STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF ELENA STOYKA, by MICHELLE STOYKA, her Personal Representative, and MICHELLE STOYKA and MICHAEL STOYKA, Individually,

Plaintiffs-Appellants,

v

MT. CLEMENS GENERAL HOSPITAL, DR. MICHAEL KITTO, MACOMB EMERGENCY CARE PHYSICIANS, P.C., and DR. ROBERT FABER,

Defendants-Appellees,

and

ST. JOSEPH MERCY OF MACOMB and DR. HARRY ARETAKIS,

Defendants.

UNPUBLISHED
April 19, 2007

No. 271970
Macomb Circuit Court
LC No. 04-002686-NH

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants Mt. Clemens General Hospital (MCGH), Macomb Emergency Care Physicians, P.C. (MECP), and Drs. Robert Faber and Michael Kitto. We reverse.

I. Basic Facts and Procedural History

This case arises from medical treatment received by plaintiffs' decedent, Elena Stoyka, over the two-day period immediately preceding her death. Elena was seen and treated during this period by a number of health care professionals, including Drs. Faber and Kitto, for croup. Following Elena's death, plaintiffs filed suit alleging professional negligence in the treatment of Elena for this affliction. Plaintiffs further alleged vicarious liability and direct negligence by MCGH and MECP, as the "real or ostensible" employers of Dr. Faber, Dr. Kitto, and various other healthcare professionals who had treated Elena in the hours before her death.

Defendants[1] subsequently sought summary disposition of plaintiffs' claims on a number of grounds, including that plaintiffs had failed to satisfy the requirements of the notice of intent statute, MCL 600.2912b. In making this argument, defendants asserted that plaintiffs had failed to separately and distinctly specify the standard of care applicable to each individual health care professional or organization, as required by MCL 600.2912b(4)(b) and our Supreme Court's decision in *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004). Rather, defendants argued, plaintiffs impermissibly grouped the various healthcare professionals and facilities under a single standard of care. Plaintiffs argued in response that each of the elements required by MCL 600.2912b(4), including the standard of care applicable to each defendant, were easily ascertainable from their notices of intent and thus satisfied the requirements of MCL 600.2912b(4).

Following a hearing on defendants' motions, the trial court issued a written opinion and order granting summary disposition in favor of defendants. The trial court based its ruling on only one of the many issues raised by defendants in their motions—whether plaintiffs' notices of intent satisfied the standard of care requirement of MCL 600.2912b(4)(b). The trial court ruled that plaintiffs had not satisfied the statute because:

> the various notices of intent to file a claim . . . contain but a single standard of care encompassing all caretakers (facilities, doctors – emergency room physicians and pediatricians, nurses, respiratory therapists, unspecified medical staff and other employees) without distinction although only certain caretakers (with differing specialties) were involved at the various stages of Elena Stoyka's care. The various notices of intent noticeably neglect to single out each caretaker's standard of care and particular failing.

After concluding that plaintiffs' failure to comply with MCL 600.2912b(4)(b) required that their notices of intent be stricken, the trial court dismissed plaintiffs' suit on the ground that the statute of limitations for plaintiffs' medical malpractice claim had expired. This appeal followed.

II. Analysis

We review de novo a trial court's decision regarding a motion for summary disposition. *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 484; 679 NW2d 98 (2004). Issues of statutory interpretation are also reviewed de novo on appeal, as a question of law. *Id*.

Among other prerequisites to commencing suit, a medical malpractice claimant is required to provide a health facility or practitioner with a written notice of intent setting forth several statutorily enumerated statements about the intended suit, including "[t]he applicable standard of practice or care alleged by the claimant." MCL 600.2912b(4)(b); *Roberts*, *supra* at 685-686. A claimant is not required to ensure that such statement is correct, but the claimant

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[1] As used in this opinion, the term defendant refers only to defendants-appellees MCGH, MECP, and Drs. Faber and Kitto.

must 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 691-692 (emphasis partially added).

Relying on the language emphasized above, defendants assert that the trial court correctly concluded that, under *Roberts*, *supra*, plaintiffs' failure to "single out each caretaker's standard of care" was fatal to their notices of intent. We disagree.

In *Roberts*, *supra* at 692-695, the Court observed that among the defendants were an obstetrician, an emergency room physician, a physician's assistant, and two different facilities; yet the plaintiff made no attempt to identify a specific standard of practice or care applicable to any particular defendant. Rather, the plaintiff alleged in her notices of intent "an identical statement applicable to all defendants in response to § 2912b(4)(b)." *Id*. at 692. This was not, however, the basis on which the Court found the plaintiff's notices of intent defective. Rather, the Court concluded that the notices of intent simply did not contain the information necessary to comply with the requirements of MCL 600.2912b(4)(b). *Id*. at 693-695. With regard to the defendant facilities, the Court noted that the notices of intent failed to allege a standard applicable specifically to a hospital or professional corporation, or, that these entities were vicariously or directly liable to plaintiff. *Id*. at 693. Further, as to the individual professionals, the standard of care alleged by the plaintiff, i.e., that these individual were to "properly care for" and "render competent advice and assistance" to the plaintiff, was too general to be "adequately responsive to the statutory requirement that the claimant allege an applicable standard of practice or care relevant to the defendant." *Id*. at 693-694.

In contrast to the statements at issue in *Roberts*, the notices of intent at issue here set forth standards of care specifically tailored to the particular facts of this case. Rather than merely indicate that defendants failed to "properly care for" or "assist" Elena, the notice of intent mailed by plaintiffs to MCGH and several of the doctors who treated Elena at that hospital, including Dr. Kitto, explicitly indicated that "the child's airway was not properly monitored or managed." The notice also expressly indicated that MCGH was liable for Elena's death either vicariously, based on the negligence of MCGH staff members who treated Elena, or through its own direct negligence in the hiring, supervision, and training of its staff.

The notice of intent mailed to Dr. Faber and several of the other health care providers who had treated Elena on the day before her death was similarly particular in its allegations. Indeed, the notice expressly indicated that the standard of care applicable to these individuals on that date required that Elena be admitted to the hospital for treatment or kept under observation for a longer period of time. The notice also indicated that the standard of care required these individuals to administer steroid treatments to Elena before discharging her, rather than merely provide Elena with a prescription for the steroid.

Finally, the notice of intent provided to MECP, the entity that employed Dr. Faber when he treated Elena, restated the malpractice alleged to have occurred on that date and indicated that MECP was to be sued for its direct negligence in failing to properly select and train its staff, as

well as for its vicarious liability to plaintiffs for the alleged negligence of it "agents, servants, and employees."[2]

Thus, we find defendants' reliance on *Roberts* to assert that plaintiffs impermissibly grouped the various healthcare professionals and facilities under a single standard of care to be misplaced. As explained by the Court in *Roberts*, *supra* at 696, MCL 600.2912b(4) only requires that the information required by that subsection be present in some readily decipherable form, not that it "be in any particular format." Furthermore, the Court did not indicate that the grouping of various healthcare professionals and facilities under a single standard of care was necessarily fatal to a claimant's notice of intent. To the contrary, the Court recognized that the same standard of care might conceivably apply across various disciplines. See *id*. at 694 n 11 ("the standard of care applicable to one defendant is *not necessarily* the same standard applicable to another defendant) (emphasis added); see also *id*. at 692 n 8 ("[t]he standard of practice or care that is applicable . . . to a surgeon would *likely* differ in a given set of circumstances from the standard applicable to an OB/GYN or to a nurse") (emphasis added).

As already noted, in order to satisfy the requirements of MCL 600.2912b(4), statements made by a claimant in his or her notice of intent need not ultimately be shown to be accurate. *Id*. at 691-692. Rather, the statements need only "allow the potential defendants to understand the claimed basis of the impending malpractice action. . . ." *Roberts*, *supra* at 692 n 7. Defendants do not allege that plaintiffs' notices of intent fail in this regard. Accordingly, we reverse the trial court's order granting summary disposition in favor of defendants and dismissing plaintiffs' complaint.

Reversed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra

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[2] Plaintiffs' notices of intent also contain statements alleging that "the applicable standards of practice have been breached by all of the . . . name parties" in more than 20 additional and somewhat generic ways. At oral argument, counsel for plaintiffs explained that this statement was intended to cover every possible eventuality that might be revealed during discovery, in order to ward off a claim that the notice of intent are insufficient to raise those claims in a later filed complaint. Whether plaintiffs' precautionary tactic is required is not at issue in this case, and we take no position on the matter. But see, *Korpal v Shaheen*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket No. 266418); see also *Newton v Medina*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2006 (Docket No. 266232) ("[a] medical malpractice claimant is limited to the issues that are raised in the notice of intent in a manner that is compliant with § 2912b(4)").