

STATE OF MICHIGAN
COURT OF APPEALS

Theresa Bailey, a/k/a Theresa Long,
Individually and as the Personal Representative of
the Estate of Christal Bailey,

Plaintiff-Appellee,

v

Sethavarangura Pornpichit, M.D.,
a/k/a Pornpichit Sethavarangura,
M.D.,

Defendant-Appellant.

UNPUBLISHED
August 8, 2006

No. 267546
Wayne Circuit Court
LC No. 04-411504-NH

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying his motion for summary disposition on plaintiff's complaint alleging medical malpractice. We reverse and remand for dismissal of plaintiff's complaint with prejudice. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff received prenatal care from defendant during her pregnancy with twins. During the last weeks of her pregnancy, plaintiff complained several times of various health issues, including weight gain, pain in her legs, and labor pains. Defendant performed ultrasounds, advised plaintiff that everything was all right, encouraged her to endure the pain, but performed no physical exam. Plaintiff experienced fetal kicks and went to the hospital, where she was examined and found to be dilated to six centimeters. When plaintiff was put on a monitor, only one twin was seen, and plaintiff was given an emergency caesarian section. One twin was born alive; the other, Christal Bailey, was stillborn.

Plaintiff sued defendant for medical malpractice and wrongful death. Plaintiff submitted an affidavit of merit by Michael A. Roth, M.D., an obstetrician and gynecologist. The affidavit stated that defendant breached the standard of care by (1) failing to do glucose tolerance testing, (2) failing to routinely monitor fetal heart tones, (3) failing to do a maternal fetal ultrasound, (4) failing to monitor the pregnancy closely when plaintiff reached the 32nd or 33rd week to ensure adequate growth, and (5) failing to listen and react to the concerns of plaintiff.

Defendant moved for summary disposition, arguing that plaintiff's affidavit of merit failed to comply with the requirements of MCL 600.2912d because it did not sufficiently specify the required element of proximate cause, and therefore, plaintiff did not properly commence her action. With respect to proximate cause, Dr. Roth's affidavit simply stated, "That as a result of Dr. [Sethavarangura's] failure to comply with the applicable standard of care, as outlined above, Christal Bailey was delivered stillborn." Defendant also argued that plaintiff's complaint should be dismissed with prejudice because the deficiency in Dr. Roth's affidavit was not remedied before the limitation period expired. Finally, defendant argued that proximate cause could not be established on the testimony of plaintiff's expert.

The trial court denied defendant's motion, reasoning that Dr. Roth's affidavit was sufficient because it generally informed defendant of plaintiff's claim and that Dr. Roth would be more specific at trial.

We review de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

The trial court erred in denying defendant's motion for summary disposition because Dr. Roth's deposition did not sufficiently provide the manner in which defendant's alleged breach of the standard of care proximately caused plaintiff's decedent's injury as required by MCL 600.2912d(1)(d). To commence a medical malpractice action, a plaintiff must file both a complaint and an affidavit of merit that complies with MCL 600.2912d(1). *Scarsella v Pollak*, 461 Mich 547, 548; 607 NW2d 711 (2000).

In *Roberts v Mecosta County Gen Hosp (After Remand)*, 470 Mich 679, 699-700 n 16; 684 NW2d 711 (2004), our Supreme Court noted that a notice of intent submitted under MCL 600.2912b was insufficient because, among other things, the notice failed to state the manner in which the defendant's alleged breach of the standard of care proximately caused the injury:

Plaintiff's notices of intent state that "as a result of [defendants'] negligence . . . , [plaintiff] is now unable to have any children." At first blush, this may appear to satisfy the proximate causation requirement of § 2912b(4)(e). However, it is not sufficient under this provision to merely state that defendants' alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the manner in which it is alleged that the breach was a proximate cause of the injury.

The mere correlation between alleged malpractice and an injury is insufficient to show proximate cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86-88; 684 NW2d 296 (2004). Proximate cause is a legal term of art that incorporates both cause in fact and legal (proximate) cause. *Id.* at 86. The cause in fact element generally requires showing that but for the defendant's actions, the plaintiff's injury would not have occurred. *Id.* at 86-87. Legal (proximate) cause normally involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for such consequences. *Id.* at 87.

In this case, plaintiff's affidavit describing the matter of proximate cause simply states "[t]hat as a direct result of Dr. [Sethavarangura's] failure to comply with the applicable standard

of care, as outlined above, Christal Bailey was delivered stillborn.” The standard of care “outlined above” consisted of performing tests. Presumably, if defendant had performed the tests and learned of Christal Bailey’s fetal distress, then defendant possibly could have done something to save her. But the affidavit does not describe the manner in which defendant’s failure to perform the tests factually and foreseeably caused Christal Bailey to be stillborn. It is possible that, even had defendant performed the tests, Christal Bailey still could have been stillborn. Therefore, we find that plaintiff’s affidavit of merit was insufficient to satisfy MCL 600.2912d(1)(d).

A plaintiff who fails to file a valid affidavit of merit with the complaint is subject to dismissal without prejudice, but if such plaintiff fails to comply with the statute of limitations, the action is dismissed with prejudice. *Scarsella, supra* at 549-550. Moreover, under controlling case law, a defective affidavit of merit does not toll the limitation period. *Kirkaldy v Rim (On Remand)*, 266 Mich App 626; 702 NW2d 686 (2005); *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003); *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003). The limitation period for malpractice actions is two years. MCL 600.5805(6). Here, plaintiff did not file a conforming affidavit within the two-year limitation period. Therefore, plaintiff’s complaint must be dismissed with prejudice.

We reverse and remand for dismissal with prejudice. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

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Defendant-Appellant.¹

Before: Neff, P.J., and Bandstra and Zahra, JJ.

NEFF, P.J. (*dissenting*).

I respectfully dissent. Contrary to the conclusion reached by the majority, I find that plaintiff's affidavit of merit complies with MCL 600.2912d and would affirm the trial court's denial of summary disposition.

While I agree that *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 700-701; 684 NW2d 711 (2004) is instructive with respect to requirements for a statement of proximate cause in an affidavit of merit,² I find *Roberts* factually inapposite. In *Roberts*, the Court explained:

Under MCL 600.2912b(4), a medical malpractice claimant is required to provide potential defendants with notice that includes a "statement" of each of the statutorily enumerated categories of information. Although it is reasonable to expect that some of the particulars of the information supplied by the claimant

¹ Defendant's name was incorrectly stated on plaintiff's complaint and therefore on subsequent pleadings in the trial court. His correct name is Pornpichit Sethavarangura.

² The notice of intent, considered in *Roberts*, and the affidavit of merit are governed by similar statutory purpose and language with respect to their requirements for statements of proximate cause.

will evolve as discovery and litigation proceed, the claimant is required to make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings. The information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them. This is not an onerous task: all the claimant must do is specify what it is that she is *claiming* under each of the enumerated categories in § 2912b(4). Although there is no one method or format in which a claimant must set forth the required information, that information must, nevertheless, be specifically identified in an ascertainable manner within the notice. [*Roberts, supra* at 700-701.]

Roberts involved a medical malpractice action against “two different facilities, an obstetrician, an emergency room physician, and a physician’s assistant, yet no attempt was made to identify a specific standard of practice or care applicable to any particular defendant.” *Id.* at 701. Accordingly, the statement of proximate cause, which stated, “as a result of [defendants’] negligence . . ., [plaintiff] is now unable to have any children,” failed to satisfy the statutory requirements. *Id.* at 699 n 16.

On the contrary, in this case, there is only one defendant and plaintiff particularized the allegations of negligence in her affidavit of merit, stating that defendant breached the standard of care by (1) failing to do glucose tolerance testing in a patient who is morbidly obese and carrying twins, (2) failing to routinely monitor fetal heart tones, (3) failing to do maternal fetal ultrasounds, (4) failing to monitor the pregnancy closely when plaintiff reached the 32nd or 33rd week to be certain that both babies were growing adequately, and (5) failing to listen and react to the concerns being voiced by plaintiff and defendant’s nurse. With regard to proximate cause, the affidavit of merit stated, “That as a direct result of [defendant’s] failure to comply with the applicable standard of care, as outlined above, [plaintiff’s baby] was delivered stillborn.”

Given the stark differences in the specificity in plaintiff’s allegations and those in *Roberts*, and given that this case involves only a single defendant, *Roberts* does not reasonably control the outcome in this case, particularly in light of the above guidance from *Roberts*. The affidavit of merit satisfies the requirement of MCL 600.2912d(1)(d), that the affidavit contain a statement of “[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.” Plaintiff has shown far more than a mere correlation between the alleged malpractice and the injury. *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004) (see the majority, *ante* at 3). Accordingly, the trial court properly denied defendant’s motion for summary disposition.

/s/ Janet T. Neff