STATE OF MICHIGAN

COURT OF APPEALS

HEATHER SWANSON,

Plaintiff-Appellee,

v

PORT HURON HOSPITAL, a/k/a PORT HURON HOSPITAL MEDICAL GROUP,

Defendant,

and

JEANNIE L. ROWE, D.O. and BLUEWATER OBSTETRICS AND GYNECOLOGY, P.C.,

Defendants-Appellants.

UNPUBLISHED
June 2, 2009

No. 275404
St. Clair Circuit Court
LC No. 04-002438-NH

HEATHER SWANSON,

Plaintiff-Appellant,

v

PORT HURON HOSPITAL, a/k/a PORT HURON HOSPITAL MEDICAL GROUP,

Defendant,

and

JEANNIE L. ROWE, D.O. and BLUEWATER OBSTETRICS AND GYNECOLOGY, P.C.,

Defendants-Appellees.

No. 278491
St. Clair Circuit Court
LC No. 04-002438-NH

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

This is a consolidated appeal arising out of a medical malpractice action filed by plaintiff Heather Swanson against defendants Port Huron Hospital (a/k/a Port Huron Hospital Medical

Group), Jeannie L. Rowe, D.O., and Bluewater Obstetrics and Gynecology, P.C. (Bluewater). Swanson alleged, in part, that Dr. Rowe's negligence during a laparoscopic procedure to remove an ovarian cyst resulted in a puncture wound to Swanson's aorta and then a scar around her naval as a result of a laparotomy performed to repair the aorta. In Docket No. 275404, Dr. Rowe and Bluewater appeal as of right the jury trial judgment in Swanson's favor. In Docket No. 278491, Swanson appeals as of right the trial court's award of attorney fees and costs. The trial court dismissed Port Huron Hospital from the proceedings below, thus it is not a party to either appeal. We reverse.

I. Basic Facts And Procedural History

On April 9, 2002, 16-year-old Swanson went to the Port Huron Hospital emergency room, complaining of severe lower right quadrant pain. An ultrasound showed a 4-centimeter ovarian cyst, and the hospital admitted her. The attending physician requested an OB/GYN consultation with Dr. Rowe. Dr. Rowe then diagnosed Swanson with a right ovarian cyst. Swanson was discharged from the hospital on April 11, 2002, even though her pain was allegedly continuous and she was experiencing nausea and vomiting.

On April 12, 2002, Swanson returned to see Dr. Rowe, still complaining of severe lower right quadrant pain, nausea, and vomiting. A pelvic ultrasound showed that the cyst had grown to 5.6 centimeters. Dr. Rowe recommended a laparoscopy and drainage of a right ovarian cyst. According to Dr. Rowe, in discussing the procedure with Swanson and her mother, Dr. Rowe informed them that risks involved in such treatment included "the risk of possible injury to bowel, blood vessels or other pelvic organs . . . ." Swanson's mother admitted that Dr. Rowe told her that damage to blood vessels could occur, but she claimed that she thought that meant "little vessels," not the "main aorta." Later that same day, the hospital readmitted Swanson and scheduled her for a laparoscopy with possible right ovarian cystectomy and possible appendectomy later that same evening. Before the procedure, Swanson's mother signed an "Authorization, Release and Waiver" form and an informed consent form.

At 6:30 p.m. on April 12, 2002, Dr. Rowe performed the laparoscopy. The laparoscopy was initiated by inserting a veress needle through the umbilical fold into the abdomen. More specifically, the veress needle was inserted in a caudle fashion, at an angle towards the feet, while Dr. Rowe lifted up on the abdomen with a towel clip. Once the veress needle was inserted into the abdomen, CO2 gas was passed through the needle into the abdomen to insufflate the abdomen. According to Dr. Rowe, the veress needle was then withdrawn from the abdomen and a trocar inserted at an angle towards the feet, through which a camera was used to observe the ovarian cyst. At that time, Dr. Rowe observed some bright red blood in the peritoneal cavity. Dr. Rowe was not immediately able to locate the exact source of bleeding, but it appeared to stop, so she proceeded to drain the cyst.

While Dr. Rowe was exiting the surgical site, she observed a large "pulsating" mass (that is, a retroperitoneal hematoma). Dr. Rowe consulted a general surgeon, who immediately recommended a vascular consultation with Dr. Khattab Joseph. With Dr. Rowe's assistance, Dr. Joseph then performed an exploratory laparotomy. According to Dr. Rowe, during this second procedure, an incision was made approximately 2 inches above the umbilicus, extending around to 3 inches below the umbilicus. Dr. Joseph and Dr. Rowe identified a "very small" puncture, "like a needle puncture," at the distal portion of the aorta, at the bifurcation of the aorta. Dr.

Joseph repaired the puncture with two "very fine sutures." Dr. Joseph opined that the veress needle caused the puncture, due to its small size. Dr. Rowe also opined that the puncture was caused when she inserted the veress needle. Dr. Rowe then closed the incision without further complication.

On April 18, 2002, the hospital discharged Swanson. Swanson alleged that at the time of discharge, she had continued lower right quadrant pain, a significant amount of gas pain, and strain with bowel movements. Dr. Rowe testified that Swanson was discharged with medication to treat nausea and pain, but she was in stable condition.

In April 2004, Swanson initiated this lawsuit by mailing a notice of intent to defendants. The notice of intent alleged that the applicable standard of care required defendants to, *inter alia*, "appropriately evaluate the aforementioned patient, including but not limited to, assessing the abdomen and abdominal structures in order to determine the appropriate amount of force needed to perform a laparoscopy;" "appropriately identify the location of the aorta and other anatomical structures prior to placing the veress needle . . . [and/or] the trocar . . . ;" and "protect vital structures, such as the aorta from surgical injury." With respect to breach, the notice of intent merely stated, "The applicable Standard of Practice and Care was breached as evidenced by the failure to do those things set forth in Section II above." Regarding what actions should have been taken to comply with the standard of care, the notice of intent simply stated, "The action that should have been taken to achieve compliance with the Standard of Care should have been those things set forth in Section II above." And with respect to proximate cause, the notice of intent stated:

> As a result of the defendants' gross and blatant negligence, Heather Swanson sustained injury to the main artery in her body, necessitating a surgical repair that rendered this teenager permanently scarred and disfigured, along with intermittent diarrhea and abdominal pain.

Swanson filed her complaint and affidavit of merit in October 2004. And during the September 2006 jury trial, Swanson's primary theory of liability was premised on allegations that Dr. Rowe inserted the veress needle and/or trocar at the wrong angle into the abdomen and used too much force during the insertion. Following deliberations, the jury returned a verdict in Swanson's favor, finding that Swanson sustained an injury, that defendants were negligent, and that defendants' negligence was the proximate cause of Swanson's injury.

Defendants then moved for a judgment notwithstanding the verdict (JNOV), arguing, in pertinent part, that Swanson's notice of intent failed to comply with MCL 600.2912b. The trial court denied defendants' motion.

II. Notice Of Intent

A. Standard Of Review

Defendants argue that the trial court clearly erred by denying their motion for JNOV because Swanson's notice of intent failed to sufficiently specify proximate cause by failing to detail the manner in which defendants' alleged breach of the standard of care factually and foreseeably caused injury to Swanson's aorta.

This Court reviews de novo a trial court's decision on a motion for JNOV.[1] Whether a notice of intent complies with the requirements of MCL 600.2912b is a question of law that this Court reviews de novo.[2]

B. Proximate Cause

"Before commencing an action alleging medical malpractice against a health professional or health facility, a medical-malpractice claimant must provide each health professional and health facility written notice of intent to file a claim."[3] "The notice must include several statutorily enumerated statements about the intended suit."[4] And among the statutorily enumerated statements required to appear in the notice of intent is a statement providing 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."[5] "In order to satisfy this requirement, the notice must contain specific allegations regarding the conduct of the named defendants."[6] "[I]t is not sufficient to state that defendants' negligence caused the alleged harm. Rather, the claimant must describe the manner in which the actions or lack thereof caused the complained of injury."[7]

In *Miller v Malik*, this Court concluded that the plaintiff's notice of intent was insufficient to meet the requirement of MCL 600.2912b(4)(e).[8] In the plaintiff's notice of intent in that case, after enumerating the various duties to which the various defendants were allegedly required to have adhered, the plaintiff simply stated that the defendants had thereby breached the applicable standards of care because "'[t]here was a failure to do all things listed in paragraph II above.'"[9] Regarding what actions the defendants should have taken to comply with the standard of care, the plaintiff merely stated, "'See paragraph II above.'"[10] And with respect to proximate cause, the plaintiff asserted only, "'Had the standard of care been complied with in a timely and appropriate manner, [the patient]'s deep vein thrombosis [DVT] would have been avoided and/or timely diagnosed and treated, thereby avoiding his demise from pulmonary embolism.'"[11] Relying on the Michigan Supreme Court's decisions in *Roberts v Mecosta Co Gen Hosp (After*

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[1] *Sniecinski v Blue Cross and Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003).

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

[3] *Bush v Shabahang*, 278 Mich App 703, 709; 753 NW2d 271 (2008), citing MCL 600.2912b(1).

[4] *Id.*, citing MCL 600.2912b(4).

[5] MCL 600.2912b(4)(e); see *Bush, supra* at 714.

[6] *Bush, supra* at 714.

[7] *Miller v Malik*, 280 Mich App 687, 695-696; 760 NW2d 818 (2008), citing *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 699-700 n 16; 684 NW2d 711 (2004) and *Boodt v Borgess Medical Ctr*, 481 Mich 558, 560; 751 NW2d 44 (2008).

[8] *Id.* at 697-699.

[9] *Id.* at 696-697.

[10] *Id.* at 697.

[11] *Id.*

Remand) and *Boodt v Borgess*, this Court then noted that "[a]lthough [the] plaintiff stated that the DVT and [the patient]'s subsequent death would have been avoided if the standard of care had been followed, nowhere did she state *how* any defendant failed to prevent, diagnose, or treat the DVT or pulmonary embolism."[12]

> The reader is left to wonder whether [the] plaintiff is alleging that the DVT could have been prevented, a diagnosis of the DVT could have been made in time to avoid the pulmonary embolism, or the pulmonary embolism could have been diagnosed or treated in time to avoid [the patient]'s death. [The] [p]laintiff identified many duties in the standard of care portion of the notice of intent, but she failed to describe the manner in which any failure on the part of any defendant to perform any of these duties caused [the patient]'s DVT, pulmonary embolism, or death.[13]

Accordingly, this Court concluded that the notice of intent was not sufficiently stated to put the defendants on statutory notice of the nature of the claim.[14]

Here, the notice of intent alleged that the applicable standard of care required defendants to, *inter alia*, "appropriately evaluate [Swanson], including but not limited to, assessing the abdomen and abdominal structures in order to determine the appropriate amount of force needed to perform a laparoscopy;" "appropriately identify the location of the aorta and other anatomical structures prior to placing the veress needle . . . [and/or] the trocar . . . ;" and "protect vital structures, such as the aorta from surgical injury." With respect to breach, Swanson's notice of intent merely stated, "The applicable Standard of Practice and Care was breached as evidenced by the failure to do those things set forth in Section II above." Regarding what actions should have been taken to comply with the standard of care, the notice of intent simply stated, "The action that should have been taken to achieve compliance with the Standard of Care should have been those things set forth in Section II above." And with respect to proximate cause, the notice of intent stated:

> As a result of the defendants' gross and blatant negligence, Heather Swanson sustained injury to the main artery in her body, necessitating a surgical repair that rendered this teenager permanently scarred and disfigured, along with intermittent diarrhea and abdominal pain.

Swanson's notice of intent is very similar in its deficiencies to the notice of intent in *Miller*. The notice of intent here was similarly inadequate to meet the requirement of MCL 600.2912b(4)(e). Here, although Swanson stated that "defendants' gross and blatant negligence" caused "injury to the main artery in her body," nowhere did she state *how* the defendants were negligent other than by breaching the enumerated standards of care. In other words, there is no indication in the notice of intent how defendants caused or could have avoided the injury to

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[12] *Id.* (emphasis added).

[13] *Id.* (internal citation omitted).

[14] *Id.* at 699.

Swanson's artery. Like in *Miller*, Swanson did identify certain duties in the standard of care portion of the notice of intent, but she failed to describe *the manner* in which any failure on the part of defendants to perform any of these duties caused Swanson's injury.

For example, although Swanson asserted that defendants had a duty to appropriately evaluate Swanson, including "assessing the abdomen and abdominal structures in order to determine the appropriate amount of force needed to perform a laparoscopy," Swanson never explained *how* determining the appropriate amount of force would have prevented injury to the aorta, nor did she allege that Dr. Rowe actually used anything other than the appropriate amount of force. Similarly, Swanson did not explain *how* identifying "the location of the aorta and other anatomical structures" would have prevented injury to the aorta. Further, Swanson failed to explain *how* Dr. Rowe was supposed to "protect vital structures, such as the aorta from surgical injury."

Thus, "Although the instant notice of intent may conceivably have apprised [defendants] of the nature and gravamen of [Swanson's] allegations, this is not the statutory standard; § 2912b(4)(e) requires something more."[15] The mere correlation between alleged malpractice and an injury is insufficient to show proximate cause.[16] We therefore conclude that the notice of intent was not sufficiently stated to put the defendants on statutorily sufficient notice of the nature of the claim.

Accordingly, we conclude that the trial court erred in denying defendants' motion for JNOV. Swanson's notice of intent failed to sufficiently specify proximate cause by not detailing the manner in which defendants' alleged breach of the standard of care factually and foreseeably caused injury to Swanson's aorta. Because Swanson's notice of intent was deficient, her claim was never properly commenced, and she was never authorized to proceed with filing a complaint and affidavit of merit.[17] "'MCL 600.2912b places the burden of complying with the notice of intent requirements on the plaintiff and does not place a reciprocal duty on the part of the defendant to challenge any deficiencies in the notice before the complaint is filed.'"[18] Because this issue is dispositive, we need not address the parties' remaining arguments.

We reverse on the basis of the defective notice of intent and remand for entry of an order vacating the verdict and judgment against defendants. We do not retain jurisdiction. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck
/s/ Donald S. Owens

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[15] *Boodt, supra* at 560-561.

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

[17] *Boodt, supra* at 562-563.

[18] *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 679 NW2d 98 (2004), quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 59; 642 NW2d 663 (2002).

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Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

O'CONNELL, J. (*dissenting*).

For the same reasons stated in my dissent in *Miller v Malik*, 280 Mich App 687, 700-707; 760 NW2d 818 (2008), application for leave to appeal held in abeyance ___ Mich ___; 764 NW2d 231 (2009), I respectfully dissent as to the majority's conclusion that the notice of intent is defective in this case. Needless to say, I believe this Court wrongly decided *Miller*.

The majority opinion relies on *Bush v Shabahang*, 278 Mich App 703, 753 NW2d 271 (2008), lv gtd in part 482 Mich 1105 (2008), and *Miller*, *supra*, to conclude that the notice of intent in the present case is defective. The Supreme Court has granted leave in *Bush* and is holding *Miller* in abeyance until it decides *Bush*. It would seem to me that the Supreme Court's anticipated decisions in both *Miller* and *Bush* would be outcome-determinative in this case, and that the most prudent solution would be to hold this case in abeyance pending our Supreme Court's decisions in *Miller* and *Bush*. At this time I voice no opinion as to the balance of the trial court's decisions in this case. Should our Supreme Court reverse *Bush* or *Miller*, and should this case be remanded to this Court, I will address the balance of the issues raised on appeal at that time.

I would affirm only that part of the lower court decision that concluded the notice of intent was not defective.

/s/ Peter D. O'Connell