defendant." 470 Mich at 694, n. 11 (emphasis added). Thus, the *Roberts II* Court acknowledged that the standard of care applicable to one health care provider *is not necessarily the same* as the standard of care applicable to another provider. But, this language from the *Roberts II* majority opinion unquestionably leaves open the possibility that, in a given set of circumstances, two defendants (even two physicians in differing specialties) *may well be governed by the same standard of practice or care*. The language used in footnotes 8 and 11 of the *Roberts II* opinion explicitly leaves open the possibility that multiple health care providers named in a single malpractice case may be governed by the same standard of care.

Not only is this a logical reading of the law applicable to notices of intent, this *must* be the law in light of the unequivocal text of §2912b(4)(b). As noted previously, that subsection of the notice of intent statute requires only a statement of the standard of practice or care *as alleged by the claimant*. If the claimant (whether correctly or incorrectly) asserts in a notice of intent that the standard of care demands the same response from two different defendants, that statement fully

complies with the requirement of §2912b(4)(b) precisely because it represents a statement of the standard of care *as alleged by the plaintiff*.

For each of these reasons, Dr. Lauer's argument that the January 2003 notice of intent did not comply with §2912b(4)(b) must be rejected.

B. Dr. Lauer's Argument Against "Incorporation" In A Notice Of Intent.

The other argument which Dr. Lauer raises in his application for leave concerns his claim that plaintiff's notice of intent was defective because it did not include separate statements regarding the applicable standard of care, the breach of that standard of care and the steps that should have been taken to comply with the standard of care. According to Dr. Lauer, §2912b(4)(b)-(d) require that each of these three factors identified in the statute must be addressed separately.

The January 2003 notice mailed by plaintiff's counsel contained separate headings for "The Applicable Standard of Care," "The Manner The Applicable Standard Of Practice Or Care Was Breached," and "The Action That Should Have Been Taken To Achieve Compliance With The Standard Of Care." Under the heading pertaining to the way in which the standard of care was breached, section C of the notice, the plaintiff listed the various things which the defendants failed to do. Notice (Exhibit C), pp. 1-3. As the sections of the notice related to standard of care and the steps that should have been taken to comply with the standard of care, plaintiff's notice indicated that the reader should "See paragraph C." Notice (Exhibit C), pp. 1, 3.

Dr. Lauer argues that this "incorporation" of one of the requirements of §2912b(4) into another section of a notice of intent is inappropriate. Dr. Lauer contends that, to give effect to each of the subdivisions of §2912b(4), a notice of intent must contain a separate statement as to the standard of care, a separate statement as to how that standard of care was breached, along with a

separate statement of the steps which should have been taken to comply with the standard of care.

Dr. Lauer is wrong.

What is immediately observable about the text of §2912b(4)(b), (c) and (d) is the sizable amount of overlap in these three subsections. The simple fact is that the various “statements” required by §2912b(4) are unquestionably interrelated, and there is a substantial amount of duplication in the requirements called for by this subsection, particularly as to the three provisions in §2912b(4) addressed to the standard of care,

MCL 600.2912b(4)(b) not only requires that a notice of intent contain a statement of the *applicable* standard of care. Thus, by the express language of this provision, the statements of the standard of care which are contained in a notice of intent will be limited only to those which are *applicable* to a particular case. The implications of the text of §2912b(4)(b) as it applies to a physician such as Dr. Lauer are obvious. Dr. Lauer is an interventional cardiologist. As such, Dr. Lauer routinely performs a variety of procedures, each of which would be subject to differing standards of practice or care. For example, an interventional cardiologist is responsible for catheterizations, balloon angioplasty, the placement of stents, the administration of intervascular ultrasound, and the administration of various drugs.

In performing these diverse acts, an interventional cardiologist would presumably be governed by a particular standard of care. However, in drafting the notice of intent in this case, the plaintiff was not required to identify the myriad standards of care which *might* be applicable to an interventional cardiologist, plaintiff was charged with the responsibility of setting out the *applicable* standard of care. Because plaintiff was not dealing with a case involving the administration of drugs, the performing of an intervascular ultrasound or the placement of a stent, it is obvious that the

standards of care applicable to these procedures would never be included in the notice of intent prepared here. Instead, by the express dictates of §2912b(4), the notice had to be confined to the *applicable* standard of care, that which governs the treatment provided by an interventional cardiologist to a patient such as Mr. Waltz - a patient undergoing a heart catheterization whose artery is perforated during that procedure.

Moreover, it stands to reason that any statement of the standard of care which finds its way into a plaintiff's presuit notice would *not* include those aspects of the medical care provided by the defendant which *complied* with the standard of care. In other words, a notice of intent to sue, in describing the *applicable* standard of care, is not going to delve into what a defendant did *right*. That notice will, instead, necessarily focus on the standards of care which the plaintiff alleges were performed improperly.

Thus, when a notice of intent describes the *applicable* standard of care under §2912b(4)(b), that notice will necessarily be limited to the standard(s) of care which the defendant allegedly breached. It is, therefore, not at all surprising that a notice of intent will satisfy the next requirement of the notice statute, §2912b(4)(c), which requires a statement of the manner in which the applicable standard of practice or care was breached, by "incorporating" the notice's prior statement regarding the standard of care.

Thus, it is entirely appropriate in a case such as this for a notice of intent to isolate the *applicable* standard of care, *i.e.* the standard of care which was breached, by stating that the standard of care required Dr. Lauer to immediately contact a surgeon once the perforation was detected. Notice (Exhibit C), p. 3, ¶aa. After identifying this *applicable* standard of care, it would be entirely appropriate to "incorporate" that standard of care into the section of the notice directed to

§2912b(4)(c) by asserting that the manner in which the standard of care was breached was that the defendant failed to comply with the standards of care previously identified.

Similarly, §2912b(4)(d) requires a statement of the steps that should have been taken to comply with the standard of care. But, having previously identified the *applicable* standard of care, which as described above is necessarily limited to those things that the defendant did *wrong*, it is not at all improper for the notice to state that the steps necessary to achieve compliance with the standard of care was for the defendant to do that which the previously identified standard of care required. The defendant's suggestion that a notice of intent cannot "incorporate" other sections of such a notice is patently erroneous.⁵

There is, therefore, an obvious interrelationship between the statement required by §2912b(4)(b) pertaining to the applicable standard of care and any statement as to how that applicable standard of care was breached or the steps that should have been taken to comply with the standard of care. In this case, plaintiff's notice indicated, for example, that Dr. Lauer breached the applicable standard of care by failing to terminate the procedure earlier when the lesion in Mr. Waltz's artery could not be initially crossed with a wire. Notice (Exhibit C), p. 3. Dr. Lauer cannot contest that this statement along with numerous other statements in Section C of the notice constitutes full compliance with §2912b(4)(c). This is a statement of how the applicable standard of care was breached. But, Dr. Lauer's argument against "incorporation" in a notice of intent completely overlooks the fact that this statement of how the applicable standard of care was breached necessarily

⁵It is worth noting on this point that this Court in *Roberts II* confronted a notice of intent in which certain sections were "incorporated." In *Roberts II* this Court did not declare the notice to be inadequate simply because it "incorporated" other sections of the notice. What the Court ruled, instead, was that the sections of the notice which were incorporated were themselves inadequate. 470 Mich at 695-698.

contains within it *a statement of the applicable standard of care* sufficient to comply with §2912b(4)(b). It is, quite simply, impossible to come away from a reading of this statement of how the applicable standard of care was breached without arriving at the conclusion that the applicable standard of care for purposes of §2912b(4)(b) required a physician in Dr. Lauer's position to stop the procedure when the lesion could not be initially crossed.

Similarly, the January 2003 notice indicated that Dr. Lauer breached the applicable standard of care in failing "to timely contact a surgeon once the perforation was recognized." *Id.* Again, this statement of how the applicable standard of care was breached contains within it a statement of the applicable standard of care governing Dr. Lauer's conduct. The standard of care required that Dr. Lauer immediately contact a surgeon once he realized that he had perforated Mr. Waltz's artery.

A similar analysis applies to any argument that Dr. Lauer has raised based on §2912b(4)(d). Under that provision, the notice must state the steps that could have been taken to comply with the standard of care. But, having previously identified the *applicable* standard of care and how that *applicable* standard of care was breached, the notice has already conveyed the steps that should have been to comply with the standard of care. Thus, the January 2003 notice indicates that Dr. Lauer breached the applicable standard of care by failing to terminate the procedure when the lesion could not be initially crossed. It necessarily follows that Dr. Lauer could have achieved compliance with the standard of care *by stopping the procedure when the lesion could not be crossed.*

Likewise, plaintiff's notice specified that Dr. Lauer breached the standard of care by failing to contact a surgeon immediately after he realized that he had perforated Mr. Waltz's artery. This statement of how the applicable standard of care was breached undeniably provides a statement of what Dr. Lauer should have done under the circumstances to comply with the applicable standard of

care - he should have immediately contacted a surgeon when he realized that he had perforated Mr. Waltz's artery.

Let us assume that Dr. Lauer's argument against "incorporation" in a notice of intent were correct. What this means is that plaintiff herein could have achieved compliance with §2912b(4) by mailing a notice which contained a separate heading applicable to the standard of care which stated that the applicable standard of care required Dr. Lauer to terminate the procedure when he could not initially cross the lesion. As Dr. Lauer envisions the notice requirement, plaintiff's notice then had to contain a separate section addressed to breach of the standard of care which indicated that Dr. Lauer breached the standard of care by continuing with the procedure even after initially failing to cross the lesion. According to Dr. Lauer's argument, the notice then had to contain yet another section addressed to the requirements of §2912b(4)(d) in which plaintiff stated that Dr. Lauer could have achieved compliance with the standard of care by stopping the procedure when he was initially unable to cross the lesion.

The notice described in the preceding paragraph would apparently satisfy the criteria which Dr. Lauer asks this Court to adopt. Yet, what is of overwhelming significance is that this separate statement of the standard of care, how that standard was breached and the steps that should have been taken to comply with that standard *would not have told Dr. Lauer anything more than the January 2003 notice of intent told him*. That notice, reasonably read,⁶ advised Dr. Lauer in this simple medical

⁶The attorney responsible for drafting this brief has, regrettably, been involved in many cases post-*Roberts II* in which health care providers have challenged the contents of notices of intent. One of the universal observations which the undersigned has made in responding to these arguments is how amazingly stupid doctors (and their attorneys) suddenly become when presented with notices of intent. The defendants bringing these motions - and Dr. Lauer is no exception - are often well trained and highly experienced professionals, who in every other context profess to have vast knowledge of the medicine associated with their areas of practice.

malpractice claim, what the standard required of him, what he failed to do in violating that standard and what he could have done to comply with that standard. That is all that §2912b(4) requires.

C. The Proximate Cause Requirement Of MCL 600.2912b(4)(e)

In his Application for Leave, Dr. Lauer mentions only once the proximate cause requirement of §2912b(4)(e). Dr. Lauer states in an introductory section to the argument section of his brief that plaintiff's presuit notice "failed to provide a coherent statement regarding causation." Defendant's Brief, p. 9. Yet, in the arguments which follow, Dr. Lauer never contends that plaintiff's notice failed to comply with §2912b(4)(e), focusing instead on §2912b(4)(b)-(d). Defendant's Brief, pp. 10-20. It would appear, therefore, that Dr. Lauer has not presented any challenge to plaintiff's notice as defective under §2912b(4)(e). However, to the extent that the single sentence in his application could be construed as having raised this issue as well, plaintiff will address §2912b(4)(e) as well.

MCL 600.2912b(4)(e) specifies that a presuit notice of intent must contain a statement of "[t]he manner in which it is alleged the breach off the standard of practice or care was the proximate cause of the injury claimed in the notice. "To comply with this requirement, plaintiff indicated in the January 2003 notice that Dr. Lauer "caused a perforation which lead [*sic*] to Mr. Walt's death." Notice (Exhibit C), p. 1. The notice also indicated under a separate heading addressed to the proximate cause component: "If the standard of care had been followed, Mr. Waltz would not have

Yet, these same professionals - and again Dr. Lauer is again no exception - undergo an astounding transformation when presented with a notice of intent. These professionals suddenly become incapable of understanding the most basic of medical concepts as they profess absolutely no grasp of what the plaintiff attempted to convey in the notice of intent. The overheated arguments advanced by Dr. Lauer in this Court demonstrate this point well. In every other context in this case, Dr. Lauer will present himself as someone who is well-versed in his chosen profession, completely conversant with the standards governing his practice. Yet, if the brief which has been filed on his behalf in this Court is to be believed, when Dr. Lauer received the notice of intent, he was completely at a loss to explain what this notice was referring to.

died on October 11, 2001.”

In its October 31, 2006 decision in this case, the Court of Appeals ruled that this statement of causation “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).” 272 Mich App at 632. The Court of Appeals, however, ruled that, when viewing the notice as a whole, the causation component of §2912b(4) was satisfied.

The Court of Appeals was correct in its conclusion that §2912b(4)(e) was satisfied here. The Court of Appeals was, however, wrong in suggesting that the simple declarative statement in plaintiff’s notice was inadequate to comply with that statutory provision.

Plaintiff was required by the literal text of §2912b(4)(e) to provide *a statement of the manner in which she was alleging that the defendant’s breaches of the standard of care caused the injury being claimed in this case*. There should have been no question that such information was provided to the defendants in the January 2003 notice. That notice began with a section pertaining to the factual basis for the claim. Notice (Exhibit C), p. 1. That portion of the notice specifically stated that Mr. Waltz underwent a catheterization during which his artery was perforated, leading to his death.

Plaintiff’s notice also contained a list of numerous ways in which Dr. Lauer breached the standard of care during the procedure and in responding to the perforation of Mr. Waltz’s artery. Finally, in the section of the notice which contained the proximate cause aspect of plaintiff’s claim, the notice stated that if the standard of care had been complied with, Mr. Waltz would not have died on October 11, 2001.

The *manner* in which the defendants’ breaches of the standard of care caused the injury which is the subject of this case was clearly provided in this notice - *Dr. Lauer breached the standard of*

care in a number of respects in his treatment of Mr. Waltz on October 6, 2001 and, as a direct result of that negligence, the injury that is the subject of this wrongful death action occurred - Mr. Waltz died. The manner in which Dr. Lauer's negligence caused the injury being claimed in this case was transparently conveyed - *his negligence caused the death of Mr. Waltz.*

In considering whether plaintiff complied with §2912b(4)(e), it is important to return to the text of that provision. That section of the notice of intent statute requires a statement of the manner in which it is alleged that the defendant's breaches of the standard of care were the proximate cause "of the injury claimed in the notice". This is a wrongful death action and, as in every wrongful death action, the injury being claimed is *the death of plaintiff's decedent*. What §2912b(4)(e) requires in this case is not a statement as to how the defendants' professional negligence caused the medical condition which ultimately led to Mr. Waltz's death. Rather, what is required in this wrongful death action is a statement of how Dr. Lauer's negligence caused the injury being claimed, where the injury being claimed happens to be the death of the plaintiff's decedent.

Taking the literal text of §2912b(4)(e), the *manner* in which defendants' breach led to *the injury being claimed* in this (or any other) wrongful death action is capsulized in a simple declarative sentence - the manner in which the defendant's breach of the standard of care caused the injury being claimed in this case is that *the defendant's breach of the standard of care killed plaintiff's decedent*. That is, without any textual embellishment, all that §2912b(4)(e) requires of the proximate cause element of a notice of intent in a wrongful death action. The manner in which Dr. Lauer's negligence caused the injury being claimed in this particular medical malpractice case is that *the defendant's negligence killed David Waltz*.

The very simple question posed by §2912b(4)(e) in this (and every other) wrongful death

action is this: In what manner is it alleged that the defendants' negligence proximately caused the injury being claimed in the case? And, the simple answer to this question in this (and every other) wrongful death action is: the manner in which the defendant's negligence proximately caused the injury being claimed herein is that *the defendants' negligence killed plaintiff's decedent*.

The adequacy of the proximate cause statement in plaintiff's notice can be demonstrated in another way. Assume that Dr. Lauer perforated Mr. Waltz's artery and that Mr. Waltz's life was saved, but he sustained other adverse cardiac consequences as a result of the perforation. In such a hypothetical case, *the injury* being claimed would be the damage done to Mr. Waltz's heart. A notice of intent prepared in such a case must contain some statement of the manner in which the defendant's negligence was the proximate cause of Mr. Waltz's damaged heart, the injury being claimed in such a case.

But where, as here, the injury being claimed is the death of the plaintiff's decedent, the manner in which the defendant's negligence is the proximate cause of the injury being claimed will *always* be the same - the manner in which the defendant's negligence represented the proximate cause of the injury being claimed is that *the defendants' negligence killed plaintiff's decedent*.

In *Roberts II*, the Court recognized that in certain cases, "the burden of explication" imposed on the plaintiff by the notice of intent statute "will be minimal." 470 Mich at 694, n. 11. In acknowledging that there are situations where the burden on the plaintiff is "minimal," the *Roberts II* Court was addressing §2912b(4)(b). But, the same thing must be said of §2912b(4)(e) in any case involving a wrongful death. In such cases, the degree of explication as to how the defendants' breaches of the standard of care caused the injury being claimed in the notice is, indeed, minimal - the manner in which the defendant's negligence caused plaintiff's injury is that this negligence caused

plaintiff's decedent's death.

The notice of intent prepared by plaintiff's counsel in this case fully complies with the literal requirements of §2912b(4)(e). That notice describes numerous ways in which Dr. Lauer breached the standard of care. After itemizing these breaches of the standard of care, the plaintiff's notice of intent states that as a result of these breaches, Mr. Waltz died. Plaintiff's notice supplied everything that §2912b(4)(e) requires; that notice stated the manner in which the defendants caused the injury being claimed in this case - the *defendants' malpractice killed Mr. Waltz*.

Thus, reading the plaintiff's notice of intent in a reasonable fashion, what that document so clearly conveyed is that because Dr. Lauer failed to suspend the procedure after the initial attempt to cross the lesion failed, *Mr. Waltz died*. Because Dr. Lauer failed to perform pericardiocentesis, *Mr. Waltz died*. Because Dr. Lauer failed to immediately contact a surgeon after perforating the artery, *Mr. Waltz died*.

It is further clear that the statement in plaintiff's notice with respect to proximate cause is consistent with this Court's ruling in *Roberts II*. The notice of intent at issue in *Roberts II* differed markedly from that involved in this case. In *Roberts II*, a case which arose out of the plaintiff's ectopic pregnancy, the plaintiff stated in a single paragraph that the standard of care required the defendant hospital to provide a "competent, qualified and licensed staff . . . to properly care for [plaintiff] . . . and to render same in accordance with the applicable standard of care." Thus, the statements regarding the standard of care in the notice of intent at issue in *Roberts II* were generic in the extreme. The statement of how the standard of care was breached in the *Roberts II* notice was in no way tied to the specific facts at issue in that case. Rather, the notice claimed only that the defendants "breached the standard of care by breaching the standard of care." 470 Mich at 696.

What is first notable about the Court's decision in *Roberts II* is the discussion contained therein as to why plaintiff's notice did not comply with the requirements of §2912b(4)(c). That provision of the notice of intent statute requires a statement of "the manner in which it is claimed that the applicable standard of practice . . . was breached . . ." The Court in *Roberts II* noted that the plaintiff's notice of intent indicated that the defendants breached the standard of care by failing to provide "care and treatment . . . in accordance with the standard of care." In *Roberts II*, the Court found that this statement did not comply with the requirements of §2912b(4)(c), because, "rather than indicating the *manner* in which the . . . standards of care were breached by defendants, the notices simply indicate that the standards were, in fact, breached." 470 Mich at 701 (emphasis in original).

The Court's comments in *Roberts II* regarding the plaintiff's lack of compliance with §2912b(4)(c) is pertinent here because that subsection of the notice of intent statute is the only one other than §2912b(4)(e) which uses the phrase, "*the manner*." In §2912b(4)(c), the notice of intent must contain a statement of "the manner" in which the applicable standard of care was breached; under §2912b(4)(e) there must be a statement of "the manner" in which the defendants' negligence causes "the injury claimed in the notice." What the Court held in *Roberts II* was that the plaintiff's notice of intent failed to comply with §2912b(4)(c) because that notice provided only a statement that the standard of care was breached, not a statement as to *the manner* in which the standard of care was breached.

This critique of the notice of intent submitted in *Roberts II* must be compared to the notice of intent filed here. What *Roberts II's* discussion of the plaintiff's failure to comply with §2912b(4)(c) demonstrates is that, if the notice at issue herein made *only* the statement that the defendants' negligence was the proximate cause of the plaintiff's injury, that notice would not be

compliant with §2912b(4)(e).

But, the notice of intent involved in this case differs from that which was involved in *Roberts II* in one significant respect. Here, plaintiff did not simply declare in the notice that the defendant's negligence *was* the proximate cause of the injuries being claimed. Rather, the notice which plaintiff mailed in this case specified *how* the defendant's negligence caused the injury being claimed herein - *that negligence killed Mr. Waltz*.

The Court in *Roberts II* also found that the plaintiff's notice of intent was defective because it did not comply with §2912b(4)(e). The discussion contained in the section of the *Roberts II* decision pertaining to the plaintiff's failure to comply with §2912b(4)(e) also supports the view that the notice sent by the plaintiff in this case complies with the notice of intent statute. In the section of the notice designed to comply with the proximate cause requirement of §2912b(4)(e), the *Roberts II* notice of intent stated only the following:

5. THE MANNER IN WHICH THE PROXIMATE CAUSE OF CLAIMED INJURY

See paragraph 2 above.

470 Mich at 688.

Thus, the notice of intent in *Roberts II* contained no independent statement of proximate cause in the section of the notice which was designed to comply with §2912b(4)(e). Rather, the notice referred only to a prior, conclusory paragraph setting out the defendant's failure to comply with the applicable standard of care. The Court found the notice defective because, "nowhere in the notices does plaintiff state that any of the defendants misdiagnosed her condition; *nor do the notices state any consequences stemming from a misdiagnosis.*" 470 Mich at 699 (emphasis added).

In *Roberts II*, the Court found that the notice did not comply with §2912b(4) because the plaintiff first failed to specify with particularity what the defendants did wrong - there was no statement that the defendants misdiagnosed the plaintiff's condition. More importantly for purposes of §2912b(4)(e), the notice of intent mailed in *Roberts II* did not meet the requirements of the proximate cause component of the statute because that notice failed to state *the consequences* which flowed from the defendants' malpractice.

In this case, plaintiff unquestionably provided both a statement of what Dr. Lauer did wrong in his treatment of Mr. Waltz on October 6, 2001, as well as a clear statement of *the consequences* that followed from that negligence. Plaintiff listed a number of things that Dr. Lauer did wrong and plaintiff further provided a clear statement of the consequences resulting from his professional negligence, *Mr. Waltz died*.

In *Roberts II*, the Court found that the plaintiff's notice did not comply with §2912b(4)(e) because plaintiff failed to include therein a statement of "how defendants' conduct constituted the proximate cause of plaintiff's claimed injury." 470 Mich at 701. Here, plaintiff's notice contained that which was missing from the notice under consideration of *Roberts II*. The notice mailed by plaintiff in January 2003 expressly indicated how the defendants' negligence caused the injury being claimed herein.

Moreover, in *Roberts II* the Court indicated that the contents of a notice of intent must be considered in conjunction with the function that such notice is designed to serve. Thus, the Court indicated in *Roberts II* that, "the information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them." 470 Mich at 701. Here, there can be no serious assertion that Dr. Lauer could not grasp the

nature of a claim being made against him based on the notice of intent mailed to him. On October 6, 2001, the only time that Dr. Lauer ever provided care to Mr. Waltz, Dr. Lauer performed a catheterization during which Mr. Waltz's artery was perforated. Mr. Waltz died five days later as a result of that perforation.

One final aspect of any argument regarding §2912b(4)(e) should be considered. If this case went to trial, it would be the plaintiff's burden to show that the defendants' negligence represented a proximate cause of the plaintiff's injury. In other words, the trier of fact would have to decide the question of *whether* the defendants' negligence caused Mr. Waltz's death, and the plaintiff could obtain a verdict in her favor just by presenting evidence that Dr. Lauer's negligence was, in fact, the cause of that death.

Yet, if a court were to rule that the statement in plaintiff's notice of intent that the defendants' negligence caused Mr. Waltz's death was *not* sufficient to satisfy this subsection of the notice of intent statute, *it would mean that the notice of intent, mailed months before the case is even begun, must contain more information than would be necessary to prevail on the causation element of plaintiff's claim at trial.* This makes no sense. It makes no sense to construe §2912b(4)(e) in such a way that the information contained in a presuit notice pertaining to proximate cause must be more detailed than that which plaintiff would have to actually prove at trial to succeed on her claim. It makes no sense to require that a presuit notice contain certain statements regarding proximate cause which would not even be essential to the plaintiff's case at trial.

Yet, if this Court were to accept the Court of Appeals' interpretation of §2912b(4)(e), that is precisely what would happen. There is no reason to believe that the Michigan Legislature drafted the notice of intent statute in such a way that a plaintiff must present more information regarding

proximate cause in a document mailed months before suit is even filed than would be required to obtain a favorable verdict at trial.

For each of these reasons, this to the extent that Dr. Lauer has even raised an issue concerning the adequacy of plaintiff's notice of intent under §2912b(4)(e), that argument must be rejected.

III. THE COURT OF APPEALS ERRED IN CONCLUDING THAT BORGESS MEDICAL CENTER AND HEART CENTER FOR EXCELLENCE, PC WERE ENTITLED TO SUMMARY DISPOSITION BASED ON INADEQUACIES IN PLAINTIFF'S NOTICE OF INTENT.

In her cross-application for leave to appeal, Ms. Boodt has challenged the Court of Appeals' ruling that summary disposition was appropriate in favor of Borgess Medical Center and Heart Center for Excellence, PC, because of defects in plaintiff's notice of intent as to these two defendants.

The Court of Appeals held that there was no indication in the notice as how these two defendants were involved in the events leading to Mr. Waltz's death. 272 Mich App at 629. This Court should review and reverse that determination.

Contrary to the Court of Appeals' conclusion, the notice did provide a statement of the involvement of these defendants. The factual basis for the notice indicated that on October 6, 2001, Mr. Waltz *presented to defendants*. Notice (Exhibit C), p. 1. These defendants had been already identified as Borgess Medical Center and Heart Center for Excellence < P.C.. The statement in the notice was, therefore, sufficient to convey something which the defendants well knew long before they received the notice of intent - that the events of October 6, 2001 took place at Borgess Medical Center and that they involved a physician employed by Heart Center for Excellence, P.C.

Plaintiff's notice also indicated that it was intended to assert claims based on the vicarious responsibility of Borgess Medical Center and Heart Center for Excellence, P.C. Thus, the first

paragraphs of the notice provided:

TO: BORGESS MEDICAL CENTER; DR. MICHAEL ANDREW LAUER; DR. MICHAEL ANDREW LAUER, M.D., P.C.; HEART CENTER FOR EXCELLENCE, P.C.

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.

Notice (Exhibit C), p. 1.

In the statements relating to how the standard of care was breached, the notice specified both claims of direct responsibilities against these two entities as well as claims for which they might be held vicariously liable based on the acts or omissions of Dr. Lauer. With respect to potential direct claims of negligence, the January 2003 notice provided:

- 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;

* * *

- 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;

* * *

- 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 patients, and/or failed to comply with, or require compliance with its own standards, bylaws, rules and regulations for the care of patients in the patient's condition;

* * *

- 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 non physician 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.

Id., pp. 1-3.

All of these represent statements of how the standard of care was breached with respect to the institutional defendants *as alleged by the plaintiff*. That is all that §2912b(4) requires.⁷

However, these two defendants were also notified of the fact that Ms. Boodt intended to pursue a claim against these defendants based on the negligence of their agents. And, these two defendants did not need to be made aware off their legal relationship with Dr. Lauer, which might lead to a finding of vicarious liability for his personal negligence associated with the treatment he provided to Mr. Waltz on October 6, 2001.

For reasons discussed in the prior section of this brief, the January 2003 notice of intent complied with §2912b(4) as to plaintiff's claims against Dr. Lauer. Since this is true and since the Borgess Medical Center and Heart Center for Excellence, P.C. were put on notice that they would be held responsible for the breaches of the standard of care committed by their agents, the notices complied with §2912b(4).

IV. THE LOWER COURTS ERRED IN CONCLUDING THAT THE SANCTION TO BE IMPOSED FOR A DEFECT IN PLAINTIFF'S NOTICE OF INTENT WAS THE DISMISSAL OF MS. BOODT'S CASE WITH PREJUDICE.

⁷Plaintiff acknowledges that these statements of direct liability against these two defendants were not part of the complaint later filed in this case. But, this does not alter the fact that these statements comply with the requirements of §2912b(4).

For the reasons discussed in Issues I and II, *supra*, no part of this case should have been dismissed for a failure to comply with the requirements of §2912b(4). However, even if the defendants were correct in concluding that the January 2003 notice of intent did not fully comply with that statute, it does not follow that this case was subject to dismissal with prejudice on that basis.

This Court has previously considered the appropriate sanction to be imposed where a party fails to submit the presuit notice required by §2912b. In *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26; 594 NW2d 455 (1999), the Court ruled that the appropriate disposition of such a case would be dismissal *without* prejudice. 460 Mich at 47. Under the reasoning employed by the Court in *Dorris*, if this case were to be dismissed for failing to comply with §2912b, that dismissal should be *without* prejudice.

If this case were to be dismissed *without* prejudice as *Dorris* provides, Ms. Boodt must be afforded the opportunity to refile this case. And, such a refiled action could be timely based on the operation of the tolling period provided for in MCL 600.5856(a).⁸ This Court's recent decision in *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), clearly demonstrates how this tolling provision must operate in this case. In *Kirkaldy*, the Court directly confronted the question of how the tolling period provided in MCL 600.5856(a) is triggered in a medical malpractice action. The *Kirkaldy* Court explicitly held:

Under MCL 600.5856(a) and MCL 600.2912d, *the period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendant. Scarsella, [v Pollak, 461 Mich 547, 549; 607 NW2d 711 (2000)]. In this case, as in Geraldts [v Munson Healthcare, 259 Mich App 225; 673 NW2d 792 (2003)] and Mouradian [v Goldberg, 256 Mich App 566; 664 NW2d 805 (2003)], plaintiff filed and served a*

⁸At the time this case was filed, that provision specified that the statute of limitation is tolled, "at the time the complaint is filed and a copy of the summons and complaint are served on the defendant." MCL 600.5856(a).

complaint and affidavit of merit. Thus, the period of limitations was tolled on that date.

478 Mich at 585-586 (emphasis added).

Kirkaldy, therefore, instructs that when Ms. Boodt filed this action in June 2003, along with an affidavit of merit signed by Dr. William Gifford, the statute of limitations was tolled. *Cf Saffian v Simmons*, 477 Mich 8; 727 NW2d 1323 (2004). This means that during the entire pendency of this case, the limitations period was tolled. *See Terrance Land Development Co v Seeligson & Jordan*, 250 Mich App 452, 459; 647 NW2d 525 (2002); *Yeo v State Farm Fire & Casualty Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000). Thus, if this case is remanded for entry of a dismissal *without* prejudice as it should be under *Dorris*, plaintiff would have the right to refile her case on a timely basis since the statute of limitations has been tolled under MCL 600.5856(a) since the date the complaint was filed.

Plaintiff would further note that this case does not have the statute of limitations issue which was presented to the Court in the *Roberts* case. In *Roberts II*, the Court held that the plaintiff's notice did not comply with §2912b(4) in several respects. That decision was of significance because of a determination which the Court made the first time that the *Roberts* case was before it.

In *Roberts*, the acts of malpractice occurred in October 1994. Plaintiff's counsel mailed a notice of intent to the prospective defendants in September 1996, and, after waiting the time period provided in §2912b, she instituted her malpractice action in February 1997. That filing date was beyond the two year statute of limitations applicable to malpractice claims. *See* MCL 600.5805(6). The complaint filed in *Roberts* was, however, timely if plaintiff could claim the benefit of the 182 day tolling period then provided in MCL 600.5856(d). That provision tolls the statute of limitations

during the mandatory waiting period imposed in §2912b. At the time the *Roberts* case was decided, that tolling provision specified that if, during the mandatory waiting period called for by §2912b, a claim would be barred by the statute of limitations, the plaintiff would be entitled to tolling for a period of 182 days, “after notice is given *in compliance with section 2912b.*” (emphasis added).

This Court ruled in *Roberts I* that under the language then contained in §5856(d), if a presuit notice of intent is not “in compliance with” §2912b, the plaintiff cannot claim the 182 day tolling period provided in that statute. The Court held in *Roberts I*, “the plain language of §5856(d) clearly requires a medical malpractice plaintiff to comply with the provisions of §2912b in order to toll the limitation period.”⁹ 466 Mich at 67. Thus, under *Roberts I*, when the plaintiff mailed notices of intent which did not fully comply with the requirements of §2912b, the plaintiff lost the ability to claim the 182 day tolling period then provided in §5856(d). And, since the 182 day tolling period was necessary to make plaintiff’s cause of action timely in the *Roberts* case, when this Court later ruled in *Roberts II* that plaintiff’s notices of intent were defective, plaintiff’s cause of action was barred by operation of the statute of limitations.¹⁰

⁹It is worth noting that the language in §5856(d) which led this Court to its decision in *Roberts I* has since been removed from that statute. MCL 600.5856(d) was amended in 2004. In that amendment, the statutory language at the end of §5856b(d) - “notice is given in compliance with section 2912 - was removed. As of 2004, that tolling provision indicates that “at the time notice is given *in compliance with the applicable notice period.*” Thus, as rewritten in 2004, the 182 day tolling period is not predicated on compliance with §2912b(4) as it was in 2002 when *Roberts I* was decided.

¹⁰In arguing for the complete dismissal of plaintiff’s cause of action, Dr. Lauer seriously misconstrues the impact of the Court’s decision in *Roberts I*. In his application, Dr. Lauer asserts that “filing a valid NOI is a prerequisite to a medical malpractice claim because doing so tolls the two-year limitations period in such actions.” Lauer Application, p. 11. *Roberts*, however, had nothing to do with the tolling of the two year limitations period. *Roberts* only concerned the 182 day tolling period provided in §5856(d). It was not until the Court decided *Kirkaldy* that the tolling of the two year period was addressed and, as discussed previously, in *Kirkaldy* this Court

This case differs from the facts which were before the Court in *Roberts* in one significant respect. In *Roberts*, the plaintiff's cause of action could be deemed timely *only if* the plaintiff could claim the 182 day tolling period provided in §5856(d). By contrast, Ms. Boodt's cause of action filed in June 2003 was timely without reference to the 182 day tolling period provided in that statute. Here, the malpractice at issue occurred in October 2001 and this case was filed approximately twenty months later, on June 19, 2003. This case was, therefore, filed within the two year period provided in MCL 600.5805(6).

For the reasons discussed in the earlier sections of this brief, this Court should rule that plaintiff's notice of intent was sufficient to satisfy §2912b(4) as to all of the defendants. But, if the Court determines that plaintiff's notice is defective as to any of the defendants, it must address the important question of the implications of such a finding. Since this case was filed in June 2003, long before the two year limitations period expired, and since, under this Court's decision in *Kirkaldy*, the statute of limitations was tolled when this case was filed, if there is to be a dismissal in this action for failing to comply with §2912b, it must be a dismissal *without* prejudice to Ms. Boodt's right to reinstitute this action.

V. WHERE A COURT DETERMINES THAT A PRESUIT NOTICE OF INTENT IS DEFECTIVE, RATHER THAN DISMISSING THAT CASE, THE COURT SHOULD ALLOW THE PLAINTIFF TO FILE AN AMENDED NOTICE OF INTENT.

Even if plaintiff's notice of intent did not fully comply with §2912b, the Court should have afforded plaintiff the opportunity to correct any defect in his notice of intent through an amendment

explicitly held that the statute of limitations in a malpractice action is tolled when a complaint is filed with an affidavit of merit.

of that document. The source of plaintiff's right to amend in these circumstances is statutory. The statute which gives plaintiff the right to submit an amended notice or affidavit is MCL 600.2301, which statute provides:

The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every state of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

MCL 600.2301 is written in broader terms than the court rule which applies to amendments, MCR 2.118. That court rule applies solely to the amendment of *pleadings*. See MCR 2.118(A)(1). The Michigan Court Rules limit the term "pleadings" to certain specified documents which do not include affidavits of merit. See MCR 2.110(A). By contrast, MCL 600.2301 allows the amendment of any process, pleading or proceeding in a trial court.

MCL 600.2301 expressly states that a court may allow an amendment "in form or substance, for the furtherance of justice." In this instance justice dictates that in response to the defendant's motions for summary disposition premised on , §2912b(4), plaintiff should have been allowed to submit an amended notice of intent.

The final sentence of §2301 represents a legislative determination that amendments are to be freely granted to avoid a drastic result such as dismissal on the basis of an act or omission which does not affect the rights of an adverse party. The final sentence of §2301 specifies that a court at every stage of a proceeding, "*shall* disregard any error or defect in the proceedings which do not affect the substantial rights of the parties" (emphasis added). Clearly, use of the word "shall" in this statute "indicates a mandatory and imperative directive." *Burton v Reed City Hospital Corp*, 471 Mich 745,

752; 691 NW2d 424 (2005); *Oakland County v State of Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997). A court *must*, therefore, allow an amendment to avoid an error or defect which does not affect the substantial rights of a party.

The defendants argue that plaintiff's presuit notice was defective under §2912b(4). Yet, it is important to note that their circuit court motions requesting the dismissal of plaintiff's case on that basis was not made until 20 months after this case was filed. By the time the defendants sought the dismissal of this case based on a defect in the presuit notice, discovery was almost completed and the parties were poised to conduct a case evaluation.

The alleged defects in the notice of intent which are the subject of this appeal clearly did not "affect the substantial rights" of the defendants. Under these circumstances, the appropriate remedy for any defect in the presuit notice was an order allowing plaintiff to amend that document.

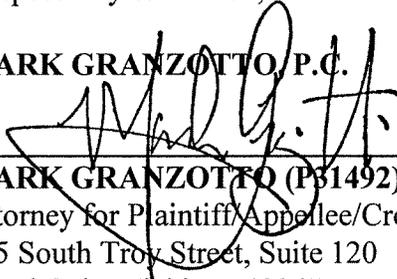
Here, even if plaintiff's notice of intent were ruled defective, the fact remains that under the facts of this case, allowing the plaintiff to amend the notice to comply fully with §2912b, would both be in "the furtherance of justice" and would not "affect the substantial rights" of the defendants.

RELIEF REQUESTED

Based on the foregoing, plaintiff/appellee/cross-appellant, Melissa Boodt, as Personal Representative of the Estate of David Waltz, deceased, respectfully requests that this Court affirm the Court of Appeals October 31, 2006 decision as it pertains to plaintiff's claims against Dr. Lauer. Additionally, plaintiff would request that this Court reverse the Court of Appeals' determination as to the other two defendants named herein, Borgess Medical Center and Heart Center for Excellence, P.C.

Respectfully submitted,

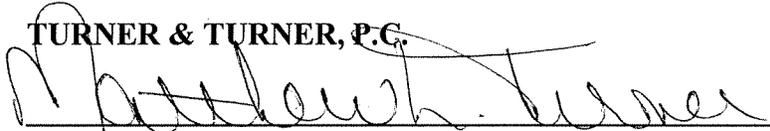
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