

STATE OF MICHIGAN

SUPREME COURT

BETH HOFFMAN, Personal Representative
of the ESTATE OF EDGAR BROWN, Deceased,

Plaintiff - Appellee,

v

DR. PETER BARRETT,

Defendant - Appellant.

SUPREME COURT
CASE NO: 144875

COA NO: 289011

LC CASE NO: 03-3576-NH
(Calhoun County)

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DEFENDANT-APPELLANT DR. PETER BARRETT'S
SUPPLEMENTAL BRIEF

144875
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MICHIGAN SUPREME COURT

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STATEMENT OF QUESTIONS

I. DOES PLAINTIFF'S NOTICE OF INTENT COMPLY WITH THE PROVISIONS OF MCL 600.2912b(4)?

Defendant-Appellant Answers: "No"

Plaintiff-Appellee Answers: "Yes"

Trial Court Answers: "Yes"

II. SHOULD PLAINTIFF'S CASE HAVE BEEN DISMISSED WITH PREJUDICE FOR FAILING TO COMPLY WITH MCL 600.2912b(4)?

Defendant-Appellant Answers: "Yes"

Plaintiff-Appellee Answers: "No"

Trial Court Answers: "No"

STATEMENT OF FACTS

In addition to the facts listed below, defendant-appellant reincorporates and relies on his Statement of Facts in his Application for Leave to Appeal.

On 11/10/08 the trial court dismissed plaintiff's cause of action, without prejudice. The trial court found that plaintiff's Notice of Intent complied with the provisions of MCL 600.2912b, but that plaintiff's Affidavit of Merit was defective. On 11/19/08, defendant filed a Claim of Appeal to the Court of Appeals, appealing the findings by the trial court and that the matter should have been dismissed with prejudice instead of without prejudice. On 06/03/10, the Court of Appeals issued a published decision affirming the trial court's findings. On 07/13/10, defendant-appellant filed an Application for Leave to Appeal to the Michigan Supreme Court. On 11/22/10, the Michigan Supreme Court issued an order holding the matter in abeyance.

On 10/24/11, the Supreme Court issued an order remanding the matter back to the Court of Appeals for reconsideration. On remand, the Court of Appeals issued a published opinion on 03/08/12, once again, affirming the trial court's findings and dismissal without prejudice. On 04/02/12, defendant-appellant filed an Application for Leave to Appeal to the Michigan Supreme Court. On 10/05/12, this Court issued an order, which stated as follows:

On order of the Court, the application for leave to appeal the March 8, 2012 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address whether plaintiff's complaint should have been dismissed with prejudice because her notice of intent did not comply with MCL 600.2912b(4). The parties may file supplemental briefs within 35 days of the date of this order, but they should not submit mere restatements of their application papers.

Plaintiff's Notice of Intent stated as follows:

SECTION 2912b NOTICE OF INTENT TO FILE CLAIM

RE: EDGAR BROWN. DECEASED

This Notice is intended to apply to the following healthcare professionals, entities and/or facilities as well as their employees or agents, actual or ostensible, who were involved in the evaluation, care and/or treatment of EDGAR BROWN, DECEASED.

DR. PETER BARRETT, BATTLE CREEK HEALTH SYSTEMS, AND ANY AND ALL PROFESSIONAL CORPORATIONS AND ALL AGENTS AND EMPLOYEES, ACTUAL OR OSTENSIBLE, THEREOF.

I. FACTUAL BASIS OF THE CLAIM

On January 13, 2001, Edgar Brown fell from a ladder and was brought to Battle Creek Health Systems Emergency Room. He was found to have multiple rib fractures and a right pneumothorax. Dr. Peter Barrett was assigned to care for Mr. Brown and he was admitted to the hospital.

A chest tube was inserted and was removed on January 19, 2001. Mr. Brown developed an ileus and a nasogastric tube was inserted. Between the time of his admission and his discharge, Mr. Brown continued to have diminished breath sounds. His last chest x-ray was taken on January 20, 2001 and his last abdominal x-ray was taken on January 19, 2001. Mr. Brown was discharged home on January 24, 2001. He had a distended abdomen and was still having difficulty breathing.

Within 24 hours of discharge, Mr. Brown became short of breath while talking, his abdomen remained distended and his daughter called for an ambulance. Mr. Brown went into full arrest in the ambulance. The cause of death was determined to be complications of multiple injuries from [sic]. On autopsy, Mr. Brown was found to have right pulmonary atelectasis and right empyema/pleuritis, as well as an intestinal ileus.

II. APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

A reasonable and prudent physician and/or hospital staff would have:

a. Monitored a patient such as Mr. Brown carefully and regularly, including, but not limited to, having performed full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.

b. Performed full physical examinations of a patient in circumstances such as Edgar Brown, including respiratory and abdominal assessments on a regular basis.

c. Adequately assessed and intervened for respiratory compromise in a patient such as Edgar Brown.

d. Refrained from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make sure that his pulmonary status and gastrointestinal status were stable.

e. Refrained from discharging a patient in the condition of Edgar Brown.

f. Refrained from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.

g. Provided appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continued to have respiratory distress and gastrointestinal problems.

III. THE MANNER IN WHICH IT IS CLAIMED THAT THE STANDARDS OF PRACTICE OR CARE WERE BREACHED

The defendant physician and/or hospital staff did not:

a. Monitor a patient such as Mr. Brown carefully and regularly, including, but not limited to, perform full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.

b. Perform full physical examinations of a patient in circumstances such as Edgar Brown, including respiratory and abdominal assessments on a regular basis.

c. Adequately assess and intervene for respiratory

compromise in a patient such as Edgar Brown.

d. Refrain from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make sure that his pulmonary status and gastrointestinal status were stable.

e. Refrain from discharging a patient in the condition of Edgar Brown.

f. Refrain from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.

g. Provide appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continuing [sic] to have respiratory distress and gastrointestinal problems.

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

A reasonable and prudent physician and/or hospital staff should have:

a. Monitored a patient such as Mr. Brown carefully and regularly, including, but not limited to, having performed full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.

b. Performed full physical examinations of a patient in circumstances such as Edgar Brown, including respiratory and abdominal assessments on a regular basis.

c. Adequately assessed and intervened for respiratory compromise in a patient such as Edgar Brown.

d. Refrained from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make sure that his pulmonary status and gastrointestinal status were stable.

e. Refrained from discharging a patient in the condition of Edgar Brown.

f. Refrained from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.

g. Provided appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continued to have respiratory distress and gastrointestinal problems.

V. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY.

As a proximate result of the defendant's conduct, Edgar Brown died prematurely from his injuries.

The trial court and the Court of Appeals found that the Notice of Intent, read as a whole, complied with the mandatory requirements of MCL 600.2912b(4). Defendant has argued that plaintiff's Notice of Intent fails to comply with the provisions of MCL 600.2912b(4). In particular, defendant has argued that plaintiff's Notice of Intent fails to provide any statement describing the "manner in which" defendant's breach of the standard of care resulted in injuries claimed pursuant to MCL 600.2912b(4)(e).

Defendant respectfully submits that plaintiff's Notice of Intent simply fails to describe how the alleged breach of the standard of care caused the patient to die prematurely. The Notice of Intent does not describe how the defendant doctor would have prevented the patient's death if he complied with the alleged standard of care. Additionally, the Notice of Intent does not describe how the actions or inactions of the defendant doctor caused the patient to die prematurely from his injuries.

Plaintiff simply describes, in general terms, what the defendant doctor should have done in order to comply with the standard of care and concludes, with no explanation, that the decedent died prematurely as a result of the doctor's alleged failure to comply with the standard of care. Plaintiff completely fails to describe the "manner in which" the defendant's breach proximately caused the premature death.

For example, the Notice of Intent fails:

- to describe how the doctor's alleged failure to perform "full diagnostic tests" caused the patient to die prematurely¹;
- to describe how the performance of a full physical examination of the patient would have prevented the patient's premature death²;
- to describe how the doctor's alleged failure to adequately assess and intervene for respiratory compromise caused the patient to die prematurely³;
- to describe how refraining from discharging the patient caused the patient to die prematurely⁴;
- to describe how discharging a patient such as this without appropriate home care follow-up and equipment, including oxygen, caused the patient to die prematurely⁵; and,
- to describe how the doctor's alleged failure to provide appropriate treatment while the patient was in the hospital proximately caused the patient to die prematurely⁶.

¹ Further, the Notice of Intent fails to describe what the results of the diagnostic tests would be and how these tests would have prevented the patient's premature death.

² Further, the Notice of Intent fails to describe what the results of the physical examination would have been and how the results would have prevented the patient's premature death.

³ Further, the Notice of Intent fails to describe what the doctor would have done to adequately address and intervene for the patient's alleged respiratory compromise and how this assessment and intervention, or lack thereof, caused the patient to die prematurely.

⁴ Further, the Notice of Intent fails to describe how discharging the patient caused the patient to die prematurely or how the patient would not have died if not discharged from the hospital.

⁵ Further, the Notice of Intent fails to describe how appropriate home care follow-up would have prevented the patient to die prematurely.

⁶ Further, the Notice of Intent fails to describe what appropriate treatment the patient would have received in the hospital which would have prevented the patient from dying prematurely.

Plaintiff's Notice of Intent simply describes the alleged standard of care and how plaintiff believes the doctor failed to comply with the standard of care. Plaintiff then concludes that the breach of the standard of care caused the patient to die prematurely. However, the Notice of Intent fails to describe the manner in which the alleged breach of the standard of care caused the patient to die prematurely from his injuries. There is no notice, information, or explanation on how the alleged breach of the standard of care caused the alleged injury/damages as required by MCL 600.2912b(4).

LEGAL ARGUMENT

I. PLAINTIFF'S NOTICE OF INTENT DOES NOT COMPLY WITH THE PROVISIONS OF MCL 600.2912b(4) AND THE CASE SHOULD HAVE BEEN DISMISSED WITH PREJUDICE.

A. Plaintiff's Notice of Intent Does Not Comply with the Provisions of MCL 600.2912b.

A plaintiff must provide a potential defendant with a proper Notice of Intent complying with the provisions of MCL 600.2912b in order to commence a medical malpractice action. See *Boodt v Borgess Medical Center*, 481 Mich 558, 562-564; 751 NW2d 44 (2008). Plaintiff failed to comply with the provisions of §2912b(4) by failing to provide any statement as to "the manner in which" defendant's breach of the standard of care resulted in the injuries claimed pursuant to §2912b(4)(e). *Roberts v Mecosta County General Hospital (After Remand)*, 470 Mich 679, 684 NW2d 711 (2004) (*Roberts II*). Summary disposition was appropriate pursuant to *Boodt, supra*, and *Roberts v Mecosta County General Hospital*, 466 Mich 57; 42 NW2d 633 (2002) (*Roberts I*).

In order for a medical malpractice claim or theory to be viable, the potential defendant must receive notice pursuant to MCL 600.2912b as to the alleged claim prior

to the filing of the Complaint. Plaintiffs must comply with each of the provisions of MCL 600.2912b and the claim must be filed within the statutory period.⁷

MCL 600.2912b places the burden of complying with the Notice of Intent requirements on the plaintiff and does not implicate a reciprocal duty on the part of the defendant to challenge any deficiencies in the notice before the Complaint is filed. *Roberts I, supra* at 66. MCL 600.2912b(4) sets forth the minimal information to be contained in the notice given to the health professional or health facility, which includes the facts, standard of care, the actions that should have been taken, how the defendant breached the standard of care, **proximate cause**, and the names of those being notified. *Id.* at 65. The use of the word "shall" in MCL 600.2912b(4) denotes mandatory, not discretionary, action. *Id.*

In *Roberts I*, the Court held that the statute of limitations could not be tolled under MCL 600.5856(d), "unless notice was given in compliance with all the provisions of MCL 600.2912b." *Roberts I, supra* at 70-71. The Court also held that §2912b imposed no requirements on defendants to object to the sufficiency of plaintiff's Notice of Intent before filing the Complaint." *Id.* at 66-67. In *Roberts II*, the Court decided the issue of whether or not plaintiff's Notice of Intent was deficient pursuant to the requirements of

⁷ MCL 600.2912b, in pertinent part, provides:

(1) ... 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 written notice under this section not less than 182 days before the action is commenced.

...

(4)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.** [Emphasis added.]

MCL 600.2912b and whether the statute of limitations was tolled. The Court noted that MCL 600.2912b requires a plaintiff to include in the Notice of Intent a **statement** responding to **each** of the provisions, including:

“The manner in which it is claimed that the breach was the proximate cause of the injury claimed in the notice.” MCL 600.2912b(4).

Plaintiff's Notice of Intent was defective because it failed to provide adequate notice responding to each of the provisions of §2912b(4) and, thus, the statute of limitations was not tolled. (*Id.* at 702). Failure to provide the required information renders the Notice of Intent defective and did not provide proper notice requiring dismissal of plaintiffs' claim. *Roberts I, supra* at 70-71.

The Court in *Roberts II* noted that plaintiff's Notice of Intent was not wholly deficient with respect to all of the requirements but that the plaintiff was not in full compliance because plaintiff failed to include a **statement** regarding the “manner in which” it was claimed that each of the defendants breached the standard of care proximately causing the injury. *Roberts II, supra* at 690-702.

When reviewing the proximate cause portion of the Notice of Intent, the *Roberts II* Court stated that the plaintiff failed to offer any statement as to how a breach by the defendant was a proximate cause of the injury. The Court disagreed that an inference could be gleaned that there was a misdiagnosis, which resulted in the fallopian tube bursting thus leading to sterility because that was not stated. Plaintiffs must state what action breached the standard of care and what injuries that action caused. *Id.* at 699.

The *Roberts* Notice of Intent was much more detailed factually so that the reader might be able to infer that a wrong diagnosis was made, that the defendants should have diagnosed an ectopic pregnancy and the failure to diagnose an ectopic pregnancy caused a delay in treatment resulting in a rupture of her fallopian tubes. That was not

adequate, however. The Court believed there was **ambiguity as to whether or not it was the delay or the direct treatment that caused** the rupture resulting in sterility. *Id.* The Court held that MCL 600.2912b provided specific subsections and required statements responsive to each subsections to provide proper notice. The notice in the *Roberts* case was held to be insufficient to meet the particularized requirements of section 2912b. *Id.* at 701.

In a more recent case, *Boodt, supra*, the Court held that a Notice of Intent that fails to comply with the provisions of MCL 600.2912b does not toll the statute of limitations. In that case, the Court specifically held that plaintiff's failure to include a statement describing "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 this notice" was defective and, thus, failed to toll the statute of limitations. The Court noted, as explained in *Roberts II*, "it was not sufficient under this provision to merely state that defendants alleged negligence caused an injury." Rather, §2912b(4)(e) requires a Notice of Intent to more "precisely to contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury." *Boodt* at 560. Because the Notice of Intent did not toll the statute of limitations in that case, the case was dismissed with prejudice as the statute of limitations had expired. **The fact that plaintiff had also filed a Complaint and Affidavit of Merit did not toll the statute of limitations because plaintiff was not allowed to file a Complaint until after plaintiff filed a valid Notice of Intent containing all of the information required under §2912b(4).** See *Boodt, supra* at 562-563, citing *Roberts I*, 466 Mich at 64 and *Miller v Malik*, 280 Mich App 687; 760 NW2d 818 (2008).

This case is similar to the Notice of Intent in *Boodt* and *Roberts* and, thus, the trial erroneously denied the Motion for Summary Disposition on this issue. Plaintiff's

section on proximate cause merely states "As a proximate result of the defendant's conduct, Edgar Brown died prematurely from his injuries." This paragraph does not describe "the manner in which" the claimed alleged breach of the standard of care resulted in plaintiff's injury. A reading of the entire Notice of Intent fails to provide any information describing how the alleged breach of the standard of care caused the patient to die premature from his injuries.

In this case, the trial court and the Court of Appeals erred in ruling that plaintiff's Notice of Intent complied with the requirements of MCL 600.2912b. Plaintiff failed to provide the specificity as required by *Roberts* and, thus, the Notice of Intent was insufficient. Therefore, the trial court and the Court of Appeals erred in ruling that plaintiff's Notice of Intent complied with the statute and the matter should have been dismissed with prejudice because plaintiff is not allowed to file a Complaint and Affidavit of Merit until plaintiff has filed a valid Notice of Intent. See *Boodt, supra* and *Miller, supra*. The plaintiff cannot commence an action before he or she files a Notice of Intent that contains all of the information required under MCL 600.2912b(4) and the period of limitation and/or savings provision has expired and dismissal with prejudice is appropriate. *Id.*

Also, Defendant submits that *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009) is not applicable to this case because *Bush* dealt with MCL 600.5856(c) as amended by 2004 PA 87, effective April 22, 2004. This case was filed before the amendment to MCL 600.5856 and, thus, the *Bush* holding applying the post-amendment language is not applicable. See *Green v Pierson, unpublished opinion per curiam of the Court of Appeals, Issued February 9, 2010 (Docket No: 289588)* (See Exhibit A).

B. The Time Period To File Has Expired And Dismissal With Prejudice Is Required

A plaintiff in a medical malpractice case must do more than simply file a Complaint. A potential plaintiff must first send a Notice of Intent complying with the provisions of MCL 600.2912b to the prospective defendant at least 182 days before filing a Complaint. *Roberts I, supra* and *Roberts II, supra*. Plaintiff must also file an Affidavit of Merit complying with the provisions of MCL 600.2912d with the Complaint. A valid Complaint must be filed before expiration of the appropriate statute of limitations and/or savings period.

Determination of the appropriate time within which plaintiff was required to file her lawsuit involves the interplay between MCL 600.5856(d)⁸ and MCL 600.5852.⁹ MCL 600.5856(d) has since been amended and renumbered MCL 600.5856(c), but the amendment occurred after the filing of this lawsuit. Thus, Defendant will refer to MCL 600.5856(d) for purposes of this argument.

MCL 600.5856(d) is the notice tolling provision operating to toll the statute of limitations or repose when a claimant provides valid written Notice of Intent to commence a medical malpractice action, pursuant to MCL 600.2912b, **if the statute of limitations or repose** would otherwise expire during the pre-suit notice period.

A Notice of Intent that was filed before the effective date of the 2004 amendment of MCL 600.5856 does not toll the wrongful death savings provision and a plaintiff that

⁸ **MCL 600.5856(d) provides:**

The statute of limitations or repose are tolled: (d) If, during the applicable notice period under §2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with §2912b.

⁹ **MCL 600.5852 provides:**

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within two years after Letters of Authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within three years after the period of limitations has run.

fails to file a Notice of Intent that complied with the content requirements of MCL 600.2912b(4) cannot commence an action. See *Boodt, supra* and *Johnson v Hurley Medical Group, PC*, 491 Mich 892; 810 NW2d 273 (2012). Also, MCL 600.2301 is inapplicable where no action or proceeding is pending, and that no action is pending if it could not be commenced. See *Johnson, supra*; *Boodt, supra*; and, *Driver v Naini*, 490 Mich 239, 254, 264; 802 NW2d 311 (2011).

In *Johnson v Hurley Medical Group, PC*, 270 Mich App 575; 716 NW2d 611 (2006) (*Johnson I*), plaintiff's decedent presented to Hurley Medical Center's emergency room on 11/22/97 due to complaints of chest pain and shortness of breath. The patient was discharged the following day on 11/23/97. Plaintiff's Complaint alleges that on 11/26/97, the patient was examined and scheduled for a stress test by defendant doctor. On the evening of 11/26/97, the patient died of a massive heart attack. The two-year statute of limitations would have expired on 11/26/99. *Johnson I, supra* at 576-577.

In *Johnson I, supra*, after receiving Letters of Authority appointing her as personal representative of Johnson's estate on 07/31/98, plaintiff (Johnson's widow), gave defendants notice of her intent to pursue medical malpractice claims on 07/17/00 and filed the medical malpractice action on 12/22/00. Thus, the personal representative filed the Notice of Intent and the Complaint after the 2-year statute of limitations. Therefore, the plaintiff in *Johnson I, supra*, was relying on the wrongful death savings provision. See *Johnson I, supra* at 567-577.

In *Johnson I, supra*, the Court of Appeals affirmed the dismissal of the case. However, the Michigan Supreme Court remanded the matter back to the trial court for entry of an order denying the motion for summary disposition pursuant to *Mullins v St*

Joseph Mercy Hospital, 480 Mich 948; 741 NW2d 3000 (2007). See *Johnson v Hurley Medical Group, PC*, 480 Mich 1047; 743 NW2d 885 (2008).

After the case was remanded back to the trial court, the trial court dismissed the matter on the ground that plaintiff's Notice of Intent was deficient and did not toll the statute of limitations and/or wrongful death savings provision. Therefore, since plaintiff's Notice of Intent was deficient, plaintiff could not proceed with filing a Complaint and Affidavit of Merit. The Court of Appeals, in an unpublished case, reversed the trial court's dismissal regarding the Notice of Intent and remanded the matter back to the trial court. See *Johnson v Hurley Medical Group, PC*, unpublished opinion per curiam of the Court of Appeals, Issued August 12, 2010 (Docket No: 287587) (*Johnson II*) (See Exhibit B).

Johnson II was then appealed to the Michigan Supreme Court. This Court reversed the judgment of the Court of Appeals and reinstated the trial court's order granting summary disposition because plaintiff failed to file a Notice of Intent that stated the manner in which the alleged breach of the standard of care or practice was the proximate cause of the injury claimed in the Notice. See *Johnson v Hurley Medical Group, PC*, 491 Mich 892; 810 NW2d 273 (2012). Therefore, since the plaintiff in *Johnson* was relying on the wrongful death savings provision, this Court ruled in *Johnson II* that a defective Notice of Intent does not toll the wrongful death savings provision and that a non-defective Notice of Intent is required before an action can be commenced. Thus, pursuant to *Johnson II, supra*, when a plaintiff files a defective Notice of Intent, relying on the wrongful death savings provision prior to the 2004 amendment of MCL 600.5856, the plaintiff is not afforded any tolling if the Notice of Intent is defective and the dismissal is with prejudice if the wrongful death savings provision has expired. This is exactly what has occurred in this case, which demands dismissal with prejudice.

MCL 600.5852 extends the otherwise applicable statute of limitations period for wrongful death actions. Although the statute of limitations itself remains two years, an action alleging wrongful death may be "saved" by the existence of a grace period, which can, at a maximum, amount to an additional three years within which to bring the action. MCL 600.5852 provides that the action must be brought within two years from the date the personal representative is appointed but not longer than three years from when the statute of limitations would otherwise expire. In this case, MCL 600.5852 required plaintiff to file a valid Notice of Intent, Complaint and Affidavit of Merit no later than January 24, 2006, five years after the alleged malpractice.

In the present case the alleged malpractice occurred on January 24, 2001, the day Decedent was discharged from the hospital. Thus, the 2-year statute of limitations expired on January 24, 2003. See MCL 600.5805(6), MCL 600.5838a and MCL 600.5856. Plaintiff filed the Notice of Intent on March 3, 2003, which was after the 2-year statute of limitations and, thus, was relying on or invoking the savings provision. See MCL 600.5852. Letters of Authority were issued to Beth Hoffman on July 27, 2001, providing a grace period until July 27, 2003. The absolute latest date to file a valid Notice of Intent and Complaint was January 24, 2006, more than six years ago. Because plaintiff failed to file a valid Notice of Intent, the Complaint is invalid and must be dismissed. *Roberts I, supra* at 66. Further, the statute of limitations and/or savings period was never tolled. *Boodt, supra, Miller, supra, and Johnson, supra*. The limitation period and savings period has expired and dismissal with prejudice is appropriate.

RELIEF REQUESTED

WHEREFORE, defendant-appellant, Dr. Peter Barrett, respectfully requests that this Honorable Court grant his Application for Leave to Appeal for the reasons stated herein and reverse the trial court's order and Court of Appeals' opinion and dismiss this matter with prejudice. In the alternative, defendant-appellant requests that this Honorable Court issue an Opinion or Order vacating the Court of Appeals' decision and remanding the matter back to the trial court for entry of an Order Granting Defendant's Motion for Summary Disposition **with prejudice**. Defendant-appellant also requests any other relief this Honorable Court deems appropriate.

Respectfully Submitted,

Aardema Whitelaw, PLLC

Dated: November 2, 2012



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TIMOTHY P. BUCHALSKI (P56671)
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(A)

STATE OF MICHIGAN
COURT OF APPEALS

PAUL G. GREEN, II as Personal Representative
of the Estate of PAUL GERALD GREEN,
Deceased,

UNPUBLISHED
February 9, 2010

Plaintiff-Appellant,

v

No. 289588
Berrien Circuit Court
LC No. 2004-003044-NH

CHARLES PIERSON, M.D., BARBARA
CARLSON, M.D., SOUTHWESTERN
MEDICAL CLINIC, P.C., RICHARD
KAMMENZIND, M.D., HEALTHCARE
MIDWEST INTERNAL MEDICINE, THOMAS
POW, M.D., GREAT LAKES HEART &
VASCULAR INSTITUTE, P.C., and LAKELAND
MEDICAL CENTER ST. JOSEPH,

Defendants-Appellees.

Before: Talbot, P.J., and Whitbeck and Owens, JJ.

PER CURIAM.

In this medical malpractice/wrongful death action, plaintiff Paul Green, II, personal representative of the Estate of Paul Gerald Green, deceased, appeals by right the trial court's order granting defendants Charles Pierson, M.D.; Barbara Carlson, M.D.; Southwestern Medical Clinic, P.C.; Richard Kammenzind, M.D.; Thomas Pow, M.D.; Great Lakes Heart & Vascular Institute, P.C.; and Lakeland Medical Center, St. Joseph, summary disposition under MCR 2.116(C)(7) and dismissing Green's action as time-barred.¹ We affirm.

I. Basic Facts And Procedural History

On October 2, 2000, the 62-year-old decedent visited the Southwestern Medical Clinic's walk-in clinic, complaining of shortness of breath, weakness, and generally not feeling well. Dr. Pierson, decedent's family physician, examined decedent and noted that his blood urea nitrogen level was 110. Dr. Pierson increased the decedent's diuretic and instructed him to have blood

¹ On stipulation of the parties, in September 2008, defendant Healthcare Midwest Internal Medicine was dismissed from the cause of action with prejudice based on its affidavit of non-involvement under MCL 600.2912c.

work done. The decedent had a history of coronary artery disease, hypertension, chronic renal insufficiency, and insulin dependant diabetes.

The decedent's laboratory results came back on the evening of October 4, 2000. His blood urea nitrogen level had increased to 114, which was a sign that the decedent was dehydrated and that his kidneys were not working properly. After learning that the decedent was still not feeling well, Dr. Pierson instructed him to go the emergency room.

On October 4, 2000, the decedent was admitted to Lakeland Medical Center, St. Joseph, for complaints of shortness of breath, weakness, and increased blood urea nitrogen level. The admitting diagnosis was dehydration and increased congestive heart failure. The treatment plan was cautious administration of intravenous fluids. Dr. Pierson examined decedent on the morning of October 5, 2000, and he noted that decedent's blood urea nitrogen level, although still elevated, had decreased. Dr. Pierson then obtained cardiology and nephrology consultations from Dr. Pow and Dr. Kammenzind, respectively, to evaluate and manage decedent's heart and renal conditions. The last time Dr. Pierson saw the decedent was the morning of October 5th; Dr. Carlson then took over to cover for Dr. Pierson.

Decedent's condition was stable between October 5th and October 7th. On October 6, 2000, the administration of fluids was discontinued. And on October 7, 2000, Dr. Pow ordered intravenous Dobutrex to optimize cardiac output and increase renal output. Shortly after receiving the Dobutrex, the decedent developed chest pain. An acute myocardial infarction was diagnosed, with ischemic pulmonary edema. The decedent was intubated, transferred to the intensive care unit, and eventually placed on an intraaortic balloon pump. The decedent subsequently developed pseudomonas septicemia and staphylococcal septicemia. The decedent also developed ischemia in his extremities and ischemic bowel. On November 4, 2000, the decedent was taken off life support and he died.

On July 31, 2001, letters of authority were issued, naming Green as personal representative of the decedent's estate. On July 31, 2003, the last day of the two-year wrongful death saving provision,² Green filed his statutorily required notice of intent.³ Dr. Pierson, Dr.

² MCL 600.5852 states:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

³ MCL 600.2912b(1) states:

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 written notice under this section not less than 182 days before the action is commenced.

Carlson, and the Southwestern Medical Center filed their 154-day response to Green's notice of intent on December 22, 2003.⁴ And on January 29, 2004, Green filed his medical malpractice/wrongful death complaint against defendants.⁵

In June and July 2004, defendants filed motions for summary disposition, all asserting that Green's complaint was untimely under the April 4, 2004 decision in *Waltz v Wyse*,⁶ in which the Michigan Supreme Court held that a plaintiff's filing of the notice of intent did not toll the two-year wrongful death saving provision period. Green responded, arguing that his complaint was timely under the law existing at the time he filed his complaint.⁷ Green also argued that *Waltz* should not be applied retroactively.

In August 2004, the trial court granted defendants' motions for summary disposition under MCR 2.116(C)(7). The trial court ruled that *Waltz* applied retroactively and ordered Green's cause of action dismissed with prejudice. Green filed a claim of appeal with this Court in September 2004. And, in November 2006, this Court issued its opinion, affirming the trial court.⁸

⁴ MCL 600.2912b(7) states:

Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

- (a) The factual basis for the defense to the claim.
- (b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.
- (c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.
- (d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage.

⁵ There is no dispute that Green filed the complaint well within the three-year cap on the saving provision, which did not expire until November 4, 2005 (three years after the two-year medical malpractice period of limitations ran on November 4, 2002). See MCL 600.5805; MCL 600.5852.

⁶ *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

⁷ See *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000) (holding that a plaintiff's filing of the notice of intent *did* toll the two-year wrongful death saving provision period).

⁸ *Green v Pierson*, unpublished opinion per curiam of the Court of Appeals, issued November 30, 2006 (Docket No. 257802).

Green then appealed to the Michigan Supreme Court. And, in December 2007, the Supreme Court issued its opinion,⁹ citing *Mullins v St Joseph Mercy Hospital*.¹⁰ In *Mullins*, the Supreme Court held that the *Waltz* decision did not apply to any cause of action that was filed after *Omelenchuk v City of Warren*¹¹ was decided in 2000 and in which the wrongful death saving period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided.¹² Here, Green's case was filed after *Omelenchuk* was decided and the wrongful death saving period expired on July 31, 2003, after *Omelenchuk* was decided and before *Waltz* was decided. Accordingly, the Supreme Court remanded this case to the trial court for entry of an order denying defendants' motions for summary disposition.¹³

In October 2008, defendants moved for summary disposition, asserting again that Green's complaint was untimely. More specifically, Dr. Pierson, Dr. Carlson, and the Southwestern Medical Clinic argued that because the two-year wrongful death saving provision expired on July 31, 2003, the same day that Green filed his notice of intent, there was no time left to be tolled by the filing of his notice of intent, and when he filed his complaint 182 days later, on January 29, 2004, his complaint was untimely. They also argued that Green's complaint was prematurely filed under the 182-day notice period, which begins to run the day after the notice of intent is mailed.¹⁴ Therefore, they argued, because the complaint was filed on the 182nd day following the filing of his notice of intent, it was filed before the full, requisite 182-day notice period had expired.¹⁵ In other words, because Green filed his notice of intent on July 31, 2003, the 182-day period began to run on August 1, 2003, and it did not expire until January 30, 2004, one more day after Green filed his complaint.

In a separate motion, Dr. Kammenzind argued that Green's notice of intent was defective because the allegations in the notice of intent did not match the allegations in Green's complaint and, therefore, the notice was not sufficient to put them on notice of the claims against them. Accordingly, they argued that the defective notice was not operative to toll the statute of limitations and Green's complaint was untimely.¹⁶ Dr. Pow, the Great Lakes Heart & Vascular Institute, and the Lakeland Medical Center, St. Joseph concurred with both Dr. Pierson, Dr. Carlson, and the Southwestern Medical Clinic's and Dr. Kammenzind's motions.

⁹ *Green v Pierson*, 480 Mich 979; 741 NW2d 836 (2007).

¹⁰ *Mullins v St Joseph Mercy Hospital*, 480 Mich 948; 741 NW2d 300 (2007).

¹¹ *Omelenchuk*, 461 Mich at 567.

¹² *Mullins*, 480 Mich at 948.

¹³ *Green*, 480 Mich at 979.

¹⁴ MCR 1.108(1).

¹⁵ See MCL 600.2912b(1).

¹⁶ See *Boodt v Borgess Medical Ctr*, 481 Mich 558, 561, 564; 751 NW2d 44 (2008) (holding that a defective notice of intent precludes the commencement of a cause of action); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64; 642 NW2d 663 (2002) (holding that a defective notice of intent did not toll the period of limitations).

Green responded, arguing that, because Dr. Pow, Dr. Kammenzind, the Great Lakes Heart & Vascular Institute, and the Lakeland Medical Center, St. Joseph failed to file responses to his notice of intent, he was free to file his complaint at any time after waiting only 154 days.¹⁷ Thus, Green argued, his complaint regarding those non-responding defendants was filed while tolling was still in effect and was timely. With respect to Dr. Pierson, Dr. Carlson, and the Southwestern Medical Clinic, who did file a response, Green responded that his complaint, filed exactly 182 days after he filed his notice of intent, was timely; indeed, Green apparently conceded that if he had waited one more day, then his complaint would have been untimely. Green also argued that his notice of intent, when read as a whole, properly complied with the notice of intent requirements and provided defendants with proper notice regarding the allegations of negligence against them. Green argued that there was no requirement that his complaint include every allegation from the notice of intent.

During oral arguments on the motion, Dr. Pow, Dr. Kammenzind, the Great Lakes Heart & Vascular Institute, and the Lakeland Medical Center, St. Joseph argued that the fact that Green was *entitled* to file his complaint after only 154 days had passed was irrelevant because he *chose to wait* until the last day of the 182-day notice period to file and was, thus, without any time remaining in the two-year wrongful death saving period. Green argued that laches should have precluded defendants from raising any of their new arguments because they should have raised them in their 2004 motions for summary disposition. Dr. Pow, Dr. Kammenzind, and the Great Lakes Heart & Vascular Institute, responded that their arguments should not be barred by laches because, even though the case had been pending for over four years, the parties had not yet closed discovery in the case. Dr. Pierson, Dr. Carlson, and the Southwestern Medical Clinic stated their concurrence with the other defendants' motions.

After hearing oral arguments on the motions, the trial court ruled from the bench that Green's complaint was filed early—that is, he did not wait “no less than 182 days before the action [was] commenced”—and his complaint was, therefore, untimely filed with respect to Dr. Pierson, Dr. Carlson, and the Southwestern Medical Clinic. But regarding the other defendants, the trial court ruled that Green's complaint was timely filed. The trial court went on to rule that Green's notice of intent when read as a whole sufficiently set forth the allegations of negligence against each of the defendants. However, the trial court ruled that Green's notice of intent did not sufficiently set forth proximate causation. With respect to causation, Green's notice of intent simply stated: “Timely and proper compliance with the standard of care would have prevented [the decedent], from untimely demise.” The trial court ruled that this statement was not specific enough. Accordingly, on December 2, 2008, the trial court entered its order granting defendants' motions for summary disposition under MCR 2.116(C)(7). The trial court also ordered Green's cause of action dismissed with prejudice.

Green now appeals.

¹⁷ MCL 600.2912b(8) states:

If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period.

II. Motion For Summary Disposition

A. Standard Of Review

Green argues that the trial court erred in granting defendants' motions for summary disposition under MCR 2.116(C)(7). Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by the statute of limitations. Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.¹⁸ The court must accept the plaintiff's well-pleaded factual allegations as true and must construe them in the plaintiff's favor, unless documentation that the movant submits contradicts the allegations.¹⁹ Absent disputed issues of fact, we review de novo whether the cause of action is barred by a statute of limitations.²⁰ Further, whether a notice of intent complies with the requirements of MCL 600.2912b is a question of law that this Court reviews de novo.²¹

B. Waiver/Forfeiture Of Defense

Green argues that the trial court erred in allowing defendants to raise new issues regarding the statute of limitations where the defendants waived or forfeited those issues by failing to address or raise them in their 2004 motions for summary disposition.

To constitute waiver, there must be actual or constructive knowledge of a right, benefit, or advantage, and an intention to relinquish that right, benefit, or advantage or "such conduct as warrants an inference of relinquishment," such as doing something "inconsistent with the existence of the right in question" or inconsistent with one's "intention to rely upon that right."²² On the other hand, forfeiture is simply the failure to assert a right in a timely fashion.²³

Green argues that at the time his complaint was filed, defendants had actual or constructive knowledge of their right to have the lawsuit dismissed for either Green's alleged failure to comply with the statutory notice of intent requirements or his alleged failure to comply with the statutory requirements for the filing of his complaint. Defendants, however, did not assert either of these arguments in their 2004 motions; they merely asserted the applicability of *Waltz*. And, on remand, defendants proceeded towards litigation by filing witness lists and taking depositions. Therefore, Green argues, defendants' failure to move immediately for dismissal was a ratification of the statutory compliance of the notice of intent and the complaint.

¹⁸ *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

¹⁹ MCR 2.116(G)(5); *Maiden*, 461 Mich at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

²⁰ *Colbert v Conybeare Law Office*, 239 Mich App 608, 609 NW2d 208 (2000).

²¹ *Jackson v Detroit Medical Ctr*, 278 Mich App 532, 545; 753 NW2d 635 (2008).

²² *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716; 179 NW2d 252 (1970).

²³ See *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

However, the Michigan Supreme Court has already considered and rejected a similar argument in *Burton v Reed City*.²⁴ In *Burton*, the Court held that the defendants did not waive their MCL 600.2912b-compliance defense just because they did not bring their motion for summary disposition until the period of limitations had run.²⁵ After noting that the burden of compliance with MCL 600.2912b is on the plaintiff,²⁶ the *Burton* Court went on to explain that defendants had clearly invoked and preserved the defense:

Here, defendants specifically raised the statute of limitations and plaintiff's compliance with MCL 600.2912b in their answer and affirmative defenses. Such a direct assertion of these defenses by defendants can by no means be considered a waiver. To the contrary, it was a clear affirmation and invocation of such defenses. Defendants' pleadings were more than sufficient to comply with the requirements of MCR 2.116(D)(2) (requiring the statute of limitations to be raised in the first responsive pleading or in a motion filed before the responsive pleading).^[27]

Thus, according to *Burton*, a defendant preserves a defense of failure to comply with MCL 600.2912b by raising such defense in his answer and affirmative defenses.

Here, in their answer to Green's complaint, Dr. Pierson, Dr. Carlson, and the Southwestern Medical Clinic averred that Green's notice of intent and complaint were "improper in form and not in accordance with the rules set forth in the relevant statutes and Michigan Court Rules; . . . inadequate, insufficient and defective in that they pled only conclusions; . . . [and] they fail to contain the allegations necessary to meet statutory requirements pursuant to MCL 600.2912b and MCL 600.2912d[.]" Further, in their affirmative defenses, Dr. Pierson, Dr. Carlson, and the Southwestern Medical Clinic averred that Green "failed to comply with the provisions of MCL 600.2912b and MCL 600.2912d, et seq. and [Green's] Complaint must, therefore, be dismissed." Dr. Kammenzind, Dr. Pow, Great Lakes Heart & Vascular Institute, and Lakeland Medical Center, St. Joseph all stated similar affirmative defenses.

Therefore, we conclude that defendants' pleadings in their answers and affirmative defenses were "more than sufficient to comply with the requirements of MCR 2.116(D)(2)" and such "direct assertion[s] of these defenses by defendants can by no means be considered a waiver."²⁸

C. Sufficiency Of Proximate Causation Statement

Green argues that the trial court erred in finding, sua sponte, that his notice of intent contained an insufficient statement regarding proximate cause where the defendants, by not

²⁴ *Burton v Reed City*, 471 Mich 745; 691 NW2d 424 (2005).

²⁵ *Id.* at 754.

²⁶ *Id.*

²⁷ *Id.* at 755 (internal citation omitted).

²⁸ *Id.* at 755.

challenging the sufficiency of the proximate cause stated in the notice of intent, demonstrated that they understood the theory of causation in this matter. More specifically, according to Green, the relevant inquiry is whether the notice of intent was sufficient to allow the defendants to reasonably understand the claim; therefore, the trial court's understanding of the claim as stated in the notice of intent is irrelevant. Therefore, it is important, Green contends, that when defendants filed their motions for summary disposition, they did not challenge the sufficiency of Green's proximate cause statement. Rather, according to Green, defendants only challenged the standard of care and allegations of negligence. Green asserts that one can deduce from this lack of objection that defendants understood and deemed sufficient Green's proximate cause statement.

1. Sua Sponte Determination

We conclude that the trial court had authority pursuant to MCR 2.116(I) to decide sua sponte whether summary disposition was appropriate based on its determination that sufficient facts existed to render judgment.²⁹ Therefore, we reject Green's contention that the trial court erred in dismissing the case for deficiencies in his proximate causes statement just because the defendants did not specifically raise the issue.

2. Applicability Of *Bush v Shabahang*

Pursuant to supplemental briefing requested by this Court, Green argues that the Michigan Supreme Court's decision on *Bush v Shabahang*³⁰ applies to this case. However, we conclude that the *Bush* decision does not apply to the facts of this case. As defendants point out, the *Bush* decision was based on the Court's interpretation of MCL 600.5856, as amended by 2004 PA 87, effective April 1, 2004. And the enacting provision of 2004 PA 87 specifically states:

(1) Except as provided in subsection (2), this amendatory act applies to civil actions filed on or after the effective date of this amendatory act.

(2) This amendatory act does not apply to a cause of action if the statute of limitations or repose for that cause of action has expired before the effective date of this amendatory act.^[31]

Here, Green's complaint was filed on January 29, 2004, several months *before* the April 1, 2004 effective date of the amendatory act. Thus, the *Bush* holding, applying the post-amendment language of MCL 600.5856 does not apply in this case.

²⁹ See *Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006).

³⁰ *Bush v Shabahang*, 484 Mich 156; 722 NW2d 272 (2009) (holding that a timely-filed, yet defective notice of intent tolls the period of limitations and that, upon a showing of good faith effort to comply with the MCL 600.2912b requirements, the plaintiff is entitled to amend to notice of intent).

³¹ 2004 PA 87, enacting § 1.

Therefore, we consider the compliance of Green's notice of intent with the statutory requirements of MCL 600.2912b(4) under the law existing prior to the 2004 amendment of MCL 600.5856.

3. MCL 600.2912b(4) Compliance

MCL 600.2912b(4), which provides the statutory required contents of a notice of intent, states:

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 professionals and health facilities the claimant is notifying under this section in relation to the claim.

The purpose of MCL 600.2912b is to provide health care providers, who a claimant suing in a medical malpractice suit, with an opportunity to settle the claim out of court.³² As stated previously, "[t]he plaintiff bears the burden of establishing compliance with MCL 600.2912b[,]"³³ and full compliance is mandated.³⁴ And, interpreting MCL 600.2912b(4), the Michigan Supreme Court has explained the level of specificity needed for a notice of intent to comply with the statutory requirements. In *Roberts v Atkins (After Remand)*,³⁵ the Court stated that the notice of intent need not be in any particular format, but it "must identify, in a readily ascertainable manner, the specific information mandated by [MCL 600.2912b(4)]." A claimant must present this information "with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them."³⁶ More specifically, with respect to causation, it is not sufficient to merely state that a defendant's negligence caused the

³² *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 515 NW2d 68 (1997).

³³ *Ligons v Crittenton Hosp*, 285 Mich App 337, 344; ___ NW2d ___ (2009), citing *Roberts v Atkins (After Remand)*, 470 Mich 679, 691; 684 NW2d 711 (2004).

³⁴ *Roberts*, 470 Mich at 682; *Roberts*, 466 Mich at 66.

³⁵ *Roberts*, 470 Mich at 696.

³⁶ *Id.* at 701.

alleged harm.³⁷ Rather, the claimant must describe *the manner* in which the defendant's actions or lack thereof caused the complained of injury.³⁸

Here, section V of Green's notice of intent—the section entitled “THE MANNER IN WHICH THE BREACH WAS THE CAUSE OF THE INJURY”—simply states: “Timely and proper compliance with the standard of care would have prevented [the decedent], from untimely demise.” We conclude that this assertion alone was insufficient to comply with the statutory requirement that Green state with specificity the manner in which defendants' actions or lack thereof caused the complained of injury.³⁹ With that said, however, we are mindful that when considering the sufficiency of the notice of intent, “no portion . . . may be read in isolation; rather, the notice of intent must be read as a whole.”⁴⁰ But even taking the notice of intent as a whole, we conclude that it does not sufficiently describe the manner in which defendants' alleged breach was the proximate cause of the injury.

When read as a whole, Green's factual basis for his claim states that his decedent was admitted to the hospital with “dehydration and increased congestive heart failure[,]” administration of “cautious intravenous fluids” was ordered, after a few days the “diuretics were held and Dobutrex therapy was initiated[,]” the decedent was then diagnosed with “acute myocardial infarction . . . with ischemic pulmonary edema[,]” he was intubated and transferred to the intensive care unit and “placed on an intraaortic balloon pump[,]” he then developed “Pseudomonas Septicemia[,] . . . Staphylococcal Septicemia[,] [and] . . . ischemia in his extremities and ischemic bowel,” and then a month later he was taken off life support and died. Green then alleges that defendants failed to do various things that they presumably should have done to comply with the applicable standard of care, including, but not limited to, “[o]rder or perform a cardiac workup”; “[r]ecognize the difference between gastroesophageal reflux disease and cardiac symptoms”; “[r]ecognize the need for diuretic therapy”; “[r]efrain from administering excessive intravenous fluids as to avoid ischemic pulmonary edema”; “[c]onsult the appropriate specialist including, but not limited to, a pulmonologist”; “[p]rovide immediate diagnostic testing”; “[p]rovide adequate preoperative cardiac clearance”; “[d]iagnose existing cardiac disease”; and “[p]rovide proper medication[.]”

Despite all of these allegations, the notice does not describe the manner in which these actions or the lack thereof caused the decedent's death. Although the notice of intent may have arguably apprised defendants of the nature and gravamen of Green's allegations—that is, that defendants' alleged breaches caused the decedent to suffer a heart attack—MCL 600.2912b(4)(e) requires something more.⁴¹ The statute requires a statement describing *the manner* in which the

³⁷ *Boodt*, 481 Mich at 560; *Roberts*, 470 Mich at 699-700 n 16.

³⁸ MCL 600.2912b(4)(e); *Boodt*, 481 Mich at 560; *Roberts*, 470 Mich at 699-700 n 16.

³⁹ See *Boodt*, 481 Mich at 560 (holding as deficient the plaintiff's causation statement, which stated, “If the standard of care had been followed, [David] Waltz would not have died on October 11, 2001.”).

⁴⁰ *Boodt v Borgess Medical Ctr*, 272 Mich App 621, 628, 630; 728 NW2d 471 (2006), rev'd in part on other grounds 481 Mich 558 (2008).

⁴¹ See *Boodt*, 481 Mich at 560-561.

defendant's actions or lack thereof caused the complained of injury—that is, how defendants' alleged failures to do the various things that they presumably should have done listed above caused decedent's death in this case.⁴² "Although the factual recitations in the notices indicate that [the decedent] suffered an adverse medical result, this result is not connected in any meaningful way with the conduct of any defendant."⁴³ The mere correlation between alleged malpractice and an injury is insufficient to show proximate cause.⁴⁴ Accordingly, we conclude that the trial court correctly held that Green failed to adequately allege proximate cause in his notice of intent. And in light of the defective nature of the notice of intent, Green was not entitled to commence his action, and defendants were entitled to summary disposition.⁴⁵

Because our resolution of this issue is dispositive, we decline to address defendants' alternative arguments related to their motions for summary disposition.

We affirm. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Donald S. Owens

⁴² MCL 600.2912b(4)(e); *Boodt*, 481 Mich at 560; *Roberts*, 470 Mich at 699-700 n 16.

⁴³ *Roberts*, 470 Mich at 701.

⁴⁴ *Craig v Oakwood Hosp*, 471 Mich 67, 86-88; 684 NW2d 296 (2004).

⁴⁵ *Boodt*, 481 Mich at 562-563.

(B)

STATE OF MICHIGAN
COURT OF APPEALS

THELMA JOHNSON, Personal Representative of
the Estate of CARL JOHNSON,

UNPUBLISHED
August 12, 2010

Plaintiff-Appellant,

v

No. 287587
Genesee Circuit Court
LC No. 00-069254-NH

HURLEY MEDICAL GROUP, P.C., doing
business as HURLEY MEDICAL CENTER, and
DR. MOONGILMADUGU INBA-VASHVU,
M.D.,

Defendants-Appellees,

and

KENNETH JORDAN, M.D.,

Defendant.

Before: GLEICHER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from an order granting defendants summary disposition on the ground that plaintiff's notice of intent, required under MCL 600.2912b(4), was deficient.¹ We reverse and remand, and decide this appeal without oral argument pursuant to MCR 7.214(E).

Plaintiff's notice of intent set forth in pertinent part as follows:

¹ This case previously came before this Court in *Johnson v Hurley Medical Group, PC*, 270 Mich App 575; 716 NW2d 611 (2006), rev'd 480 Mich 1047 (2008).

1. FACTUAL BASIS FOR CLAIM

On November 22, 1997, Carl Johnson was admitted to Hurley Medical Center with a diagnosis of atypical chest pain, rule out unstable angina and myocardial infarction. Carl Johnson was then discharged on November 23, 1997 with instructions to continue Zestil, Dyazide and (Nalfon) Fenoprofen and to maintain low salt, low cholesterol and low sugar diet. Mr. Johnson was also instructed to see his family physician Dr. Jordan^[2] in one week and to schedule an out patient stress cardiolyte test with Dr. Vaghu (Dr. Inbavazhvu). Mr. Johnson scheduled and was examined by Dr. Inbavazhvu on November 26, 1997 and scheduled for the stress test on December 2, 1997. Later in the evening on November 26, 1997, Mr. Johnson suffered a massive heart attack and died.

2. THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

The standard of care upon discharge from the hospital and evaluation by Dr. Inbavazhvu was to prescribe baby aspirin, beta blockers, and restriction of activities until the source of the atypical chest pain was determined.

3. THE MANNER IN WHICH IT IS CLAIMED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED.

See Paragraph No. 2 Above.

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

See Paragraph No. 2 Above.

5. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF INJURY CLAIMED IN THE NOTICE.

Had defendants complied with the standard of care, Carl Johnson would not have suffered a massive heart attack leading to his demise.

The circuit court deemed the notice of intent deficient under *Boodt v Borgess Medical Ctr*, 481 Mich 558; 751 NW2d 44 (2008). The Supreme Court in *Boodt* held in relevant part as follows:

Regarding causation, the notice of intent states: "If the standard of care had been followed, [the decedent] would not have died on October 11, 2001." This statement does not describe the "manner in which it is alleged the breach of

²The parties dismissed Dr. Jordan from the case by stipulation. *Johnson*, 270 Mich App at 578 n 1.

the standard of practice or care was the proximate cause of the injury claimed in the notice,” as required by MCL 600.2912b(4)(e). Even when the notice is read in its entirety, it does not describe the manner in which the breach was the proximate cause of the injury. When so read, the notice merely indicates that [the defendant] caused a perforation and that he then failed to do several things that he presumably should have done. . . . However, the notice does not describe the manner in which these actions or the lack thereof caused [the] death. As this Court explained in *Roberts v Mecosta Co General Hosp (After Remand)*, 470 Mich 679, 699-700 n 16; 684 NW2d 711 (2004), “it is not sufficient under this provision to merely state that defendants’ alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury.” (Emphasis in original).

Although the instant notice of intent may conceivably have apprised [the defendant] of the nature and gravamen of plaintiff’s allegations, this is not the statutory standard; § 2912b(4)(e) requires something more. In particular, it requires a “statement” describing 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.” MCL 600.2912b(4)(e). The notice at issue here does not contain such a statement. [481 Mich at 560-561 (footnote omitted).]

Plaintiff suggests that the notice of intent, in its entirety, adequately advises that the failure to restrict activities and prescribe baby aspirin and beta blockers resulted in the decedent’s heart attack. However, even reviewing the notice as a whole, the notice at most offers merely a statement that the failure to follow the standard of care caused the decedent’s death. Stated differently, the notice does indicate that defendants failed to take particular actions, but the notice does not further describe the manner in which these alleged failures caused the decedent’s death. In a fashion virtually identical to the deficient proximate causation notice examined in *Boodt*, plaintiff’s notice here neglects to supply any information addressing how defendants’ failures *proximately* caused the decedent’s death. Consequently, we cannot meaningfully distinguish the instant notice from the notice deemed insufficient in *Boodt*.

The medical malpractice described in plaintiff’s notice occurred in 1997, and plaintiff filed her lawsuit in 2000. Plaintiff relied on the tolling provision then in effect to permit the filing of this case after the otherwise applicable two-year statute of limitations period contained in MCL 600.5805(5) had expired. At that time, MCL 600.5856(d) supplied the applicable tolling provision. In *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002) (*Roberts I*), the Supreme Court held that a notice of intent that failed to comply with all requirements of MCL 600.2912b(4) did not toll the statute of limitations. In *Bush v Shabahang*, 484 Mich 156, 165-170; 772 NW2d 272 (2009), the Supreme Court recognized that the 2004 amendment of MCL 600.5856(c) eliminated this aspect of *Roberts I*. In light of the 2004 amendment, a plaintiff who mails a notice later deemed defective in some respect may nevertheless claim the tolling period now set forth in MCL 600.5856(c).

If *Roberts I* and *Boodt* supplied the only pertinent authority regarding the effect of plaintiff's defective notice of intent filed pursuant to former MCL 600.5856(d), we would conclude that the circuit court properly granted defendants' motion for summary disposition.³ However, given the Supreme Court's recent decision in *Bush*, 484 Mich at 185, the absence of tolling under former § 5856(d) does not alone suffice to resolve this case. In *Bush*, the Supreme Court invoked MCL 600.2301 in support of its holding that a plaintiff may through amendment bring a defective notice of intent into compliance with MCL 600.2912b(4). *Id.* at 176-178. In reaching this holding, the Supreme Court neglected to address whether a plaintiff who mailed a notice of intent before the 2004 amendment of § 5856(c) may nevertheless claim the benefit of amendment under § 2301. The instant case presents precisely this question.

We acknowledge that in one respect, the Supreme Court's holding in *Bush* dictates that plaintiff should have been permitted to amend her notice of intent, and that her amended notice of intent would relate back to the date that she mailed the original NOI, "in accord with the treatment afforded to pleadings when amended under MCR 2.118(D)." *Bush*, 484 Mich at 181 n 44. But the *Bush* Court declined to overrule the holding in *Roberts I*, although the Supreme Court in *Bush* expressed dissatisfaction with the holding in *Roberts I*:

[W]e question whether *Roberts I* and *Boodt* were correctly decided, as they failed to consider the entire legislative scheme and the legislative history involved. However, because the NOI and filing in this case occurred after 2004, this issue is not before us and we will refrain from deciding this issue in the present case. [*Bush*, 484 Mich at 175-176 n 34.]

That *Bush* did not overrule *Roberts I* appears to leave intact the *Roberts I* Court's ruling that a plaintiff who mailed a defective notice of intent before the effective date of the 2004 amendment of MCL 600.5856(c) could not claim the benefit of the 182-day tolling period contained in MCL 600.2912b.

If the only issue presented here concerned plaintiff's ability to cure by amendment the defective notice of intent under § 2912b(4), *Bush* would mandate that we afford plaintiff an opportunity to amend her notice. But this case presents a second issue: whether the amendment process adopted by the *Bush* Court also applies to § 5856(d) as it existed before the 2004 amendment. We conclude that the amendment process endorsed by the Supreme Court in *Bush* also extends to former § 5856(d). We find it anomalous to conclude that an amended notice of intent filed after 2004 under § 5856(c) would relate back to the original notice's mailing date, as *Bush* dictates, but that an amendment of a notice of intent filed under former § 5856(d) would not relate back to the date of the original notice's filing. We find further support for our view in another aspect of the Supreme Court's decision in *Bush*. The Supreme Court in *Bush* observed, "A review of the legislative history reveals that the Legislature did not intend for a defect in an

³ Defendants sought summary disposition pursuant to MCR 2.116(C)(7), (8) and (10), but the circuit court did not specify pursuant to which subrule it found summary disposition appropriate. Given that the essence of defendants' motion and the circuit court's ruling involves whether the statute of limitations has run, we find (C)(7) the appropriate subrule.

NOI to be grounds for dismissal with prejudice based on § 2912b. The clearest indication for this conclusion was the Legislature's complete rejection of a mandatory dismissal clause." 484 Mich at 173. According to *Bush*, amendment served the underlying purpose of § 2912b, while dismissal with prejudice did not.

Consequently, we conclude that in conformity with the Supreme Court's amendment analysis in *Bush*, plaintiff must have an opportunity to amend her notice of intent. If plaintiff amends her notice to bring it into compliance with MCL 600.2912b(4), the amended notice will relate back to the original mailing date, and plaintiff may then claim the benefit of the 182-day tolling period in current § 5856(c).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder