

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff-Appellee,

vs.

DR. PETER BARRETT,

Defendant-Appellant.

S Ct No 144875
COA Docket No. 289011

Calhoun County Circuit Court
Case No. 03-3576-NH
Hon. James C. Kingsley

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

PROOF OF SERVICE

FILED

NOV 9 2012

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

144875
PLAINTIFF'S SUPP

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STATEMENT OF QUESTION PRESENTED

- I. WHEN READ IN ITS ENTIRETY, DOES THE PLAINTIFF'S NOTICE OF INTENT COMPLY WITH MCL 600.2912B?

Plaintiff-Appellee answers "Yes."

Defendants-Appellants argue "No."

The Trial Court answered "Yes."

The Court of Appeals answered "Yes"

INTRODUCTION

By order dated Oct 5, 2012, this Court directed the Clerk to schedule oral argument on whether to grant Defendant-Appellant's Application for leave to Appeal, or to take other action pursuant to MCR 7.302(H)(1), It allowed parties to file supplemental briefs, such as the instant one, and asked that the parties address the issue of "whether the plaintiff's complaint should have been dismissed with prejudice because her notice of intent did not comply with MCL 600.2912b(4)".

The instant supplemental brief is in response to that question. Plaintiff's Notice of Intent (Exhibit A) has been found to be compliant by every court which has reviewed it, at a variety of different stages in the 10 year history of this matter, under the panoply of different tests established by first *Roberts v Atkins*, 470 Mich 679; 684 NW2d 711 (2004) and next *Boodt v Borgess Medical Center*, 481 Mich 558; 751 NW2d 44 (2008). Although the later case of *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009) has no application to the instant matter, as the Notice of Intent at issue herein was served several years prior to the amendment to MCL 600.5856(c), the test set forth in that case for sufficiency of the Notice of Intent is also met. Thus, under every possible test, the Plaintiff's Notice of Intent passes muster.

Plainly put, the lower courts were correct: read in its entirety, Plaintiff's Notice of Intent is fully requirement set forth in MCL 600.2912b, specifically the subsection setting forth the causation element, MCL 600.2912b(4). This Court should ultimately deny the Defendant's application, or, in the alternative, issue an opinion affirming the most recent Court of Appeals decision on the issue, *Hoffman v Barrett*, 295 Mich App 649; 816 NW2d 455 (2012), as properly setting forth the requirements of a compliant Notice of Intent.

STATEMENT OF FACTS

Plaintiff's Decedent, Edgar Brown, had malpractice committed upon him when he was discharged from Battle Creek Health Systems in an unstable condition on January 24, 2001 (Exhibit B, Complaint). As a result, he died needlessly.

On January 13, 2001, Mr. Brown fell from a ladder and was brought to Defendant Battle Creek's emergency room. He was found to have multiple rib fractures and a right pneumo-thorax. 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 and required oxygen to assist him with his breathing. His last chest x-ray was taken on January 20, 2001, four days before his discharge. This chest x-ray was abnormal.

Despite having persistent signs of abdominal problems, including a distended abdomen and pain, no other abdominal x-ray was taken after January 19, 2001.

On the day of his discharge, Mr. Brown was noted to have diminished breath sounds in the bases of both lungs, he still needed oxygen, and he had a distended abdomen. Nonetheless, he was discharged from the hospital in this unstable condition.

Within less than 24 hours of his discharge from Battle Creek Health Systems, Edgar Brown became critically ill and was taken by ambulance back to the hospital. He went into respiratory arrest and died on January 25, 2001. The autopsy showed that he had 850 ml of pus and fluid in his pleural space. He had a torn, lacerated spleen and necrotic areas in his liver, due to lack of blood supply. His death was completely avoidable, and had he received appropriate evaluation and treatment while at Battle Creek Health Systems, his life would not have been cut short.

THE NOTICE OF INTENT

Because this Court has specified that the parties should address the Notice of Intent (Exhibit C) in its Order of Oct 5, it is set forth here in its entirety:

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. 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 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 defendants' conduct, Edgar Brown died prematurely from his injuries.

LOWER COURTS DECISIONS RE: THE NOTICE OF INTENT

The Defendant challenged the Notice of Intent below, and every Court which reviewed the Notice found it to be compliant with MCL 600.2912b.

The first array of challenges focused on the timing of the filing, rather than upon the content. This was resolved by Order of this Court which, on the authority of *Mullins*, reversed the rulings of this Court and the Court of Appeals, and remanded the matter to the Calhoun County Circuit Court for discovery and jury trial. (Exhibit C).

Defendant renewed its challenge, and the Calhoun County Circuit Court denied it as to the Notice of Intent. (Exhibit D). The Court explained its reasoning at oral argument, stating:

THE COURT: Linguistically I think sub paragraph C of part three in which it states adequately assess and intervene for respiratory compromise in a patient such as Edward [sic] Brown. That's all.

MS. SEARS EWALD: Okay

THE COURT: I know it's generalized, but it's enough. So that's why I think the Notice of Intent is adequate. Could be better, but it's adequate. (Transcript of Aug 25, 2008, Exhibit E, at 6).

Defendant appealed to the Court of Appeals, which upheld the ruling of the lower court, stating:

When the final statement is viewed *in isolation*, it does in fact amount to no more than a bare statement that the alleged negligence caused the decedent's injuries. However, the proper way to review the notice of intent is as a whole, rather than viewing one part in isolation. *Ligons*, 285 Mich App at 344. Significantly, a notice of intent is insufficient if it "only provides notice or only provides 'a statement.' It must do both." *Esselman*, 284 Mich App at 220. The required notification need only to be set forth with the same level of specificity as "would be required of allegations in a complaint or other pleading: [the statement] must only give fair notice to the other party." *Id* at 219.

As was the situation in *Esselman*, the statement here is not sufficient to provide the requisite notice all by itself, but it is also not a tautology. See *id* at 217. A plain reading of plaintiff's notice of intent *as a whole* does not leave the reader guessing about how the decedent died as a proximate result of defendant's alleged inaction, at least when some of the technical medical terms are explained. The decedent, while under defendant's care, was suffering from readily diagnosable life-threatening conditions that inevitably became fatal because defendant simply failed to do anything about those conditions. The manner in which the breach of the standard of care proximately caused the harm is just that simple and straightforward: defendant did not investigate the significance of the decedent's symptoms and did not discover or properly deal with the causes of those symptoms, and because those causes are fatal if not dealt with, the decedent died. All the required information is plainly apparent from reading the notice of intent as a whole. (*Hoffman v Barrett*, 288 Mich App 536, 548; 794 NW2d 67 (2010).

Defendants raised the same arguments verbatim in its appeal after remand from the Order of this Court Appeals asking it to reconsider its opinion in light of the decision in *Ligons v Crittendon Hospital*, 490 Mich 61; 803 NW2d 271 (2011), notwithstanding that *Ligons* involved the adequacy of a challenged Affidavit of Merit under MCL 600.2912d. The Court of Appeals responded verbatim in its opinion on remand at *Hoffman v Barrett*, 295 Mich. App. 649, 658; 816 N.W.2d 455 (2012). Defendants appealed again to this Court, which then issued its Order of October 5, 2012.

ARGUMENT

READ IN ITS ENTIRETY, PLAINTIFF'S NOTICE OF INTENT COMPLIED WITH THE PROVISIONS OF MCL 600.2912b

The standard for compliance for a Notice of Intent is set forth in MCL 600.2912b, and the cases of this Court interpreting it. The first such case was *Roberts*, supra. In *Roberts*, this Court held that the Notice of Intent failed to comply with the requirements of the statute, and ruled that, as a result of this noncompliance, the statute of limitations was not tolled by its service upon the Defendants therein. *Id* at 691. The Notice of Intent section setting forth the standard of care stated simply,

The applicable standard of care required that [the hospital, the P.C., Desnoyers, and Davis] 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. *Id* at 692-3.

Other portions of the Notice contained similar tautological statements referring to one another. This Court summarized the overall effect of the Notice with an analogy:

A parent sees that a priceless lamp in his living room is broken. The parent asks his child, "How did the lamp become broken?" The child replies, "The lamp is broken." The repetition of the fact that the lamp is broken is unresponsive to the question that was asked. Similarly, plaintiffs' notices of intent answer the question, "How was the standard of care breached?" with the response, "The standard of care was breached." *Id* at 690, fn 14.

As to the causation section required by subsection (4), the Notice of Intent under scrutiny in *Roberts* stated, "as a result of [defendant's] negligence, ...[plaintiff] is now unable to have any children." *Id* at 699 fn 16. The *Roberts* Court noted, "it is not sufficient under the provision to merely state that defendant's alleged negligence caused an injury. Rather, §2912(b)(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. *Id*."

The *Roberts* opinion also established important guidelines to be followed when scrutinizing a Notice of Intent. It noted:

the claimant is not required to craft her notice with omniscience. However, what is required is that the claimant make a good-faith effort to aver the specific standard of care that she *is claiming* to be applicable to each particular professional or facility that is named in the notice. *Id* at 691.

The next case to address the sufficiency of a Notice of Intent was *Boodt, supra*. In *Boodt*, the Court examined a portion of a Notice of Intent, and ruled it noncompliant, stating:

Regarding causation, the notice of intent states: "If the standard of care had been followed, [David] Waltz would not have died on October 11, 2001." This statement does not describe 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," 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. *Boodt* at 560.

As pointed out by the Court of Appeals, the key to differentiating the complaint statement of causation in the instant matter from the noncompliant one in *Boodt, supra*, is that the statement made herein "is ... not a tautology." *Id.* at 548. In contrast, in *Boodt*, the notice of intent submitted by plaintiff therein contained nothing specifically linking the alleged malpractice to the resulting injuries. The entirety of the explanation of the manner of causation alleged in the entire Notice of Intent consisted of the statement that "if the standard of care had been followed, [David] Waltz would not have died on October 11, 2001." *Id.* at 560. Although this statement appeared in the final section of the *Boodt* notice, this Court was careful to note that it examined the entirety of the document (*Id.*; see also fn 1, p 561).

Starting with the final section of the Notice of Intent herein, Plaintiff states that it was because of the previously stated breaches that Plaintiff died prematurely from his injuries. What were those injuries? The injuries sustained as a result of his fall from a ladder, which led him to seek hospital care in the first place. How did Dr. Barrett treat those injuries? He had a chest tube

inserted, then had it removed. He took two X-rays, and inserted a nasographic tube as a result of an ileus. Despite the fact that none of these steps resolved the serious symptoms suffered by Edgar Brown, Dr. Barrett had him discharged from hospital care. The result of this discharge was that “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 multiple rib fractures and a right pneumothorax.”

In short, everything that told the story of how the actions and inactions of Dr. Barrett constituted breaches of the standard of care, and how those breaches led to Edgar Brown’s death, were set out in understandable form in the Notice of Intent. The Court of Appeals agreed, specifically finding that “All of the required information is plainly apparent from reading the notice of intent as a whole.” *Hoffman v Barrett*, 295 Mich App at 663. So, far from lacking a statement of the manner in which the malpractice led to the Plaintiff’s death, the instant Notice of Intent, read as a whole, properly sets out in depth and in detail exactly how Plaintiff’s death came to occur as a result of the breaches of the standard of care as set out therein. Accordingly, under the standard articulated in *Roberts* and *Boodt*, Plaintiff’s Notice of Intent is sufficient, and Defendant’s motion must be denied.

CONCLUSION

For these reasons, Plaintiff respectfully requests that this Honorable Court affirm the decisions of the Calhoun County Circuit Court, and allow the matter to proceed in the Calhoun County Circuit Court.

CHARFOOS & CHRISTENSEN, P.C.

By: 
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ANN K. MANDT (P46314)
Attorneys for Plaintiffs
5510 Woodward Avenue
Detroit, MI 48202
(313) 875-8080

Dated: November 8, 2012

PROOF OF SERVICE

The undersigned certifies that on November 8, 2012, a copy of the foregoing Response to Defendant's Application for Leave to Appeal was served upon all attorneys of record in the above-entitled cause of action, at their business locations as disclosed by the pleadings of record herein, via the following:

U.S. Mail Hand Delivery
 Facsimile Overnight Mail

I declare under penalty of perjury that the above statement is true to the best of my knowledge, information and belief.



David R. Parker

COPY
(A)

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. 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 circumstance 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.
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- g. Provide appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continuing 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 defendants' conduct, Edgar Brown died prematurely from his injuries.

NAMES OF HEALTH PROFESSIONALS, ENTITIES AND FACILITIES NOTIFIED

Dr. Peter Barrett
 Yale University Cardiothoracic Surgery
 330 Cedar Street, Room 121 SMB
 New Haven, CT 06520-8039

Battle Creek Health Systems
 Legal Affairs Department
 300 North Avenue
 Battle Creek, MI 49016

Battle Creek Health Systems
 Patrick R. Garrett, Resident Agent
 300 North Avenue
 Battle Creek, MI 49016

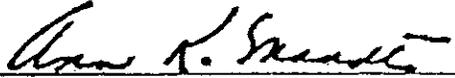
TO THOSE RECEIVING NOTICE:

You should furnish this notice to any person, entity or facility not specifically

named herein that you reasonably believe might be involved in this claim.

CHARFOOS & CHRISTENSEN, P.C.

Respectfully Submitted,

By: 

J. DOUGLAS PETERS (P25686)
ANN K. MANDT (P46314)
Attorneys for Plaintiff
5510 Woodward Avenue
Detroit, MI 48202
313/875-8080

DATED: March 3, 2003

(B)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF CALHOUN

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

Plaintiff,

No. 03- -NH

vs.

Hon.

DR. PETER BARRETT and BATTLE CREEK
HEALTH SYSTEMS, Jointly and Severally,

Defendants.

J. DOUGLAS PETERS (P 25686)
ANN K. MANDT (P 46314)
Attorneys for Plaintiff
5510 Woodward Avenue
Detroit, MI 48202
313 875-8080

COMPLAINT AND DEMAND FOR JURY TRIAL

There is no other civil action arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed after having been assigned to a judge.

BY: _____

ANN K. MANDT (P 46314)
Attorney for Plaintiff

NOW COMES the Plaintiff, Beth Hoffman, Personal Representative of the Estate of Edgar Brown, Deceased, by and through her attorneys, Charfoos & Christensen, P.C., and complains against the Defendants as follows:

1. This is a medical malpractice case filed following expiration of the statutorily required Notice period.

2. At all pertinent times, Beth Hoffman is the duly appointed Personal Representative of the Estate of Edgar Brown.

3. At all pertinent times, plaintiff's decedent lived in the City of Battle Creek, County of Calhoun, State of Michigan.

4. At all pertinent times, defendant Dr. Peter Barrett was a duly licensed physician in the State of Michigan who held himself out to the public in general, and the plaintiff's decedent in particular, as a physician who could and would provide medical care which comported with the accepted standards of care.

5. At all pertinent times, defendant Battle Creek Health Systems was a business employing physicians and/or a health care facility operating in the City of Battle Creek, County of Calhoun, State of Michigan and held itself out to the public in general, and the plaintiff's decedent in particular, as a business/facility which could and would provide medical care in a manner which comported with the accepted standards of practice, and, defendant Battle Creek Health Systems is liable for the acts and/or omissions its employees, servants, agents and/or ostensible agents. That at the time of the incident, Dr. Barrett was an employee, agent, ostensible agent of Battle Creek Health Systems.

7. Damages in this case exceed TWENTY FIVE THOUSAND (\$25,000.00) DOLLARS and jurisdiction is vested in this court.

8. 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.

9. 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.

10. Three days after his last chest x-ray, Mr. Brown was discharged home on January 24, 2001. He had a distended abdomen and was still having difficulty breathing.

11. 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 from multiple injuries. On autopsy, Mr. Brown was found to have right pulmonary atelectasis and right empyema/pleuritis, as well as an intestinal ileus.

COUNT I.

NEGLIGENCE

12. Plaintiff repeats and realleges all of the preceding paragraphs as if set forth in their entirety herein.

13. Defendants had a duty to provide Edgar Brown with medical care that comported with accepted standards and they breached their duty in several ways including, but not limited to:

- a. Failing to 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. Failing to perform full physical examinations of a patient in circumstances such as Edgar Brown, including respiratory and abdominal assessments on a regular basis.
- c. Failing to adequately assess and intervene for respiratory compromise in a patient such as Edgar Brown.
- d. 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. Discharging a patient in the condition of Edgar Brown.
- f. Discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.
- g. Failing to provide appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continued to have respiratory distress and gastrointestinal problems.
- h. Failing to have competently trained staff to care for a patient in like and similar circumstances as Edgar Brown.

14. As a direct and proximate result of the defendants' conduct, Edgar Brown suffered severe physical and emotional pain, terror and fright and incurred significant expenses in an attempt to effectuate a cure.

15. As a direct and proximate result of defendants' negligence, plaintiff's decedent, Edgar Brown, died prematurely from his injuries.

16. Wherefore, plaintiff hereby asks this Honorable Court to grant a judgment

in her favor that includes all damages allowable under the Wrongful Death Act as well as costs and attorney fees.

CHARFOOS & CHRISTENSEN, P.C.

Respectfully Submitted,

By:

J. DOUGLAS PETERS (P25686)

ANN K. MANDT (P46314)

Attorneys for Plaintiff

5510 Woodward Avenue

Detroit, MI 48202

313/875-8080

DATED: October 3, 2003

(C)

Order

Michigan Supreme Court
Lansing, Michigan

December 14, 2007

Clifford W. Taylor,
Chief Justice

134295

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

BETH HOFFMAN, Personal
Representative of the Estate of
Edgar Brown, Deceased,
Plaintiff-Appellant,

v

SC: 134295
COA: 258982
Calhoun CC: 03-003576-NH

PETER BARRETT and BATTLE
CREEK HEALTH SYSTEMS,
Defendants-Appellees.

By order of October 29, 2007, the application for leave to appeal the May 22, 2007 judgment of the Court of Appeals was held in abeyance pending the decision in *Mullins v St Joseph Mercy Hosp* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, ___ Mich ___ (2007), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Calhoun Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order and the order in *Mullins*.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 14, 2007

Corbin R. Davis

Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF CALHOUN

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

Plaintiff,

Case No.: 03-3576-NH
HON. JAMES C. KINGSLEY

v

DR. PETER BARRETT,

Defendant.

J. DOUGLAS PETERS (P25686)
ANN K. MANDT (P46314)
Attorneys for Plaintiff
Charfoos & Christensen, PC
5510 Woodward Avenue
Detroit, MI 48202
(313) 875-8080

DOLORES SEARS-EWALD (P51896)
Attorney for Defendant Barrett
Aardema, Whitelaw & Sears-Ewald, PLLC
5360 Cascade Road, SE
Grand Rapids, MI 49546
(616) 575-2060

AMENDED ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY
DISPOSITION IN PART AND GRANTING DEFENDANT'S MOTION FOR
SUMMARY DISPOSITION IN PART WITHOUT PREJUDICE

At a session of said court held in the courthouse,
City of Battle Creek, Calhoun County this
10 day of NOV, 2008.

PRESENT: HON. JAMES C. KINGSLEY, Circuit Court Judge

The Defendant having filed a Motion for Summary Disposition and Plaintiff having filed a response, the Court having heard oral arguments, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Disposition with prejudice challenging Plaintiff's notice of intent is DENIED for the reasons stated on the record;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition challenging Plaintiff's affidavit of merit is GRANTED without prejudice for the reasons stated on the record.

IT IS FURTHER ORDERED that this order resolves the last pending claim and closes the case.

JAMES C. KINGSLEY

HON. JAMES C. KINGSLEY
Calhoun County Circuit Court Judge

Attest a True Copy:

Circuit Court Clerk

(E)

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF CALHOUN

BETH HOFMAN - PERSONAL
REPRESENTATIVE -
EDGAR BROWN ESTATE,

PLAINTIFF,

VS.

FILE NO. 03-3576

PETER BARRETT,

DEFENDANT.

_____ /

MOTION

THE HONORABLE JAMES KINGSLEY, CIRCUIT JUDGE

BATTLE CREEK, MICHIGAN - AUGUST 25, 2008

APPEARANCES:

FOR PLAINTIFF: ANN MANDT (P46314)
5510 WOODWARD AVE.
DETROIT, MI 48202
313-875-8080

FOR DEFENDANT: DELORES SEARS-EWALD (P51896)
4690 E. FULTON ST., STE. 202
ADA, MI 49301
616-575-2060

REPORTED BY: TAMARA SMITH, RPR, CSR-4187
OFFICIAL COURT REPORTER

I N D E X

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WITNESSES:

(NONE)

EXHIBITS:

(NONE)

1 BATTLE CREEK, MICHIGAN

2 AUGUST 25, 2008 - AT ABOUT 8:56 A.M.

3 R E C O R D

4 THE COURT: FOR THE RECORD I'M GOING TO TAKE UP
5 BETH HOFMAN VERSUS PETER BARRETT. IT'S DOCKET NO.
6 2003-3576. COUNSEL, GOOD MORNING.

7 MS. SEARS-EWALD: GOOD MORNING.

8 MS. MANDT: GOOD MORNING, YOUR HONOR. ANN MANDT
9 ON BEHALF OF THE PLAINTIFF.

10 MS. SEARS-EWALD: DELORES SEARS-EWALD ON BEHALF
11 OF THE DEFENDANT.

12 THE COURT: INTERESTING QUESTION. THE ONLY THING
13 THAT THREW ME OFF WHEN I READ ALL OF THIS YESTERDAY, THE
14 MOST RECENT PLEADING SAYS DEFENDANT PETER BARRETT, M.D.
15 REPLY ON THE MOTION FOR SUMMARY DISPOSITION, AND I THINK
16 THIS WAS A RESPONSE TO THE PLAINTIFF'S RESPONSE TO THE
17 MOTION FOR SUMMARY DISPOSITION.

18 MS. SEARS-EWALD: YES, YOUR HONOR. I WASN'T IN
19 TOWN, AND MY SECRETARY WAS KIND OF HELPING OUT. I DIDN'T
20 READ THE TITLE BEFORE SIGNING IT. SORRY.

21 THE COURT: YOU GO AHEAD.

22 MS. SEARS-EWALD: YOUR HONOR, THIS IS OUR MOTION
23 FOR SUMMARY DISPOSITION. INITIALLY BASED ON THE NEW CASE
24 BOODT VERSUS BORGESS HOSPITAL WHICH WAS RECENTLY DECIDED BY
25 THE SUPREME COURT THE PATIENT'S OR PLAINTIFF'S NOI IN OUR

1 CASE IS FACTUALLY --

2 THE COURT: CAN WE CUT TO THE CASE?

3 MS. SEARS-EWALD: OKAY. THERE'S NOTHING IN THE
4 NOI THAT DESCRIBES THE MANNER IN WHICH ANY OF THE ALLEGED
5 BREACHES CAUSED --

6 THE COURT: I RESPECTFULLY DISAGREE WITH YOU ON
7 THE NOI, BUT I THINK THE PLAINTIFF IS DEAD ON THE AFFIDAVIT
8 OF MERIT, AND I THINK THE PLAINTIFF CONCEDES THAT IN HER
9 PLEADING, OTHERWISE DISMISSAL WITHOUT PREJUDICE ALLOWING
10 THEM TO REFILE. THAT'S WHERE IT STRUCK ME WHEN I READ
11 EVERYTHING YESTERDAY. BECAUSE THE AFFIDAVIT OF MERIT IS
12 WOEFULLY INADEQUATE UNDER THE STATUTE. BUT I REALLY DID
13 THINK THAT THE NOTICE OF INTENT WOULD COMPLY WITH THE
14 STATUTE. I REALIZE -- IT'S ALMOST IN THESE CASES WHERE YOU
15 GET TO THE POINT OF SPLITTING HAIRS WHEN YOU SAY HERE'S THE
16 STANDARD OF CARE, HERE'S THE CAUSATION, AND THE
17 REFERENCE -- AND THIS IS NOT JUST IN THIS CASE, BUT IN MANY
18 CASES THE REFERENCE IS BY INFERENCE BACK TO THE STANDARD OF
19 CARE, AND ALL THE STATEMENT IS THE DEFENDANT FAILED TO MEET
20 THE STANDARD OF CARE, PERIOD. AND IT LEAVES US KIND OF AT
21 SEA TO DETERMINE THE SPECIFICITY.

22 BUT HERE THE GENTLEMAN FELL OFF THE LADDER. HE
23 FRACTURED THE RIBS. THE LUNG WAS COLLAPSED. AND HE DIED
24 APPROXIMATELY THREE WEEKS LATER AFTER BEING HOSPITALIZED
25 WITH SURGICAL PROCEDURES, AND, YOU KNOW, THE COMPLICATIONS

1 SET IN. AND IT REALLY IS A RATHER COMPELLING CASE AS FAR
2 AS A JURY WOULD BE CONCERNED, BUT THE AFFIDAVIT OF MERIT
3 DOESN'T COVER ANY OF THE THINGS THAT SHOULD COVER. THAT
4 WAS MY ASSESSMENT, AND SO, FRANKLY -- AND I DON'T MEAN TO
5 CUT YOU OFF IF YOU WISH TO ARGUE, BUT, MS. EWALD, I REALLY
6 THOUGHT YOU WON, FRANKLY, ON AFFIDAVIT OF MERIT. AND,
7 MS. MANDT, YOU KIND OF CONCEDED THAT, MA'AM, IN THE
8 PLEADING.

9 MS. MANDT: WELL, FRANKLY, YOUR HONOR, THERE WAS
10 A PORTION OF THE AFFIDAVIT THAT CLEARLY WAS LEFT OUT, YOU
11 KNOW. I'M NOT GOING ARGUE ABOUT THAT. THE BREACH WITH --
12 WITH OTHER -- EVERYTHING ELSE, BUT THE REMEDY AS WE SAID IN
13 OUR PLEADING IS DISMISSAL WITHOUT PREJUDICE. AND I WOULD
14 THINK DEFENDANT WOULD CERTAINLY AGREE -- DEFENDANT DEPOSED
15 DR.~SCARPA. WE ALL KNOW WHAT THIS CASE IS ABOUT.

16 THE COURT: SURE.

17 MS. MANDT: ONLY TALKING ABOUT THE TIME.

18 THE COURT: IN THE AFFIDAVIT OF MERIT PARAGRAPH
19 THREE SAYS THAT IT IN MY OPINION A REASONABLE AND PRUDENT
20 PHYSICIAN AND/OR HOSPITAL STAFF WHEN CARING FOR A PATIENT
21 IN CIRCUMSTANCES SUCH AS EDWARD BROWN WOULD HAVE A, B, C,
22 D, E, F, AND G, AND THEN PARAGRAPH FOUR THE OPINIONS
23 EXPRESSED IN THIS AFFIDAVIT ARE BASED UPON ET CETERA, ET
24 CETERA, ET CETERA, AND THERE'S NO LINKAGE.

25 MS. MANDT: NO, WE -- WE MISSED IT.

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MS. SEARS-EWALD: YOUR HONOR, I AGREE WITH THAT.

I THINK THERE'S NO LINKAGE IN THE NOI ALSO. EVEN THOUGH THE BREACHES ARE ALLEGED THERE'S NOTHING DESCRIBING HOW A FAILURE TO TAKE ADDITIONAL X-RAYS CAUSED THIS MAN'S DEATH OR A FAILURE TO ORDER ADDITIONAL LAB RESULTS CAUSED HIS DEATH. I MEAN IT JUST SAYS HE DIED BECAUSE HE WAS DISCHARGED EARLY. WHY DID HE DIE BECAUSE HE WAS DISCHARGED EARLY? WHAT -- WHAT DID THAT BREACH CAUSE? IT DOESN'T SAY, YOU KNOW, HAD HE TAKEN ADDITIONAL X-RAYS HE WOULD HAVE NOTICED WHAT, MORE RIB FRACTURES, MORE LUNG PUNCTURES, WHAT, AND COULD HAVE TREATED THAT OR PREVENTED THE DEATH. ALL IT SAYS IS HE SHOULD HAVE DONE CERTAIN THINGS, BUT IT DOESN'T DESCRIBE THE MANNER IN WHICH THAT CAUSED THE ULTIMATE OUTCOME, AND THAT'S EXACTLY WHERE BOODT HAD THE PROBLEM AND ROBERTS. I THINK THIS IS NO DIFFERENT THAN THAT.

THE COURT: LINGUISTICALLY I THINK SUB PARAGRAPH C OF PART THREE IN WHICH IT STATES ADEQUATELY ASSESS AND INTERVENE FOR RESPIRATORY COMPROMISE IN A PATIENT SUCH AS EDWARD BROWN. THAT'S ALL.

MS. SEARS-EWALD: OKAY.

THE COURT: I KNOW IT'S GENERALIZED, BUT IT'S ENOUGH. SO THAT'S WHY I THINK THE NOTICE OF INTENT IS ADEQUATE. COULD BE BETTER, BUT IT'S ADEQUATE. BUT THE AFFIDAVIT OF MERIT IS BAD. SO THIS CASE IS DISMISSED

1 WITHOUT PREJUDICE. YOU MAY PREPARE AN ORDER, MA'AM.

2 MS. SEARS-EWALD: THANK YOU, YOUR HONOR.

3 MS. MANDT: THANK YOU, YOUR HONOR.

4 THE COURT: THANK YOU. MS. MANDT, THE NEXT TIME
5 AROUND THE OTHER THING THAT STRUCK ME -- TWO THINGS. ONE,
6 THEY'RE BOTH BOARD CERTIFIED SURGEONS, BUT DO WE HAVE TO
7 HAVE -- I KNOW YOUR CASE LAW SAYS YOU DON'T HAVE TO HAVE
8 CERTIFICATION ON CARDIOTHORACIC SURGERY.

9 AND, SECONDLY, MUST THERE BE A DISTINCTION IN THE
10 ALLEGATION BETWEEN WHAT THE DOCTOR DID AND THE NURSING
11 STAFF DID AND SO ON, YOU KNOW, POINTING OUT, OR CAN THEY
12 ALL BE LUMPED UNDER THE SAME UMBRELLA.

13 THE REASON I ASK THIS -- FRANKLY, THE COURT
14 REPORTER IS GOING TO GET TIRED OF ME GOING BACK TO THIS
15 CASE -- BUT SEVERAL MONTHS AGO WE HAD A MEDICAL MALPRACTICE
16 CASE IN WHICH SURGEONS, OB/GYNS, AND THE NURSING STAFF OF
17 THE HOSPITAL ALL WERE SUED AND THE VERDICT WAS
18 \$3.6 MILLION, AND IT WAS NOT A DEATH CASE. AND WE HAD FOR
19 BOTH SIDES BOARD CERTIFIED SURGEONS, BOARD CERTIFIED
20 OB/GYNS, AND A NURSING PERSON.

21 AND IT WAS INTERESTING -- I'LL SHARE THIS WITH
22 YOU, THE NURSING EXPERT FOR THE PLAINTIFF FLEW IN FROM
23 CALIFORNIA. SHE WAS -- SHE HAD BEEN A NURSE, WAS A CHARGE
24 NURSE, A HEAD NURSE, AND SO ON. AND SHE GOT HER MASTERS
25 DEGREE FROM THE UNIVERSITY OF PHOENIX. WHEN THE LAWYERS

1 FOUND THAT OUT THEY THOUGHT WELL, OKAY, THIS GIVES US
2 SOMETHING TO ARGUE.

3 BUT THE VERDICT FORM NO CAUSED THE SURGEONS, GAVE
4 85 PERCENT OF THE LIABILITY TO THE OB/GYN WHO DID THE
5 HYSTERECTOMY, AND 15 PERCENT TO THE NURSING STAFF. AND SO
6 WE HAVE ALL OF THIS EXPERT TESTIMONY FOR THE JURY TO SIFT
7 THROUGH, BUT THERE REALLY WERE SPECIFIC ALLEGATIONS OF
8 BREACHING THE STANDARD OF CARE BY THE CATEGORIES.

9 MS. MANDT: WELL, THERE'S NO QUESTION, YOUR
10 HONOR, THAT IF YOU ARE -- IN MY OPINION THAT IF YOU ARE
11 ALLEGING THAT THERE WAS NURSING NEGLIGENCE AND SURGEON'S
12 NEGLIGENCE AND OB NEGLIGENCE, YOU NEED TO SEPARATE THEM.
13 AND THIS PARTICULAR CLIMATE THAT WE HAVE IN THE APPEALS
14 COURT AND THE SUPREME COURT, WE -- IT'S ALMOST GETTING
15 RIDICULOUS TO TELL YOU THE TRUTH HOW MUCH WE HAVE TO
16 ITEMIZE ALL OF THESE PLEADINGS WHICH WE SIMPLY ARE PUTTING
17 SOMEBODY ON NOTICE. BUT CERTAINLY -- IN THAT THOSE
18 INSTANCE I WOULDN'T EVEN THINK OF BRINGING A CASE WITHOUT
19 HAVING A SEPARATED AND WITHOUT HAVING THREE AFFIDAVITS OF
20 MERIT AND --

21 THE COURT: WELL, BECAUSE WE ONLY HAVE ONE
22 DEFENDANT DR. ~BARRETT --

23 MS. MANDT: THAT IS CORRECT.

24 THE COURT: -- I REALLY WOULDN'T NEED THAT IN
25 THIS CASE, BUT I KNOW IN THE PLEADINGS HERE THERE WAS KIND

1 OF THAT ALLEGATION.

2 I'LL SHARE ONE OTHER STORY I JUST HEARD. YOU
3 MENTIONED THE APPELLATE COURTS, THE SUPREME COURT AND SO
4 ON. WE ARE NOW TEXTUALISTS. WE HAVE TO FOLLOW THE MEANING
5 OF THE WORD STARTING WITH JUSTICE SCALIA AND SO ON. I
6 HEARD LAST WEEK RON BRETZ WHO TEACHES AT COOLEY LAW SCHOOL.
7 HE WAS TALKING ABOUT EVIDENCE TO A BUNCH OF JUDGES, AND HE
8 SAID WE'RE ALL TEXTUALISTS NOW. HE SAID JUDGE TARNOW, THE
9 FEDERAL JUDGE IN DETROIT, SAID THAT -- ALL RIGHT, THE
10 FEDERAL COURTS ARE NOW FIRM BELIEVERS IN TEXTUALISM. AND
11 JUDGE TARNOW SAID THAT HE HAD GONE INTO THE FEDERAL
12 BUILDING ONE DAY, AND ON ONE OF THE CORRIDORS HE NOTICED A
13 SIGN THAT SAID WET FLOOR, SO HE DID.

14 MS. MANDT: THAT'S JUDGE TARNOW. THAT'S GREAT.

15 THE COURT: GOOD LUCK TO YOU, COUNSEL. YOU MAY
16 PREPARE THAT ORDER.

17 MS. MANDT: YOUR HONOR, MAY I ASK -- I'M SURE WE
18 WILL AGREE THAT WE'LL HAVE A SHORTENED DISCOVERY PERIOD IN
19 THE NEW CASE. EVERYTHING THAT'S BEEN DONE HERE CAN BE
20 USED.

21 THE COURT: ABSOLUTELY, YOU WILL.

22 MS. MANDT: OKAY. THANK YOU, YOUR HONOR.

23 (PROCEEDINGS CONCLUDED AT ABOUT 9:07 A.M.)
24
25

