

STATE OF MICHIGAN
COURT OF APPEALS

LITITIA BOND, as personal representative of the
ESTATE OF NORMA JEAN BLOCKER,

UNPUBLISHED
March 1, 2012

Plaintiff-Appellant/Cross-Appellee,
and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

No. 300725
Oakland Circuit Court
LC No. 2005-066794-NH

ADAM COOPER, M.D., KIRSTEN MCDANIEL,
D.O., and BOSTFORD GENERAL HOSPITAL,

Defendants-Appellees/Cross-
Appellants.

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM

Plaintiff appeals by right the order granting summary disposition in favor of defendants. This medical malpractice action arises out of Norma Jean Blocker's death on March 28, 2003, as a result of alleged complications following surgery performed by the defendant doctors on April 11, 2002. This matter has been before this Court and our Supreme Court twice previously. Most recently, our Supreme Court remanded this matter to the trial court "for reconsideration in light of *Bush v Shabahang*, 484 Mich 156; 772 NW2d 156 (2009), and *Potter v McLeary*, 484 Mich 397; 774 NW2d 1 (2009)." On reconsideration, the trial court concluded that the statement of proximate causation in plaintiff's notice of intent (NOI) was so conclusory that it did not satisfy the "good faith" requirement set forth in *Bush*, so the NOI was defective and the matter should be dismissed without opportunity to cure.¹ The trial court dismissed without prejudice, but it noted that "[p]laintiff's action is nonetheless time-barred and upon refile, the complaint will be subject to dismissal." Plaintiff contends that she should have been permitted to amend and that her claim is not time-barred; defendants contend that dismissal should have been with prejudice.

¹ The trial court found *Potter* irrelevant, and neither party contests that conclusion.

We affirm the dismissal and agree with defendants that dismissal should have been with prejudice.

No circumstances have changed since the last time this Court summarized the facts:

Drs. Cooper and McDaniel admitted the decedent to defendant hospital where a total abdominal hysterectomy and bilateral salpingo-oophorectomy was performed [on April 11, 2002]. Following the surgery, the decedent complaint[sic] of low back pain and had a decreased urinary output and no bowel movement, [on April 12, 2002]. Despite these complaints, the decedent was discharged from the hospital [on April 14, 2002]. Three days later, the decedent returned to the hospital complaining of acute abdominal pain. She was diagnosed with ischemic bowel and underwent an exploratory laparotomy, [on April 18, 2002], which was performed by Dr. Cooper and Dr. Michael Rebock. A subtotal colectomy with end ileostomy and small bowel resection was performed for infarcted gangrenous bowel. The decedent suffered postoperative complications, including multi-system organ failure and sepsis. After a lengthy stay in the intensive care unit, the decedent was transferred to another hospital. Nine months later [on March 28, 2003], she died as a result of renal failure and urosepsis.

Plaintiff sent defendants a notice of intent to file suit [on December 1, 2004]. In Section II of the notice of intent, plaintiff stated that the applicable standard of care required Drs. Cooper and McDaniel to timely and properly:

- a. Perform a thorough and complete examination;
- b. Obtain a thorough and complete medical history;
- c. Avoid unnecessary surgical procedure, i.e., TAH and BSO;
- d. Implement conservative treatment, including but not limited to, further observation and/or Lupron therapy;
- e. Avoid injury to the bowel by excessive traction or packing;
- f. Adequately observe the abdominal contents prior to closure of the abdomen;
- g. Recognize the signs and symptoms of and [sic] ileus or bowel obstruction;
- h. Perform appropriate diagnostic testing to rule out an ileus or bowel obstruction including, but not limited to, an MRI, CT scan, lower GI series or abdominal x-rays;
- i. Consult with the appropriate specialists including, but not limited to, an Infectious Disease Specialist, General Surgeon and/or Gastroenterologist;

- j. Timely and properly diagnose and treat an ileus or bowel obstruction;
- k. Recognize the need for prolonged in-patient hospitalization, continued encouraged ambulation and the need for positive bowel movement; and
- l. Any and all acts of negligence identified through the course of discovery.

In addition to these standards applicable to the doctors, the notice of intent stated that defendant hospital was required to properly and timely “[s]elect, employ, train and monitor its employees . . . and or staff . . . to insure they were competent to perform adequate medical care” and to “[e]nsure that appropriate policies and procedures are adopted and followed, including, but not limited to, pursuing patient advocacy by following the chain of command where indicated. . . .”

The notice of intent alleged that defendants breached the applicable standard of care by their “failure to do the things required in [Section] II above.” The notice also referenced Section II in stating those actions that should have been taken to achieve compliance with the standard of care. With respect to the manner in which the breach was the proximate cause of the claimed injury, the notice of intent stated: “Within a reasonable medical probability, had the standard of care been complied with in a timely and reasonable manner, [the decedent] would not have suffered severe and permanent damage and untimely demise.”

After plaintiff filed her complaint and affidavit of merit [on June 1, 2005], defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff’s notice of intent failed to adequately state the manner in which it is alleged that the breach of the standard of practice or care was the proximate cause of the decedent’s injury, as required by MCL 600.2912b(4)(e). Defendants also argued that the statement of proximate cause in plaintiff’s affidavit of merit was deficient, but that is not at issue in this appeal. The trial court ruled that the notice of intent failed to provide a sufficiently detailed statement of proximate cause. [(*Bond v Cooper*, unpublished opinion per curiam of the Court of Appeals, Docket No. 273315, issued March 3, 2009).]

This Court affirmed the trial court’s grant of summary disposition in favor of defendants. In lieu of granting leave to appeal, our Supreme Court vacated this Court’s judgment and, as discussed, remanded to the trial court for reconsideration in light of *Bush*, 484 Mich 156, and *Potter*, 484 Mich 397. While *Roberts v Mecosta Co Gen Hos*, 470 Mich 679, 685; 684 NW2D 711 (2004) was controlling at the time this NOI was written, we will discuss how *Bush* applies to this case.

On remand, the trial court observed that plaintiff’s NOI was required to include a statement explaining how defendants’ alleged acts or omissions proximately caused Blocker’s death, pursuant to MCL 600.2912b(4)(e). However, the “NOI merely sets forth in a conclusory fashion numerous actions required of Defendants, without causally linking Defendant’s alleged

breaches to the injuries of the decedent.” Citing *Bush*, 484 Mich at 177, the trial court explained that the statute of limitations would nevertheless be tolled and plaintiff permitted to amend and correct her NOI if certain criteria were satisfied: “first, whether a substantial right of a party is implicated and second, whether the cure is in the furtherance of justice.” The second criterion required the plaintiff to have made a “good faith” effort to comply with the statutory requirements, and the court found that plaintiff’s conclusory statement of proximate causation did not satisfy the “good faith” requirement. The court therefore dismissed the matter without prejudice. In a footnote, the trial court concluded that because plaintiff’s affidavit of merit (AOM) was functionally identical to the NOI, dismissal was “also appropriate under the alternative grounds raised by Defendants relative to the AOM. . . .” Although the trial court dismissed without prejudice, it observed that “[p]laintiff’s action is nonetheless time-barred and upon refile, the complaint will be subject to dismissal.”

Cases that involve questions of statutory interpretation are reviewed de novo. *Roberts* 470 Mich at 685. This court reviews de novo a trial court’s decision to grant summary disposition. *Morden v Grand Traverse Co.*, 275 Mich App 325, 331; 738 NW2d 278 (2007).

In *Bush*, our Supreme Court explained that, by enacting 2004 PA 87, the Legislature had clarified its original intent for the operation of MCL 600.5856, which governs tolling of the applicable statute of limitations upon mailing a NOI. *Bush*, 484 Mich at 164-170. Notably, *Bush* emphasized that the changes to the statute made by 2004 PA 87 were intended as a clarification of the statute’s original meaning, not a change in the meaning thereof.² *Id.* at 169-170, 170 n 25. Under the amended statute, a defective NOI may not be grounds for dismissal with prejudice. *Id.* at 170-177. *Bush* further explained that a NOI could be considered a “process” or “proceeding” and therefore was potentially amendable in form or substance pursuant to MCL 600.2301. *Id.* at 176-177. The Court observed that, “[g]iven that NOIs are served at such an early stage in the proceedings, so-called ‘defects’ are to be expected.” *Id.* at 178. Critically, however, any such amendment must not implicate a substantial right of a party, and the cure must be in the furtherance of justice, meaning, among other things, that the plaintiff made “a good-faith attempt to comply with the content requirements of [MCL 600.]2912b.” *Id.* at 178.

In *Bush*, one of the matters at issue was the defendant’s response to the plaintiff’s NOI. That response was one page long and contained only blanket statements of denial as to each statutory section. *Bush*, 484 Mich at 182-183. The Court concluded that this “was utterly

² For this reason, we presume, without deciding, that the discussion of MCL 600.2301 in *Bush* applies retroactively to cases pre-dating the effective date of 2004 PA 87. We need not decide this question because, as will be discussed, the trial court properly found plaintiff unentitled to amend her NOI in any event. If it mattered to the outcome of this case, we would hold it in abeyance in light of our Supreme Court having directed oral argument in *Johnson v Hurley Medical Group*, Court of Appeals Docket No. 287587, explicitly directing the parties to brief this precise issue: “whether MCL 600.2301 applies to cases initiated before the amendment of MCL 600.5856 in 2004 and whether the plaintiff in this case should have been allowed to amend her notice of intent.” In this opinion, we presume that it does, but we do not purport to decide.

lacking in a good-faith attempt to comply,” and so the defendant was not permitted to amend it pursuant to MCL 600.2301. *Id.* at 182-184. In contrast, the plaintiff in that case also submitted a defective NOI, but that NOI was thirteen pages long, was entirely adequate as to several of the various named defendants, and failed to adequately address the standard of care applicable to two of the defendants. *Id.* at 178-180. The Court found that the plaintiff had made a good-faith attempt to comply with all of the statutory content requirements, and so it was amendable pursuant to MCL 600.2301. *Id.*

The NOI here does not neatly match either of the notices discussed in *Bush*. It is far more involved than the one-page blanket denial submitted by the *Bush* defendants, which was essentially a blatant failure to provide *any* content mandated by *any* part of the statute. However, it seems less complete than the NOI submitted by the *Bush* plaintiff, which was extensive and detailed and only lacked two pieces of content as to two of several defendants. *Bush* did not attempt to define what constitutes “good faith” anywhere in between these extremes. But in *Roberts* 470 Mich at 694-695, our Supreme Court strongly implied that good faith might be found where a party simply made *some* articulation. There, the Court was discussing MCL 600.2912b(4)(b), the applicable standard of care, and it observed that this might, in some cases, be obvious—for example, where a wrong tooth was extracted, the standard of care might simply be to extract the correct tooth. *Id.* at 694 n 12. Nonetheless, it appears that “good faith” likely requires the NOI, when read as a whole, to contain, somewhere and in some form, at least *some* articulation of the content required by MCL 600.2912b(4), however slight.

The NOI here was five pages long, and three of the sections consisted of specific and detailed statements that together set forth the content required by MCL 600.2912b(4)(a), (b), (c), (d), and (f). However, as to MCL 600.2912b(4)(e), the NOI merely stated that “had the standard of care been complied with in a timely and reasonable manner, Norma Jean Blocker would not have suffered severe and permanent damage and untimely demise.” This does not in any way explain *how* defendants’ alleged failures proximately caused Blocker’s injuries. NOIs should be read as a whole, and we understand that they are expected to be read by sophisticated medical professionals who will likely be able to understand the medical significance of any alleged failures on their part. However, nowhere in plaintiff’s NOI did plaintiff actually, directly state the causality. Good faith should not be a high standard, and so it should be found if there had been any discernable articulation of causality, but the NOI here only lists what defendants allegedly did wrong and concludes with a tautology. We therefore agree with the trial court that plaintiff’s NOI did not contain a good faith attempt to comply with all of the content required by MCL 600.2912b(4).³ Specifically, the NOI in this case was drafted after our Supreme Court issued *Roberts* 470 Mich at 685. It was made clear through the *Roberts* decision that the manner in which the alleged breach of the standard of care was the proximate cause of the injury claimed in the notice. *Roberts* at 699, MCL 600.2912(b)(4)(e). This was not done in any fashion in the present case. In a case with facts as are present here, where the alleged malpractice occurs

³ It is therefore unnecessary for us to consider whether defendants’ substantial rights are implicated.

nearly a year before the death, good faith requires that the proximate cause be specified in some fashion in the NOI.

We need not address plaintiff's contention that the trial court erred in stating that her claim would be time-barred upon refiling. Defendant correctly observes that plaintiff makes no attempt to dispute the trial court's finding that her AOM was insufficient. Rather, plaintiff argues that pursuant to MCL 2.112(L)(2)(b), "[a]n affidavit of merit . . . may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301." However, the Court Rules upon which plaintiff relies became effective May 1, 2010, and applied prospectively only. *Lignons v Crittenton Hosp*, 490 Mich 61, 87-89; 803 NW2d 271 (2011). Under the prior versions of the Court Rules, MCL 600.2301, and *Bush*, a plaintiff may not retroactively amend a defective AOM. *Lignons*, 490 Mich at 79-87. An AOM is not a "pleading" as defined by MCR 2.110(A). Plaintiff is not entitled to amend her AOM,⁴ which must be deemed defective as the trial court found. Furthermore, although plaintiff filed her complaint prior to the expiration of the "saving period" provided by MCL 600.5852, the limitations period had already expired and so there is "nothing left to toll." *Lignons*, 490 Mich at 89-90. Consequently, dismissal should be with prejudice. *Id.*

The trial court's grant of summary disposition in favor of defendants is affirmed. However, pursuant to MCR 7.216(A)(7), we order that dismissal is with prejudice rather than without prejudice.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause

⁴ We express no opinion whatsoever as to the relief to which a similarly-situated plaintiff might be entitled under the amended Court Rules, in a case in which the amendments applied.