

State of Michigan
In the Supreme Court

DRAGO KOSTADINOVSKI and
BLAGA KOSTADINOVSKI,
as Husband and Wife,

Supreme Court No. 162909

Court of Appeals No. 351773

Plaintiffs-Appellants,

Macomb County Circuit Court

v.

Case No: 14-2247-NH

Hon. Kathryn A. Viviano

STEVEN D. HARRINGTON, M.D. and
ADVANCED CARDIOTHORACIC
SURGEONS, P.L.L.C.,

Defendants-Appellees.

Filed under AO 2019-6

**Defendant-Appellees Steven D. Harrington, M.D. and Advanced
Cardiothoracic Surgeons, P.L.L.C.'s Appendix**

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APPENDIX 1



Your Trusted Clinical Partner

Cardiopulmonary Bypass Record

22

Date: 12-14-11

ID#: 3453

Barcode: 001182362-1322 AD: 12/14/2011
 KOSTARINOVSKI, [REDACTED] M 70Y
 HARRINGTON STEVEN D DR:

Time	L MAP	R MAP	CVP	Line press	RPM	Blood Flow	FiO ₂	Gas Flow	anes Gas	SpO ₂	Temperatures	VAVR	Urine	VO ₂	Fluids/Drugs/Comments/Verbal Orders
10:05											36.0				Pre-CPB / Baseline
11:07	54	55	30	7	131	7850	1.4	100	4.0	79	32.9 37.7 34.9				+CPA 11:07 - x clamp 11:13
11:15	66	62	59	1	203	2950	3.71	60	2.25	82	32.7 32.3 34.4	35	718	26	2 Arit w/ 11:13
11:30	66	61	70	5	247	3050	3.61	60	4.50	83	30.1 30.3 34.1	30	304	↓	status / Hemocrit monitor → HAcetamin / 5 Swell
11:45	69	64	70	3	231	3000	3.00	60	6.00	86	30.1 30.1 32.5	30	194	3.0	status 4/ sweep ↑ 9
12:00	61	60	68	5	267	3100	3.46	60	9.00	86	36.0 36.0 33.2	35	231	↓	status / RW 0.12.10 / ZBUF 500ml
12:15	62	60	70	3	242	3000	3.07	60	9.00	85	36.0 32.3 34.8	30	168	4.0	status / RW 0.12.10 / ZBUF 500ml / SpO ₂ 100%
12:30	65	64	70	6	266	3250	3.80	75	8.00	81	36.5 36.2 32.7	24	221	↓	status / RW 0.12.10 / ZBUF 500ml
12:45	71	72	70	5	287	3250	3.50	70	4.50	81	36.0 36.0 34.1	30	191	5.0	status / RW 0.12.10 / ZBUF 500ml
12:52	53	53	71	6	264	3230	4.12	70	8.5	81	36.0 36.0 35.5	30	200	↓	- x clamp to 12:52 - 500ml Nitrog at 13:05
13:05	61	64	71	7	210	2410	3.47	70	8.5	81	36.0 36.0 35.0	30	190	↓	status / RW 0.12.10 / ZBUF 500ml
13:15															- CPB


* A=arterial - V=venous - B=Bladder - E=End-tidal - MP=Mean Pulmonary Pressure - N=Nursing - T=Temperature ** VIP = Venous Inlet Pressure (mmHg) *** VO₂ = Volume Orders - J=Jugular - A=Anesthesia

Time	AV	pH	pCO ₂	pO ₂	HCO ₃	BE	%Sat	HGB/HCT	Na	K	Ca	GLU	ACT	HPT	Hem	Time	sol.	Route	Flow	press.	temp	vol
10:17	A	7.34	44	7	94	17.5	97	10.2/30	140	4.8		184	-	-	units	11:15	HTR	A	230	130	4.5	500
10:45	A	7.30	35	5	51.5	27.7	100	8.5/26	146	4.4		173	138	-	-	11:40	HTR	A	170	70	6.0	500
10:57	A	7.44	37.2	188	25.4	2	100	7.8/27	143	3.5		72	660	-	-							
11:24	A	7.30	71	287	27.9	0	100	5.1/15	130	3.9		50	678	-	-							
11:32	A	7.22	68	321	28.1	0	100	5.1/15	131	3.9		62	-	-	-							
11:57	A	7.30	60	50	26.0	2	75	5.1/15	128	4.2		67	-	-	-							
12:00	A	7.37	51	331	27.4	2	100	7.1/21	132	4.5		120	655	-	-							
12:46	A	7.28	59	378	28.4	2	100	6.8/20	133	5.0		115	645	-	-							
13:15	A	7.50	30	295	29.6	8	100	6.5/14	134	5.4		154	544	-	-							
13:17	A	7.41	39	123	25.2	1	99	7.2/20	135	5.7		187	-	-	-							

Transfusing Record Blood Unit No and Time Given Comment:
 Pre-draw 7.40 on field from 8:00
 Primary Perfusionist: [Signature] ID # 1013 *Relief Perfusionist: ID # [REDACTED] Perfusion Assistant: [Signature] ID # 6716
 *Relief perfusionist must indicate time in and time out in the comment section

PATIENT CHART




 FWRP:
 001182362-1322
 AD: 12/14/2011
 KOSTADINOVSKI, DRAGO
 M 70Y
 HARRINGTON, STEVEN D DT#:

PERFUSION CHECKLIST

- NA AP
 1.0 EQUIPMENT INSPECTION
- Electrical and Operational inspection of all equipment
 - All holders secure
 - All equipment clean pre procedure
 - Roller head occlusions checked
 - Batteries charged and functional
 - Hand cranks available
 - Runaway protection checked
 - Air emboli protection system checked
 - All alarms/alerts tested and audible
 - Gas flow meter, blender, vaporizer operating correctly
 - In-line sensors calibrated and operational
 - Backup pump, heater/cooler and O₂ sources available
 - Vacuum container monitoring & test at: 7.5 in-use
- 2.0 ACCESSORIES
- Backup lighting source operational
 - Tubing clamps, banding gun, ties and scissors available
 - Pacemaker and fibrillator operational
 - Patient monitor operational, wired and calibrated
- 3.0 SOLUTIONS
- Crystalloid and colloid solutions available
 - Heparin/ACD anticoagulant & Protamine available
 - Cardioplegia solutions available
 - Blood available, CHECK TYPE AND Rh FACTOR
 - Blood transfer bags with patient labels available
 - Multi-epitaxial blood filters available
- 4.0 CIRCUIT SETUP & PRIME
- Back up disposables components available
 - Disposable package integrity / sterility checked
 - Disposables checked for defects
 - Serial/Lot numbers recorded on perfusion record
 - Expiration dates checked (Solutions, drugs, disposables)
 - H₂O lines connected to heat exchanger / leak test done
 - Cardiotomy and Oxygenator gas vents open
 - Tubing loaded in pump heads correctly
 - All tubing kink free and connections secure (tie banded)
 - Arterial filter & purge line checked
 - One-way valves in correct flow direction
 - Line pressure monitoring installed
 - Temperature probes in place
 - CO₂ flush complete
 - Oxygenator primed and de-aired
 - ALF primed and de-aired
 - Cardioplegia system primed and de-aired
 - Centrifugal flow probe calibrated
 - VAVR cardiotomy positive pressure relief valve attached
 - VAVR negative pressure relief valve unobstructed
 - Indicates Autotransfusion (ATS) components

CSS030 (03/17/10)

- 5.0 ANGIOLARY
- Laboratory equipment calibrated and O₂ compliant
 - Desired perfusate temperature & water level confirmed
 - Patient chart reviewed / calculations complete
 - Tubing harness installed and connected correctly
 - ATS bowl aligned, secured and RPM tested
 - Heparin / ACD drip regulated for collection
 - Personal protection equipment available

I participated in a "Surgical Time Out" at: 15

INITIATION OR EMERGENCY BYPASS

- Heparin given / anticoagulation adequate
- Patient's chart reviewed
- Pump components and circuit checked for proper setup and secure connections
- Pump heads revolving in proper direction
- Occlusion set on roller pumps
- Arterial boot / centrifugal head installed correctly
- Centrifugal pump flow probe calibrated
- Vent operation verified by fluid testing
- Safety devices TESTED, ARMED & AUDIBLE
- Check entire system for bubbles
- Cardiotomy & Oxygenator vents open
- Gas line connected to oxygenator / source
- FIO₂ & gas flow set to initial bypass levels
- Arterial line and filter bypass clamped
- Venous line clamped
- ALF purge line OFF
- Arterial cannula position verified

The pre-Bypass checklist was completed at: 11:00

- All equipment clean & decontaminated post procedure

I have reviewed and accept responsibility for the accuracy of this Checklist

[Signature] # 1013

[Signature] # 6126

Date: 12-17-11 Account # 3453



Hospital Address

FA#: 00192262-1322
AD: 12/14/2011
KOSTAHOVSKI, DRAGO
MAY 02 09 57 00 AM '11 M. 701
HARRINGTON, STEVEN D. DT#:

**CARDIOPULMONARY BYPASS RECORD
AUTOLOGOUS BLOOD SALVAGE**

Date: 12-14-11 Page 1 of 4
Hospital: Henry Ford Macomb Hospital ID #: 3453

Baseline Patient Data Patient Name: <u>Kostashovski, Drago</u> Pt. ID: <u>112043627</u> WT (kg): <u>65</u> Estimated Blood Vol (e.g. 70ml x kg): <u>4725</u> ml Hemoglobin: <u>0.2</u> gm/dl Hematocrit: <u>30</u> % Red Cell Vol (Blood Vol X Hct): <u>1418</u> ml		Processing Documentation Onset of Collection Time: <u>9:54 (5K)</u> Onset of Systemic Heparinization: <u>9:54</u> (Anticoagulant drip rate decreased) Onset of Protamine Administration: <u>1:36</u> (Anticoagulant drip resumed) Type of WASH Solution: <u>0.9% NaCl</u> ATS Section of CPB Checklist completed prior to collection? <input type="checkbox"/> Yes <input type="checkbox"/> No Was ATS suction used in place of cardiomy pump suckers? <input type="checkbox"/> Yes <input type="checkbox"/> No Was CPB circuit volume processed by Cell Saver, gold pump? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Anticoagulant Information Type: <u>Heparin</u> Exp Date: <u>12-15-11</u> Lot #: <u>See Pharmacy</u> Dose: <u>36 units</u> Added to: <u>1600</u> ml NS <input checked="" type="checkbox"/> Bag labeled & dated			

Unit ID #	Time	Processed vol	Anticoag vol	Irrig vol	Wash vol	PRBC Return vol	Wash		Exud. Clear Y/N	Clot Free Y/N	Fibr. Char Access	Comments
							Fill	Wash				
1	11:05	1100	100	1000	1000	250	100	500	Y	Y	Y	Line
2	1:36	1200	50	1000	1000	250	100	500	Y	Y	Y	Line
TOTAL		2520	200	1100	2000	500						

007250100
1107010082 2014-06
007402000
1107010082 2014-08

Given to Anesthesia: 500 ml Processed volume returned to patient via ECC: 0 ml ATS EBI: 720 ml
 Primary Perfusionist: Lyell ID #: 1613 Relief Perfusionist: [Signature] ID #: _____ Perfusion Assistant: [Signature] ID #: 6126
 CSS116 (7/08/11)

SpecialtyCare

APPENDIX 2

KOSTADINOVSKI, ET AL. v. HARRINGTON, M.D.,
ET AL.

EDGAR CHEDRAWY, M.D.

January 22, 2016

Prepared for you by

BIENENSTOCK
NATIONWIDE COURT REPORTING & VIDEO

Bingham Farms/Southfield • Grand Rapids
Ann Arbor • Detroit • Flint • Jackson • Lansing • Mt. Clemens • Saginaw

1 STATE OF MICHIGAN
2 IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB
3 DRAGO KOSTADINOVSKI AND)
4 BLAGA KOSTADINOVSKI, AS)
5 HUSBAND AND WIFE,)
6 Plaintiffs,)
7 vs.) No. 14-2247-NH
8 STEVEN D. HARRINGTON,)
9 M.D., AND ADVANCED)
10 CARDIOTHORACIC SURGEONS,)
11 P.L.L.C.,)
12 Defendants.)

13 The discovery deposition of EDGAR
14 CHEDRAWY, M.D., taken in the above-entitled cause,
15 before Kyla Elliott, a Certified Shorthand Reporter
16 of the State of Illinois, on the 22nd day of
17 January, 2016, at 4646 Marine Drive, Suite 7C,
18 Chicago, Illinois, pursuant to Notice at 3:55 p.m.

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Reported by: Kyla Elliott, CSR
License No: 084-004264

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mthomas@rmrmtt.com

Representing the Defendants.

1 A. Sure.

2 Q. Could you tell me, if you would, which
3 actions or omissions, whatever the case may be, you
4 believe rise to the level of a violation of the
5 standard of care by my client, Dr. Harrington.

6 A. Upon reviewing the information I had
7 available for the case and understanding the
8 approach he used for the procedure and the ensuing
9 events with regards to the stroke, the question I
10 really had was with regards to the use of the
11 EndoClamp, whether a proper preoperative assessment
12 was done for the aorta.

13 Upon reviewing the perfusionist's record
14 which became available to me, I guess a month or so
15 ago, there was a question of letting the hemoglobin
16 drop or drop down to a certain level that was not
17 corrected immediately.

18 Q. Well, let's start with the utilization of
19 the EndoClamp and whether the appropriate
20 preoperative assessment of the aorta was done. Is
21 it your opinion that there was a failure by
22 Dr. Harrington within the standard of care to do --
23 strike that. Let me start over.

24 Is it your opinion that Dr. Harrington
25 violated the standard of care in failing to do an

1 appropriate preoperative assessment of the aorta,
2 given that he utilized an EndoClamp in his December
3 2011 surgery?

4 A. Yes.

5 Q. Why don't you tell me what you believe the
6 standard of care required with respect to the use
7 of an EndoClamp.

8 A. The way an EndoClamp is used involves a
9 clamping device within the aorta to cause an
10 occlusion or lack of flow across that area. So to
11 do that safely, we need to assess the aorta to make
12 sure there's no atheroma that may dislodge upon
13 deployment or redeployment of the clamp.

14 Q. And what assessment -- preoperative
15 assessment was required by the standard of care?

16 A. My assessment would include a CT angiogram
17 to formally evaluate the aorta.

18 Q. And with all due respect, Doctor, in
19 Michigan we have a law that what you do is not
20 necessarily what is at issue, it's what the
21 standard of care, meaning what the average,
22 reasonable, prudent, similarly qualified, in this
23 case, cardiothoracic surgeon would have done under
24 the same or similar circumstances. You indicated
25 that you do a CT angiogram to formally evaluate the

1 aorta.

2 Do you believe that the standard of care,
3 meaning the average, reasonable, prudent
4 cardiothoracic surgeon -- not the best, not the
5 worse, somebody who's just reasonable and
6 prudent -- was required or also does CT angiograms
7 to formally evaluate the aorta?

8 A. I guess now I understand your question a
9 little better. I guess to clarify, in 2011, that
10 may not have been considered the standard of care.
11 But, nowadays, I believe it would be the standard
12 of care. Yes.

13 Q. And we all know that medicine is very
14 dynamic and it's fluid, correct?

15 A. Correct.

16 Q. And it changes, it seems almost daily, but
17 certainly by year, correct?

18 A. Yes.

19 Q. And the standard of care has changed,
20 correct?

21 A. I believe so.

22 Q. So -- and just so if I can paraphrase, and
23 you tell me if I'm wrong, it's your opinion that
24 while now you believe that the standard of care
25 formally does require a CT angiogram to evaluate

1 the aorta prior to utilizing an EndoClamp; in 2011,
2 you're not -- you don't believe you can say that
3 the standard of care required Dr. Harrington to do
4 a preoperative CT angiogram; is that fair?

5 A. That is fair.

6 Q. Good news is it cuts a bunch of my
7 questions.

8 I want to talk about the hemoglobin and
9 the hematocrit for a moment.

10 A. Yes.

11 MR. THOMAS: And this doesn't involve you. And
12 Mr. Meyers knows I have to place this on the
13 record. And just to the extent that there is an
14 assertion that there was a violation by
15 Dr. Harrington to transfuse the patient during the
16 surgery at issue, I would just object. And I would
17 move to strike that allegation as it wasn't pled in
18 your notice of intent nor the doctor's affidavit of
19 merit.

20 MR. MEYERS: And I'll make my mini record. And
21 that is, before the deposition of the transfusion,
22 I, in fact, notified counsel of this potential
23 issue so that we would not be accused of hiding the
24 issue or sandbagging, whatever term of art one
25 might want to use. And in advance of this

1 deposition, I put both Mr. Manion and Mr. Thomas on
2 notice of this as a potential issue so that there
3 would be no question with regard to surprise or
4 prejudice.

5 MR. THOMAS: And I do agree that I did receive
6 a call from Mr. Meyers. And he did indicate that
7 this was coming.

8 BY MR. THOMAS:

9 Q. So with that, let's talk about your
10 opinions.

11 When you were -- and I didn't notice,
12 Doctor. In the records that you reviewed -- first
13 of all, there's some highlights on these records.
14 Are these highlights yours --

15 A. Yes.

16 Q. -- or were they sent to you like this?

17 A. No. They're my highlights.

18 Q. I also noticed in some of the depositions
19 there are some dog-eared pages and I think some
20 highlights as well. Are those your dog-ears and/or
21 highlights?

22 A. Yes.

23 Q. Do you recall whether you were provided
24 with a copy of the perfusion record --

25 A. Yes.

1 Q. -- in this case? Okay.

2 MR. THOMAS: I'm going to try to be quick. You
3 may know where it is. I mean, it's --

4 MR. MEYERS: What are you looking for, Matt?

5 MR. THOMAS: Perfusionist's chart.

6 MR. MEYERS: It's in the exhibit --

7 MR. THOMAS: One of these -- and let me
8 clarify -- if you don't mind getting that out,
9 Jeff, just for the doctor. And I understand that
10 the perfusion record was made part of an exhibit.
11 And it may have even been a part of
12 Dr. Harrington's exhibit as well, but certainly
13 Lynn Masinick, when she was deposed.

14 Thank you.

15 BY MR. THOMAS:

16 Q. Had you seen this -- and what I'm
17 referring to is Exhibit 2 to Lynn Masinick's
18 deposition -- the cardiopulmonary bypass record
19 prior to receiving her deposition?

20 A. No. I received it as part of her
21 deposition.

22 Q. Okay. Had you reviewed the blood gases or
23 blood draws that were -- strike that.

24 As part of your initial review, when you
25 executed the affidavit of merit in this case, did

1 you review the blood gases and blood draws that
2 were performed during the surgery?

3 A. I don't believe I had access to them.

4 Q. Okay. Did you see the anesthesiology
5 record in this case?

6 A. I think I saw the anesthesiologist record.

7 Q. Okay. Did you take note on that record
8 that there was some documentation of the levels of
9 hemoglobin, the hematocrit, the pH, the PCO2; those
10 type of things?

11 A. If I remember correctly, it was very hard
12 to decipher.

13 Q. Fair enough.

14 So why don't you tell me, just generally
15 speaking, what your criticism is with respect to
16 the management of the patient while she was on
17 bypass.

18 A. Well, he was on bypass.

19 Q. He. Did I say she? I apologize. He.

20 A. While he was on bypass, and after reading
21 the deposition of the perfusionist, there was some
22 concern raised about the perfusionist, about the
23 blood level, the hemoglobin level. So that drew my
24 attention to looking at the page 1859 of Exhibit 2.

25 Q. And what you're referring to is Exhibit 2

1 I further certify that the taking of this
2 deposition was pursuant to notice and that there
3 were present at the deposition the attorneys
4 hereinbefore mentioned.

5 I further certify that I am not counsel
6 for nor in any way related to the parties to this
7 suit, nor am I in any way interested in the outcome
8 thereof.

9 IN TESTIMONY WHEREOF: I have hereunto set
10 my verified digital signature on this 3rd day of
11 February, 2016.

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NOTARY PUBLIC, COOK COUNTY, ILLINOIS
LIC. NO. 084-004264

APPENDIX 3

KOSTADINOVSKI, ET AL. v. HARRINGTON, M.D.,
ET AL.

LOUIS SAMUELS, M.D.

January 25, 2016

Prepared for you by

 **BIENENSTOCK**
NATIONWIDE COURT REPORTING & VIDEO

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

- - -

DRAGO KOSTADINOVSKI AND)
BLAGA KOSTADINOVSKI, AS)
HUSBAND AND WIFE,)
Plaintiffs,)

- vs -

) NO. 14-2247-NH

STEVEN D. HARRINGTON,)
M.D. AND ADVANCED)
CARDIOTHORACIC)
SURGEONS, P.L.L.C.,)
Defendants.)

- - -

ORAL DEPOSITION OF
LOUIS SAMUELS, M.D.
JANUARY 25, 2016

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I N D E X

WITNESS	PAGE
LOUIS SAMUELS, M.D.	
By Mr. Thomas	4
By Mr. Takala	66

E X H I B I T S

NUMBER	DESCRIPTION	MARKED	PAGE
1	Curriculum Vitae	4	

LOUIS SAMUELS, M.D.
January 25, 2016

Page 3

1 Oral deposition of LOUIS
2 SAMUELS, M.D. Witness, on behalf of the Defendants,
3 pursuant to the Michigan Rules of Civil Procedure,
4 taken at Bryn Mawr Hospital, Galen Rogers Conference
5 Room, 1st Floor, East Wing, 130 South Bryn Mawr
6 Avenue, Bryn Mawr, Pennsylvania, January 25, 2016,
7 commencing at or about eleven o'clock a.m., Eastern
8 Standard Time, before Maureen Walker, Professional
9 Court Reporter - Notary Public.

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- - -

RECEIVED by MSC 3/10/2022 4:19:55 PM

1 APPEARANCES:

2

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BY: TIMOTHY J. TAKALA, ESQUIRE

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RUTLEDGE, MANION, RABAUT, TERRY

13

& THOMAS, P.C.

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BY: MATTHEW THOMAS, ESQUIRE

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Attorneys for Defendants

20

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1 case that they don't do CT angiography before a
2 robotic assisted mitral valve repair.

3 Okay?

4 A. Yes.

5 Q. You understand that?

6 A. Yes.

7 Q. And you accept that as being a part of
8 this world, this cardiothoracic surgery world,
9 that surgeons oftentimes have different
10 practices, correct?

11 A. Correct.

12 Q. And the fact that both surgeons might
13 be reasonable and prudent and both very well
14 qualified, correct?

15 A. Yes.

16 Q. Okay.

17 In this case, Doctor, what --
18 let's put CT angiography out of it for a
19 minute. Other than CT angiography, do you have
20 an opinion that Dr. Harrington violated the
21 standard of care in his preoperative assessment
22 of the aorta?

23 A. No.

24 Q. So, the only test that you suggest
25 that -- and I'm going to use specific terms, so

1 listen to me. The only thing that you suggest
2 that he should have done, and I'm saying you,
3 not the standard of care, is that you think
4 because CT angiography was around and based on
5 what you reviewed, you think it would have been
6 a good tool to utilize in this case, correct?

7 A. Yes.

8 Q. But you are not sitting here telling
9 me that he violated the standard of care with
10 respect to his preoperative assessment of the
11 aorta, correct?

12 A. That is fair.

13 MR. THOMAS: I think that
14 clarifies it.

15 MR. TAKALA: I think so too.

16 MR. THOMAS: Obviously if it
17 doesn't and we have to, we'll come
18 back at a later day.

19 BY MR. THOMAS:

20 Q. I want to move onto your other
21 criticism with respect to the intraoperative
22 management of Mr. Kostadinovski. And after I
23 make a quick statement on the record and
24 certainly Mr. Takala can respond to it if he
25 needs to.

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C E R T I F I C A T I O N

I, MAUREEN WALKER, Professional Court Reporter and Notary Public, do hereby certify that the foregoing is a true and accurate transcript of the stenographic notes taken by me in the aforementioned matter.

DATED: February 5, 2015

MAUREEN WALKER

APPENDIX 4

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

-----x
DRAGO KOSTADINOVSKI AND BLAGA
KOSTADINOVSKI, AS HUSBAND AND
WIFE,

Plaintiffs,

vs.

Case No.
14-2247-NH

STEVEN D. HARRINGTON, M.D. AND
ADVANCED CARDIOTHORACIC
SURGEONS, P.L.L.C.,

Defendants.

-----x

DEPOSITION of THOMAS P. NAIDICH, M.D., taken
by Defendants at the offices of Fink & Carney
Reporting and Video Services, 39 West 37th Street,
Sixth Floor, New York, New York 10018, on Monday,
February 1, 2016, commencing at 4:30 o'clock a.m.,
before Tina DeRosa, a Shorthand (Stenotype) Reporter
and Notary Public within and for the State of New
York.

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A P P E A R A N C E S :

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BY: MATTHEW J. THOMAS, Esq.

1 Naidich, M.D.

2 probability that I know for certain what caused
3 the ACA infarct. It's possible it's
4 hypoperfusion. Excuse me, that came out wrong.
5 It's possible it's hypo-oxygenation.

6 I do say that the ACA infarct we see
7 is elongated by the involvement of the A-P,
8 anterior to posterior cerebral artery watershed.
9 That would have the same cause as the anterior to
10 middle cerebral watershed.

11 So that the extent of the anterior
12 infarct coming further back than typical is the
13 result of the same problem as caused the very
14 large watershed infarct between anterior and
15 middle.

16 Q And I appreciate all that. I just
17 want to make sure I understand. The ACA, the
18 anterior cerebral artery infarct, you don't feel
19 comfortable making a statement more likely than
20 not or beyond or within a reasonable degree of
21 medical certainty whether that was due to an
22 embolic event or it was due to a lack of or
23 inadequate oxygenation?

24 A That's not quite what I said though
25 it's toward the question you asked. I have no

1 Naidich, M.D.

2 specific evidence here for emboli, period. I have
3 no evidence for emboli.

4 Q Sure.

5 A Therefore, what I'm trying to say
6 honestly is I'm not certain what the cause of the
7 anterior cerebral artery infarct is for the front
8 part versus the watershed at the back.

9 I can understand it as a
10 hypo-oxygenation, but I don't wish to state that I
11 know that it's true for the ACA and again I defer
12 to others who may have a better idea than I do.
13 It's there. It's infarcted. But it has a little
14 different character than the watershed and I'm not
15 certain.

16 Q Okay. The right posterior temporal
17 infarct that you described, do you have an opinion
18 within a reasonable degree of medical certainty or
19 more probably than not what caused that infarct?

20 A I think it's watershed between
21 middle and posterior.

22 Q Secondary to what mechanism, if you
23 know?

24 A I would postulate the same
25 hypo-oxygenation.

1 Naidich, M.D.

2 watershed areas, that was the first infarction we
3 discussed. It is your opinion that more likely
4 than not that was due to hypo-oxygenation;
5 correct?

6 A Yes.

7 Q Okay. The right caudate-striatum
8 infarction, it is your opinion that more likely
9 than not that that is related to hypo-oxygenation;
10 correct?

11 A I think so.

12 Q Okay. The infarct in the anterior
13 cerebral artery, while it could have been from
14 hypo-oxygenation, you cannot say more likely than
15 not that it was; correct?

16 A Correct.

17 Q Okay. And similarly the right
18 posterior temporal infarction, while it could have
19 been from hypo-oxygenation, you cannot state more
20 likely than not that it was; correct?

21 A That's right.

22 Q Okay.

23 A And I would like just to add so it's
24 clear, I'm trying to be very careful. I see
25 nothing that is absolutely embolic.

1 Naidich, M.D.

2 Q Right. You don't see any --

3 MR. MEYERS: Let him finish,
4 please.

5 A Everybody is saying that it could be
6 embolic and while that's possible there isn't any
7 evidence on the imaging studies for emboli.

8 Q Would you agree that most strokes
9 related to cardiac surgery are, in fact, embolic?

10 A I'm not prepared to answer that.

11 Q Okay. Do you know what the
12 frequency of stroke is with valve replacement or
13 repair?

14 A No. It obviously varies with the
15 institution, the type of surgery done and the pump
16 team and individual skill.

17 Q Okay. Now, I didn't see included in
18 these medical records, the ones that you pooled,
19 the March MR report or the March MRA of the neck.

20 Did you pull the reports for those?

21 A We have -- we may have to back up to
22 one thing I said.

23 Q Sure.

24 A I'm not sure it was done in the same
25 hospital. It's much later and try as we might we

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C E R T I F I C A T E

STATE OF NEW YORK)

) ss.

COUNTY OF NEW YORK)

I, TINA DeROSA, a Shorthand
(Stenotype) Reporter and Notary Public
of the State of New York, do hereby
certify that the foregoing Deposition,
of the witness, THOMAS P. NAIDICH,
M.D., taken at the time and place
aforesaid, is a true and correct
transcription of my shorthand notes.

I further certify that I am
neither counsel for nor related to any
party to said action, nor in any wise
interested in the result or outcome
thereof.

IN WITNESS WHEREOF, I have
hereunto set my hand this 4th day of
February, 2016.

Tina De Rosa

TINA DeROSA



APPENDIX 5

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

- - -

DRAGO KOSTADINOVSKI,

Plaintiff,

vs.

Case No. 15-2247 NH

STEVEN HARRINGTON, M.D., ET AL,

Defendant.

_____ /

PROCEEDINGS

BEFORE THE HONORABLE KATHRYN VIVIANO, JUDGE

Mount Clemens, Michigan - August 19, 2019

APPEARANCES:

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APPEARANCES, CONTINUED.

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EXHIBITS:

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Mount Clemens, Michigan
August 19, 2019
At about 10:36 a.m.

- - -

(REPORTER'S NOTE: "Inaudible" means a word or words were not heard well enough to be able to discern a proper interpretation either because of shuffling of papers, or the speaker did not talk loud enough, or was not picked up by the microphones.)

(Court and Counsel present.)

THE COURT: Case number 14-2247 NH.
Kostadinovski versus Harrington.

You know what --
Oh, here it is.

MR. COOK: Good morning, Your Honor.
Michael Cook on behalf of Dr. Steven Harrington
and Advanced Cardiothoracic Surgeons.

MR. MEYERS: Jeff Meyers along with
Mark Granzotto for the Plaintiff.

MR. GRANZOTTO: Hi. I am Mark
Granzotto, Judge.

1 MS. EAGAN: Hillary Eagen on behalf of
2 the Defendants.

3 THE COURT: Okay. We are here
4 following a Court of Appeals remand. I do have
5 the briefs and a mental picture in front of me.
6 And I am prepared to listen and I think we start
7 with Plaintiff, I think. No?

8 MR. COOK: It is fine with me, Your
9 Honor.

10 MR. GRANZOTTO: It is our motion, I
11 believe. So I will go first.

12 Mark Granzotto on behalf of the
13 Plaintiff, Judge.

14 THE COURT: And really, just so we are
15 clear. It is not a motion necessarily. What I
16 said was I wanted you both to tell me what --

17 Because we have to set a hearing.

18 Do I have to set a hearing?

19 I have to make a decision. Right? The
20 remand was to make certain decisions.

21 MR. GRANZOTTO: That is correct.

22 THE COURT: Right? And so I wanted
23 both sides to brief out what that means and give
24 me the case law on how you think I should decide.

25 And in this case I think part of the

1 issue was it was never briefed in front of me,
2 the issue concerning the amended NOI. Correct?

3 MR. GRANZOTTO: Correct, Your Honor.

4 THE COURT: That was never argued in
5 front of me. It wasn't in front of me. So the
6 Court said: All right. This side move on the
7 amended NOI and make your arguments. And tell me
8 what the Court of Appeals tells me to do.

9 MR. GRANZOTTO: Yes. The Court of
10 Appeals --

11 THE COURT: And then they tell me
12 what --

13 They say --

14 MR. GRANZOTTO: I am sorry.

15 THE COURT: That is okay.

16 MR. GRANZOTTO: The Court of Appeals
17 remanded the case basically for two reasons. The
18 first is whether the amendment should be allowed
19 on the basis of 600.2301.

20 THE COURT: The amendment to the NOI,
21 correct?

22 MR. GRANZOTTO: Excuse me.

23 THE COURT: To the NOI.

24 MR. GRANZOTTO: The NOI. That is
25 correct.

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THE COURT: Is that correct.

MR. GRANZOTTO: That is correct.

THE COURT: Yeah.

MR. GRANZOTTO: The question --

The issue that you decided the first time through was a question of futility.

The Defendants argue --

THE COURT: The Court --

The Court responded to a motion to amend the complaint and the defense of futility.

MR. GRANZOTTO: That was --

THE COURT: That was argued in front of me. There was no --

MR. GRANZOTTO: That is correct.

THE COURT: There was no motion to amend the NOI, but that is what the Court of Appeals made the decision.

I am here listening. I understand it is on the NOI, whether it --

I mean, that is what we are dealing with today. They sent it back on the amended --

Whether I should have granted a motion to amend the NOI.

MR. GRANZOTTO: Well, I don't quite put it that way.

1 THE COURT: Okay. I will be quiet and
2 you just tell me.

3 MR. GRANZOTTO: Okay. Okay.

4 THE COURT: That is usually better.

5 MR. GRANZOTTO: The amendment --

6 The issue that was in front of you when
7 this was presented several years ago was a
8 question of futility. Can we amend our
9 complaint, or is the amended complaint futile?

10 The Defendants argument at the time was
11 that any amendment was futile precisely because
12 every amended theory that the Plaintiff sought to
13 plead by amendment had to be included in the
14 original NOI. That was the argument that the
15 Defendants made at the time.

16 You decided that it did, in fact, have
17 to be included in the original NOI and on that
18 basis found that the proposed amendment was
19 futile.

20 What the Court of Appeals determined in
21 the case was that it wasn't necessarily futile on
22 the basis of the Michigan Supreme Court's
23 decision in Bush versus Shabahang (inaudible) --

24 THE COURT: Which wasn't cited in front
25 of me or argued in front of me.

1 MR. GRANZOTTO: That is correct. It
2 was not.

3 THE COURT: Which is why we are here,
4 counsel. And I am ready for it. Because now we
5 are ready. I get it. I don't need to know --

6 We are here to talk about what the
7 Court of --

8 The Bush and what I am supposed to do
9 under Bush. Right.

10 MR. GRANZOTTO: Okay. And what I
11 believe you are supposed to do on the basis of
12 the Court of Appeals remand order is to determine
13 whether 2301, the statutory amendment process,
14 does, in fact, allow for the amendment of the
15 NOI. And that provision was in fact interpreted
16 by the Michigan Supreme Court in the context of
17 an NOI in the Bush versus Shabahang case.

18 And what the Bush versus Shabahang case
19 said was that courts are to allow the amendment,
20 if you will, of the NOI where two things are met.
21 One is, one is the question of substantial right
22 of the party being implicated. And the Supreme
23 court ruled in the Bush case that that provision
24 is, in fact, satisfied in any case in which 2301
25 is being implicated on the basis of the fact that

1 NOI are filed at such an early stage in the
2 process, and they are presented this
3 sophisticated use of (inaudible).

4 That is the first question presented on
5 (inaudible).

6 THE COURT: What is the first question?

7 MR. GRANZOTTO: The first question is
8 (inaudible).

9 THE COURT: It sounds like you just
10 said that the first question is answered.

11 MR. GRANZOTTO: The first question has
12 been answered by the Supreme Court in Bush versus
13 Shabahang.

14 THE COURT: So I don't have to make any
15 determination under the first question.

16 MR. GRANZOTTO: Well, if you did make a
17 decision --

18 THE COURT: Why would they tell me that
19 I did.

20 MR. GRANZOTTO: -- that was different,
21 it would be different than the Michigan Supreme
22 Court decided in Bush versus Shabahang.

23 THE COURT: Well, you are saying --
24 Why didn't the Court of Appeals just
25 say that.

1 MR. GRANZOTTO: The Court of Appeals
2 sent it back for the two issues.

3 THE COURT: Right. But are you saying
4 to me the first issue is decided?

5 MR. GRANZOTTO: Well, the first issue.

6 THE COURT: Why wouldn't they just tell
7 me that.

8 MR. GRANZOTTO: Well, they didn't need
9 to, Judge. Only because the Michigan Supreme
10 Court told you in Bush versus Shabahang. What
11 the Supreme Court said is there is a two part
12 test. The first is whether there is a --

13 THE COURT: If the Supreme Court said
14 so why didn't they just tell me.

15 But let's just keep moving on. I
16 suspect that they have a different answer but I
17 don't know. But you are saying --

18 Maybe they do. Do you have a different
19 answer.

20 MR. COOK: I do, Judge.

21 THE COURT: Okay. Let's keep going.
22 Got it.

23 MR. GRANZOTTO: Okay. Well, the second
24 question --

25 THE COURT: I wish they would just tell

1 me. Right? It would have been much easier if
2 they just told me.

3 MR. GRANZOTTO: Okay. And the second
4 question is whether (inaudible).

5 THE COURT: I think it would be easier
6 for you, too. And you. But go ahead.

7 MR. GRANZOTTO: The second part of the
8 2301 test under Bush is whether the interest --

9 There is --

10 It is in the interest of justice to
11 allow the amendment. And that, according to the
12 Supreme Court in Bush versus Shabahang,
13 translates to a question of whether the
14 Plaintiff's original NOI was issued in good
15 faith. It is the good faith test, the second
16 prong of the Bush analysis.

17 That test in the Court of Appeals
18 alluded to this. I think the Court of Appeals
19 was telling you the answer to this particular
20 question.

21 THE COURT: I don't know why they just
22 don't tell me.

23 MR. GRANZOTTO: Okay. But they did in
24 fact indicate (inaudible) --

25 THE COURT: Or tell you. I don't

1 understand.

2 MR. GRANZOTTO: What is different about
3 this case that any other 2301 Bush versus
4 Shabahang case, is every other case that I have
5 been involved with that involves 2301 and the
6 attempt to --

7 THE COURT: Amend the NOI.

8 MR. GRANZOTTO: -- amend an NOI. Has
9 been a situation where the original NOI is
10 defective.

11 THE COURT: Yeah.

12 MR. GRANZOTTO: That is, in fact,
13 (inaudible).

14 THE COURT: That is not this case,
15 right.

16 MR. GRANZOTTO: Well, what is
17 interesting about this case (inaudible) --

18 THE COURT: This is an entirely new
19 claim, right. The point is --

20 MR. GRANZOTTO: That is correct.

21 THE COURT: Is there any case law on
22 this anywhere.

23 MR. GRANZOTTO: Pardon.

24 THE COURT: Is there any Court of
25 Appeals or anything that talked about adding the

1 new claim to the NOI, an entirely new claim.
2 Because that is what this case is, right.

3 MR. GRANZOTTO: That is what this case
4 is.

5 THE COURT: Yeah. Okay. Is there
6 anything?

7 MR. GRANZOTTO: And the Court of
8 Appeals even referenced this in its opinion.

9 THE COURT: Yeah.

10 MR. GRANZOTTO: And they said what is
11 different about this case is that the original
12 NOI was not defective in terms of the claims that
13 were being made in the original complaint.

14 That is the essence of this. So the --

15 THE COURT: So you mean the entirely --

16 Oh, so you are saying that the Court of
17 Appeals said that not including the new claim
18 doesn't mean it is defective.

19 It says it is not defective?

20 MR. GRANZOTTO: Well, they sent it back
21 down for you to decide this. Okay. There is no
22 question.

23 THE COURT: Whether is my --

24 And I am being honest here. I am going
25 to ask you and him. So nobody get defensive. I

1 don't have a position. I think this is an
2 interesting case. I think it is interesting, you
3 know, it is what it is.

4 But you are saying it wasn't defective.
5 The Court of Appeals says that the NOI was not
6 defective.

7 MR. GRANZOTTO: It was not defective.

8 THE COURT: Okay.

9 MR. GRANZOTTO: With respect to the
10 claims contained in the original complaint. In
11 fact --

12 THE COURT: Was that in front of them.

13 MR. GRANZOTTO: Pardon me.

14 THE COURT: Keep going. I just didn't
15 even know they were discussing the NOI as it
16 related to the other claims.

17 MR. GRANZOTTO: Okay. Let me go back a
18 sec.

19 THE COURT: Okay.

20 MR. GRANZOTTO: The test, the second
21 test under Bush versus Shabahang in 2301 is good
22 faith.

23 THE COURT: Yes.

24 MR. GRANZOTTO: And it is good faith
25 directed at the original NOI.

1 THE COURT: Got it.

2 MR. GRANZOTTO: Was the original NOI
3 written in good faith.

4 THE COURT: Right.

5 MR. GRANZOTTO: What is different about
6 this case, from any other case that I have been
7 involved with 2301 and Bush versus Shabahang is
8 not only was the original NOI in good faith, it
9 was completely, completely adequate at the time.
10 Why? Because if you look at the NOI and you look
11 at the complaint, they match perfectly.

12 In other words, there is no defect of
13 the NOI with respect to the original claims made
14 in the complaint.

15 THE COURT: Then how can I conclude
16 whether there should be an amendment or a
17 disregard of the defect is appropriate under
18 2301.

19 MR. GRANZOTTO: What you are here to
20 decide is under 2301 do you allow an amendment of
21 the NOI.

22 THE COURT: If there is no defect or
23 any problem with the NOI --

24 MR. GRANZOTTO: Well --

25 THE COURT: Because it says --

1 It says: Or disregard the defect.

2 MR. GRANZOTTO: Here. Let me go back a
3 second. The Court of Appeals took their argument
4 to be that the NOI as it was originally written
5 was defective.

6 THE COURT: Yes.

7 MR. GRANZOTTO: Why was it defective?
8 It was defective because it did not contain the
9 theories that were discovered during the course
10 of discovery that the Plaintiff wanted to add.

11 THE COURT: Yes.

12 MR. GRANZOTTO: Their position before
13 you, long time ago now, but their position before
14 you was that the NOI was defective because it did
15 not include the theories that the Plaintiff
16 wanted to add by amendment which were
17 discovered --

18 THE COURT: I am just reading.

19 MR. GRANZOTTO: -- during the course of
20 discovery.

21 THE COURT: I am specifically reading
22 the language from the Court of Appeals.

23 MR. GRANZOTTO: Pardon me.

24 THE COURT: I am reading the language
25 from the Court of Appeals.

1 MR. GRANZOTTO: Fine.

2 THE COURT: And it says if the trial
3 court --

4 The trial court is to engage in an
5 analysis under MCL 600.2301 to determine whether
6 amendment of the NOI or disregard of the
7 prospective NOI defect would be appropriate.

8 MR. GRANZOTTO: That is correct.

9 THE COURT: If the trial court
10 concludes that amendment or disregard of the
11 defect would not be proper, the Court's prior
12 futility analysis blah, blah --

13 Okay. Et cetera.

14 MR. GRANZOTTO: That is correct.

15 THE COURT: But you are saying to me
16 now today that the NOI is not defective.

17 MR. GRANZOTTO: No. I am saying that
18 the NOI --

19 Understand, the second prong of the
20 Bush versus Shabahang analysis is based on the
21 question of whether the original NOI was
22 defective and whether it was filed in good faith.
23 The original. That is what Bush --

24 THE COURT: Correct.

25 MR. GRANZOTTO: -- demands. What is

1 different about this case from every other case
2 in which there is a decision based on Bush and
3 2301. I have been involved in a number of them.
4 The fact is what is different (inaudible).

5 THE COURT: I have looked at a number
6 of them.

7 MR. GRANZOTTO: Pardon me.

8 THE COURT: I have looked at a number
9 of them. I concur.

10 MR. GRANZOTTO: Okay. The fact is --

11 THE COURT: -- I don't see this to be a
12 typical (inaudible).

13 MR. GRANZOTTO: The fact is what is
14 different about this case is all of the other
15 Bush cases, including Bush, if you look at it --

16 THE COURT: Sir --

17 MR. GRANZOTTO: -- was a situation in
18 which the --

19 There was something defective about the
20 NOI --

21 THE COURT: Got it.

22 MR. GRANZOTTO: -- at the time it was
23 filed.

24 THE COURT: I understand that.

25 MR. GRANZOTTO: The point is what is

1 different about this case is at the time this NOI
2 was filed it matched completely the theories in
3 the complaint. There was no defect in the
4 affida--

5 In the Notice of Intent.

6 THE COURT: I understand your
7 recitation of it. I understand. Let's move on.

8 MR. GRANZOTTO: Okay. But the point is
9 all you have to determine for purposes of 2301
10 and the question of the amendment to the NOI
11 under Bush, the Bush analysis is whether the
12 original NOI was prepared in good faith.

13 What is important --

14 THE COURT: Why do I have to do that
15 unless there is a defect.

16 MR. GRANZOTTO: You have to do it
17 because that is what the Supreme Court said the
18 test was. That is what Bush versus Shabahang
19 says.

20 THE COURT: But based under your
21 argument there is no defect. Why would I have to
22 make any determination but let's keep going.

23 MR. GRANZOTTO: Based on their argument
24 there is a defect. Here is the defect, according
25 to them.

1 THE COURT: Okay.

2 MR. GRANZOTTO: And they got you to
3 accept this argument.

4 THE COURT: They didn't because it
5 wasn't in front of me.

6 MR. GRANZOTTO: It was --

7 Happened to be incorrect, in my
8 opinion. But this is there, this is their
9 position.

10 Your original NOI let's just say had
11 five theories in it. You go through discovery
12 and find two more theories. You move to amend to
13 add those two new theories. Their position
14 before you (inaudible).

15 THE COURT: Amend the complaint.
16 Right.

17 MR. GRANZOTTO: -- was that you can't
18 add those two theories because they are not in
19 the original NOI.

20 In other words, their position was the
21 original NOI is defective as to the two new
22 theories. That was their position before you.
23 That is their position.

24 The Court of Appeals said, okay. We
25 will accept your suggestion --

1 THE COURT: Under Gully-Reaves. That
2 is what they argued under Gully-Reaves.

3 MR. GRANZOTTO: Will accept the
4 suggestion that it is defective, but if it is
5 defective then we have a Bush versus Shabahang
6 2301 situation.

7 THE COURT: So you are not --
8 So your position is they didn't find it
9 to be defective; they just analyzed Bush.

10 MR. GRANZOTTO: Well, here.

11 THE COURT: How do I get to Bush if
12 there is not a defect in the NOI.

13 MR. GRANZOTTO: I will just tell you
14 that --

15 THE COURT: I am just going to let you
16 talk. Because I think my questions are relevant.
17 I mean, I don't get it. How do you get to Bush
18 unless they make a determination that there is a
19 defective in the NOI.

20 MR. GRANZOTTO: No, no, no. You have to
21 accept --

22 THE COURT: Yeah, because otherwise the
23 answer would be --

24 MR. GRANZOTTO: You have to accept for
25 purposes of this --

1 THE COURT: I am talking about the
2 Court of Appeals. I am not interested --

3 Yes, I am talking about the Court of
4 Appeals. If the Court of Appeals does not make a
5 determination that there is a defect, why is
6 there an analysis under Bush?

7 Isn't just the answer: There is no
8 defect, therefore, it is not --

9 There is no defect in the NOI. It was
10 done in good faith and, therefore, they would
11 reverse me and say it wouldn't be futile because
12 it is not a defect.

13 MR. GRANZOTTO: No. The Court of
14 Appeals was willing to accept. I believe that is
15 the way to interpret what the Court of Appeals
16 said in this case.

17 They are willing to accept the
18 Defendant's position that there is a defect in
19 the original NOI with respect to the amended
20 theories; the two amended theories that the
21 Plaintiff wanted to add to this case. That is
22 what the Court of Appeals said.

23 But if you are going to accept the idea
24 that the original NOI is defect --

25 And I would put "defective" in quotes.

1 If you are going to accept that
2 (inaudible).

3 THE COURT: Did they put it in quotes?

4 MR. GRANZOTTO: Did I? I did.

5 THE COURT: Did they put it in quotes.

6 MR. GRANZOTTO: They didn't even talk
7 about defective. What they said was if you are
8 going to take --

9 If you are going to take the position
10 that the NOI --

11 That the amended theories must be in
12 the NOI. And it is something, by the way, I
13 argue strenuously against in both the Michigan
14 Court of Appeals and the Michigan supreme court.
15 But they took the position if you are going to
16 argue as the defendants have argued in this case
17 that you must have --

18 The original NOI will be deemed
19 defective if the --

20 If it does not include these amended
21 theories. If you were going to take that
22 position then you can cure those defects through
23 the process that the Michigan Supreme Court
24 outlined in Bush versus Shabahang and 2301, which
25 is obviously (inaudible).

1 THE COURT: But if they believed your
2 argument, why didn't they just find it not
3 defective.

4 MR. GRANZOTTO: I --
5 No. The fact is (inaudible).

6 THE COURT: They just didn't accept it;
7 right.

8 MR. GRANZOTTO: This is a very easy
9 (inaudible).

10 THE COURT: You argued that --
11 Did you argue that in the Court of
12 Appeals.

13 MR. GRANZOTTO: Pardon me.

14 THE COURT: Did you argue in front of
15 the Court of Appeals that the NOI wasn't --

16 MR. GRANZOTTO: We argued it together
17 in both the Court of Appeals and the supreme
18 court.

19 THE COURT: But was this argument in
20 front of the Court of Appeals that it was not
21 defective.

22 MR. GRANZOTTO: Let me --

23 Let me say this. This was my third
24 argument in the Michigan Supreme Court. This is
25 the third best argument I have in this case.

1 There is a better argument that they provide
2 (inaudible).

3 THE COURT: Can we move to the --

4 MR. GRANZOTTO: That they provided me.

5 THE COURT: Can we move to the best
6 argument.

13:37:15 7 MR. GRANZOTTO: Yes. You want to know
13:37:16 8 the best argument?

13:37:17 9 THE COURT: Yeah. Let's move to the
13:37:19 10 best argument.

13:37:21 11 MR. GRANZOTTO: The best argument is,
13:37:23 12 and I don't know why no court in this a state has
13:37:27 13 realized it. But the best --

13:37:29 14 THE COURT: Perhaps it is here for us
13:37:34 15 to decide, right?

13:37:36 16 MR. GRANZOTTO: The best argument in
13:37:37 17 this situation --

13:37:38 18 THE COURT: Yes --

13:37:38 19 MR. GRANZOTTO: -- is to read the first
13:37:40 20 sentence. Read the first sentence of 2912(B).

13:37:43 21 The first sentence of 2912(B), which
13:37:46 22 this Notice of Intent statute says specifically
13:37:49 23 twice; not just once, but twice.

13:37:52 24 It says specifically that before
13:37:54 25 commencing a case you must, you must serve an NOI

13:38:17 1 and wait the appropriate time period. That is
13:38:20 2 what the first sentence of 2912(B) says; not once
13:38:24 3 but twice.

13:38:25 4 The point is it's a pre suit notice
13:38:28 5 requirement.

13:38:28 6 THE COURT: I understand your argument.
13:38:30 7 Now you're getting to the argument, which is once
13:38:32 8 you file in good faith, once you file it in good
13:38:35 9 faith, then we're done. And now anything after
13:38:38 10 that as long as I find good faith that you did
13:38:42 11 your best, then we go forward. Is that --

13:38:44 12 MR. GRANZOTTO: Then we have satisfied
13:38:45 13 both prongs of (inaudible).

13:38:50 14 THE COURT: I understand that argument.

13:38:51 15 MR. GRANZOTTO: I'm pleased then. I
13:38:52 16 can stop.

13:38:53 17 THE COURT: Well, that is the argument;
13:38:54 18 isn't it.

13:38:55 19 MR. GRANZOTTO: The argument is based
13:38:57 20 on the remand.

13:38:57 21 THE COURT: Your argument is to me
13:38:59 22 today, I think, that as long as someone made the
13:38:59 23 --

13:39:04 24 Plaintiff made best efforts to file the
13:39:06 25 NOI.

13:39:07 1 MR. GRANZOTTO: The original NOI.

13:39:08 2 THE COURT: That the remedy of the
13:39:12 3 futile after adding is you get to add. You get
13:39:15 4 to add. It's in good faith. That is what your
13:39:19 5 position is.

13:39:19 6 So the fact that claims weren't
13:39:20 7 included --

13:39:22 8 What if the claims could have been
13:39:23 9 included but weren't.

13:39:24 10 MR. GRANZOTTO: They couldn't have
13:39:25 11 been.

13:39:26 12 THE COURT: I don't know. I mean that
13:39:27 13 might --

13:39:28 14 What if they could have.

13:39:29 15 MR. GRANZOTTO: If they could have
13:39:30 16 been.

13:39:30 17 THE COURT: What if they could have.
13:39:32 18 Does that sort of eliminate --

13:39:33 19 MR. GRANZOTTO: Probably would have
13:39:36 20 implicated a different Michigan court of appeals
13:39:42 21 case which nobody has talked about here, and I
13:39:45 22 really don't want to confuse the issue too much
13:39:50 23 more.

13:39:50 24 THE COURT: The standard is as long as
13:39:52 25 you make good faith effort.

13:39:54 1 MR. GRANZOTTO: Understand under Bush
13:39:56 2 it is the original NOI good faith and --
13:40:01 3 THE COURT: Is there more than one.
13:40:03 4 MR. GRANZOTTO: If you look at 750 and
13:40:07 5 751.
13:40:07 6 THE COURT: Is there more than one NOI.
13:40:10 7 MR. GRANZOTTO: Pardon me.
13:40:11 8 THE COURT: If they make a good faith
13:40:12 9 effort.
13:40:13 10 MR. GRANZOTTO: Yes.
13:40:13 11 THE COURT: Your argument is it's
13:40:15 12 pre-suit. As long as they make good faith
13:40:17 13 effort, the analysis is done after that.
13:40:19 14 MR. GRANZOTTO: The analysis under Bush
13:40:21 15 is over.
13:40:21 16 THE COURT: If it, it becomes a
13:40:25 17 straight up futility argument.
13:40:29 18 MR. GRANZOTTO: Yes.
13:40:30 19 THE COURT: It comes up, straight up
13:40:32 20 futile whether there is delay and stuff like
13:40:34 21 that.
13:40:34 22 MR. GRANZOTTO: And the Court of
13:40:35 23 Appeals, by the way, commented on precisely this
13:40:38 24 point. That this is a case that is different
13:40:40 25 from all other precisely because the original NOI

13:40:44 1 was drafted in good faith.

13:40:46 2 THE COURT: I'm interested.

13:40:47 3 MR. GRANZOTTO: And corresponded
13:40:51 4 directly to the theory that were originally --

13:40:55 5 Can I read to you what the Court of
13:40:57 6 Appeals said.

13:41:00 7 THE COURT: Sure.

13:41:00 8 MR. GRANZOTTO: On page 750.

13:41:03 9 THE COURT: I'm interested why they
13:41:06 10 didn't just say that. If they said the analysis
13:41:08 11 in this case, judge, find out if there is good
13:41:11 12 faith. Because if there is, it is just a
13:41:16 13 straight up futility argument. I think that is
13:41:19 14 what --

13:41:20 15 MR. GRANZOTTO: This will shed a little
13:41:23 16 light on what we have been talking about.

13:41:26 17 THE COURT: And I'm not trying to
13:41:27 18 argue. I'm trying to understand your argument.
13:41:30 19 I didn't think this is what we were going to
13:41:32 20 argue. I thought --

13:41:34 21 I thought that the Court of Appeals
13:41:36 22 told this court to make, first, a determination
13:41:39 23 whether an amendment or disregard the defect will
13:41:43 24 be proper under 2301.

13:41:44 25 MR. GRANZOTTO: That is correct.

13:41:45 1 THE COURT: But it seems like your
13:41:47 2 argument is there is no defect.

13:41:49 3 MR. GRANZOTTO: No, no. 2301, 2301 was
13:41:53 4 interpreted by the Michigan supreme court. The
13:41:56 5 only case that the Michigan supreme court has
13:42:00 6 ever applied 2301 to an NOI is Bush versus
13:42:05 7 Shabahang. In Bush versus Shabahang, and the
13:42:08 8 Court said specifically, by the way, something
13:42:10 9 else that is of import to what we are here for.
13:42:13 10 It is not addressed in the defendant's brief, but
13:42:16 11 the fact is the supreme court said explicitly in
13:42:20 12 Bush versus Shabahang that a defective NOI is not
13:42:26 13 a basis for a dismissal with prejudice.

13:42:29 14 So the very worst thing that could
13:42:31 15 happen to the plaintiff in this particular
13:42:33 16 situation is a refusal to allow the amendment
13:42:43 17 presumably (inaudible) .

13:42:43 18 THE COURT: When under your analysis
13:42:45 19 would an amendment be properly denied.

13:42:49 20 MR. GRANZOTTO: Okay. Under my
13:42:50 21 analysis, under not my analysis, the supreme
13:42:54 22 court's analysis in Bush it would be properly
13:42:57 23 denied if, in fact, there was no good faith with
13:43:02 24 the filing of the original NOI.

13:43:04 25 THE COURT: What would constitute no,

13:43:06 1 not good faith.

13:43:07 2 MR. GRANZOTTO: Well, I can't quite
13:43:09 3 tell you. I would assume no good faith is if you
13:43:13 4 file an NOI that doesn't name any of the
13:43:18 5 requirements under 3912(B)(4) for example.

13:43:34 6 MR. MEYERS: I believe that what you
13:43:38 7 get to then is like any other case, whether the
13:43:41 8 amendment is in good faith. Like every case you
13:43:44 9 have had before you this morning.

13:43:46 10 THE COURT: I mean, your argument is A
13:43:47 11 bright line argument. If they make good faith
13:43:50 12 with the NOI it just goes forward.

13:43:52 13 MR. MEYERS: I disagree.

13:43:53 14 THE COURT: That is the argument being
13:43:57 15 made to me today. Like as long as I find good
13:44:00 16 faith on the filing of the NOI.

13:44:02 17 MR. MEYERS: You still have to look, I
13:44:04 18 think, at whether the amendment itself is one
13:44:08 19 that was timely and unduly prejudicial, no.

13:44:11 20 THE COURT: That is different. That is
13:44:12 21 just a motion under to --

13:44:15 22 That is just a motion for leave to
13:44:17 23 amend a complaint.

13:44:18 24 MR. MEYERS: That is where you wind up
13:44:22 25 if in fact it was (inaudible).

13:44:23 1 THE COURT: Wouldn't it be easier if
13:44:27 2 the Court of Appeals just said what you said?
13:44:30 3 Wouldn't it be easier if they just said what you
13:44:33 4 said.

13:44:34 5 MR. GRANZOTTO: I have to tell you.

13:44:36 6 THE COURT: Maybe that is not what they
13:44:38 7 mean.

13:44:38 8 MR. GRANZOTTO: The Court of Appeals
13:44:40 9 came very very close to telling you what to do
13:44:43 10 with the good faith because I'll read you the
13:44:46 11 sentence.

13:44:47 12 THE COURT: I love it when they come
13:44:50 13 close. They don't just tell me.

13:44:52 14 MR. GRANZOTTO: All right.

13:44:53 15 THE COURT: That is why I'm here.
13:44:55 16 Anything else? Keep on going.

13:44:56 17 MR. GRANZOTTO: Here is what the Court
13:44:59 18 of Appeals said with respect to the good faith
13:45:01 19 that you have to decide. It's on page 750 and
13:45:06 20 751 of the opinion.

13:45:07 21 There is no sound or valid reason that
13:45:10 22 the principles from Bush should not be applied
13:45:12 23 here.

13:45:13 24 Indeed, as a general observation the
13:45:16 25 factual circumstances are even more compelling

13:45:18 1 for the invocation of 2301 when an NOI is not
13:45:23 2 defective from the outset, but becomes defective
13:45:27 3 because discovery has shed new light on the case
13:45:32 4 and given rise to a new liability theory.

13:45:35 5 That is directly from the Court of
13:45:37 6 Appeals opinion.

13:45:37 7 THE COURT: So if the Court finds and
13:45:41 8 the argument is that it didn't, discovery didn't
13:45:45 9 give rise that was --

13:45:46 10 Information was available, didn't end
13:45:48 11 up in the NOI. Would that be an issue.

13:45:50 12 MR. GRANZOTTO: Well, that might be an
13:45:52 13 issue. That is a different case. That is not
13:45:54 14 this case.

13:45:55 15 THE COURT: I don't know how --
13:45:57 16 Would that be the case that you say
13:46:01 17 it's not good faith.

13:46:02 18 MR. GRANZOTTO: That might be a
13:46:03 19 situation where you have a closer question with
13:46:06 20 respect to the issue of good faith. But that is
13:46:10 21 not this case. What is, what is this case about.

13:46:14 22 THE COURT: The one (inaudible).

13:46:20 23 MR. GRANZOTTO: Something that was
13:46:22 24 discovered.

13:46:23 25 THE COURT: One does (inaudible) has to

13:46:28 1 be defective in order for me to analyze it, but
13:46:31 2 let's --

13:46:31 3 Okay. Anything else.

13:46:33 4 MR. GRANZOTTO: Well, yes.

13:46:33 5 THE COURT: You do have extensive
13:46:35 6 briefs in front of me and I want to hear
13:46:38 7 (inaudible).

13:46:38 8 MR. GRANZOTTO: The second issue that
13:46:39 9 the Court has remanded for is on the amendment
13:46:41 10 itself because the thing --

13:46:44 11 Two things you did not address in
13:46:46 12 your --

13:46:46 13 THE COURT: I didn't address it at all.
13:46:47 14 The only thing I did is rule on the Gully-Reaves.

13:46:53 15 MR. GRANZOTTO: You did address one
13:46:55 16 thing. You did address the question of whether
13:46:58 17 there was relation back, and that has been
13:47:05 18 decided years ago. And you said that under 2.118
13:47:08 19 there was, in fact, relation back.

13:47:10 20 THE COURT: Yeah, okay.

13:47:12 21 MR. GRANZOTTO: Now the only other
13:47:13 22 question --

13:47:13 23 THE COURT: Did you challenge that.

13:47:16 24 MR. GRANZOTTO: With respect --

13:47:19 25 THE COURT: They didn't challenge that.

13:47:21 1 That didn't go up on appeal.

13:47:23 2 MR. GRANZOTTO: Yeah. The fact is the
13:47:24 3 only other question is whether there has been
13:47:27 4 substantial prejudice or (inaudible).

13:47:29 5 THE COURT: I don't think I did an
13:47:30 6 analysis under any of them except Gully-Reaves.
13:47:35 7 That was basically --

13:47:36 8 Like under Gully it wasn't --

13:47:38 9 So I didn't --

13:47:40 10 Which is why we are here. I didn't do
13:47:42 11 the rest of the analysis. So they found if I
13:47:46 12 find it's appropriate, to either disregard the
13:47:50 13 defect or allow the amendment, then this court
13:47:52 14 has to do an analysis to determine under the
13:47:55 15 futility because they argued futility.

13:47:57 16 MR. GRANZOTTO: That is right.

13:47:58 17 THE COURT: Which is other reasons,
13:47:59 18 delay.

13:48:02 19 MR. GRANZOTTO: And I'll say very
13:48:04 20 simply on the question of prejudice. The whole
13:48:07 21 landscape has changed. The whole landscape has
13:48:10 22 changed because when you had this case before you
13:48:12 23 years ago. Now, there was an upcoming trial
13:48:16 24 date. That was their only claim of potential
13:48:19 25 prejudice.

13:48:21 1 There is no upcoming trial date. There
13:48:24 2 is no prejudice and under the supreme court
13:48:33 3 Waymer (phonetic) decision and the Santa Pliance
13:48:37 4 (phonetic) decision/ the only way that you can
13:48:57 5 claim undue prejudice, it has to be related to
13:49:02 6 some effect on the ability to defend at trial
13:49:05 7 that has gone by the board as a result of the
13:49:09 8 fact we no longer have a (inaudible).

13:49:28 9 THE COURT: Okay. What is your
13:49:30 10 response.

13:49:31 11 MR. COOK: Good morning, Your Honor.

13:49:34 12 THE COURT: What do you say my analysis
13:49:38 13 is.

13:49:38 14 MR. COOK: We're here on remand and I
13:49:41 15 know it might not feel like it, but the Court of
13:49:43 16 Appeals actually said you were right in several
13:49:45 17 respects.

13:49:46 18 THE COURT: That is nice to be right
13:49:48 19 sometimes.

13:49:48 20 MR. COOK: They remanded for an issue
13:49:50 21 that wasn't raised before you, and a lot of the
13:49:52 22 discussion has centered on the original Notice of
13:49:55 23 Intent. So I would ask you to look at foot
13:49:58 24 notes. It's on page 9, foot note 6 of the Court
13:50:02 25 of Appeals opinion. And that Your Honor, is

13:50:04 1 where the Court of Appeals --

13:50:05 2 THE COURT: Foot note 6 page 9.

13:50:07 3 MR. COOK: I believe it is foot note 6.

13:50:10 4 Let me --

13:50:12 5 Page 9, foot note 6 the Court of
13:50:14 6 Appeals opinion. And that is where the Court of
13:50:16 7 Appeals rejected Mr. Granzotto's argument.

13:50:22 8 He is in the Court of Appeals arguing I
13:50:24 9 don't need to do anything else with my Notice of
13:50:26 10 Intent because I sent this compliant originally
13:50:30 11 with the Notice of Intent. So any discussion of
13:50:32 12 amending the NOI or sending a new NOI is mute. I
13:50:38 13 sent a Notice of Intent and I'm good.

13:50:41 14 The Court of Appeals rejected that
13:50:43 15 argument and that is in that foot note. So his
13:50:46 16 argument that he has shown good faith by sending
13:50:49 17 a compliant NOI is another iteration of the same
13:50:55 18 argument the Court of Appeals rejected.

13:50:57 19 And that is why you will see in the
13:50:59 20 briefing, too. I did an application for leave to
13:51:01 21 the Court of Appeals' ruling because it's against
13:51:04 22 my interest and Mr. Granzotto did a cross
13:51:08 23 application. And what he was disputing is this
13:51:12 24 foot note here where the Court of Appeals
13:51:13 25 rejected his argument that his original NOI was

13:51:16 1 sufficient and you don't need to worry or address
13:51:19 2 any other amendment or dealing with the --

13:51:22 3 Excuse me. Amending or any defects in
13:51:24 4 that NOI. He complied with it. So he can go on.

13:51:29 5 So when he starts arguing good faith,
13:51:31 6 his argument is pretty simple. It is: I sent a
13:51:34 7 good faith NOI so I have shown good faith.

13:51:40 8 My argument in response to that is you
13:51:42 9 have not shown good faith and he stated it
13:51:45 10 correctly as to this new claim that you want to
13:51:47 11 bring. The statute allows you to send a new NOI.

13:51:52 12 Good faith, Your Honor, would have been
13:51:54 13 trying to send a new NOI. Good faith would have
13:51:58 14 been when they first learned of this new theory
13:52:01 15 to file a motion to amend the NOI. They did
13:52:07 16 neither of those. So they have not shown --

13:52:09 17 THE COURT: I understand. Even your
13:52:10 18 argument, if you can make that argument in front
13:52:12 19 of the Court of Appeals and you made it, why
13:52:14 20 didn't they say if they agreed with you.

13:52:17 21 MR. COOK: And that is --

13:52:18 22 THE COURT: It would be --

13:52:19 23 MR. COOK: That is at the end of the
13:52:20 24 Court of Appeals opinion when they expressly say
13:52:23 25 we're not going to make a judgment on in the

13:52:26 1 furtherance of justice or on the application of
13:52:29 2 2301 or good faith. We're going to let the trial
13:52:32 3 court do (inaudible) because they understood.

13:52:36 4 The one thing they did understand was
13:52:38 5 that 2301 was not raised before Your Honor. And
13:52:41 6 as an appellate court they need to exercise some
13:52:45 7 restraint.

13:52:47 8 THE COURT: They actually made a
13:52:48 9 record.

13:52:49 10 MR. COOK: Judge Viviano needs to make
13:52:51 11 a ruling on this.

13:52:52 12 THE COURT: Yes. They need a record.
13:52:54 13 So what do you say is good faith.

13:52:55 14 MR. COOK: I believe --

13:52:56 15 THE COURT: While I appreciate you both
13:52:58 16 arguing what you argued in front of the Court of
13:53:00 17 Appeals, like, again, if the Court of Appeals
13:53:02 18 accepted your argument wouldn't they have just
13:53:06 19 said good faith is filing the NOI which they
13:53:09 20 didn't.

13:53:09 21 MR. COOK: No, because they want you to
13:53:10 22 decide what is good faith in terms of this new
13:53:13 23 claim.

13:53:13 24 THE COURT: What is it? What do you
13:53:15 25 say?

13:53:16 1 MR. COOK: My. My argument is good
13:53:18 2 faith and this is the second prong of the Bush
13:53:20 3 analysis.

13:53:21 4 THE COURT: Doesn't Bush talk about the
13:53:23 5 filing --

13:53:26 6 I don't disagree necessarily with
13:53:27 7 counsel that Bush does the good faith analysis on
13:53:30 8 the filing of the original NOI.

13:53:33 9 MR. COOK: Because that is all that
13:53:34 10 Bush was addressing.

13:53:35 11 THE COURT: I appreciate that.

13:53:37 12 MR. COOK: So let me just take a step
13:53:39 13 back.

13:53:39 14 THE COURT: It's the only guidance we
13:53:41 15 have, isn't it.

13:53:44 16 MR. COOK: Bush set out a two part
13:53:47 17 test. They have to meet both parts. They have
13:53:51 18 to show it is --

13:53:53 19 Sorry. It wouldn't affect a
13:53:58 20 substantial right and it would be in the
13:54:00 21 furtherance of interest of justice. Prong one.

13:54:05 22 Mr. Granzotto's argument is in any
13:54:08 23 medical malpractice you can never affect the
13:54:14 24 substantial rights of the Defendant because they
13:54:16 25 can always understand what they are being sued

13:54:33 1 about. And that was in Bush.

13:54:37 2 If you look at the NOI in Bush they at
13:54:40 3 least alluded to the claims. My response to
13:54:42 4 that, that is not true.

13:54:43 5 THE COURT: Every case I have seen is
13:54:45 6 not about --

13:54:45 7 And I think the one area in which you
13:54:47 8 agree, that is true, the case is discussing this
13:54:50 9 particular NOI. It is at least named in the NOI.
13:54:54 10 It is more about other types of defects, not
13:54:58 11 this.

13:54:59 12 MR. COOK: So my point in this
13:55:01 13 circumstance where there is no dispute, there is
13:55:04 14 no way to draw this new hypotension claim from
13:55:07 15 the original NOI. They can't show that it
13:55:09 16 wouldn't affect the substantial rights --

13:55:12 17 THE COURT: But that isn't the analysis
13:55:16 18 that I have, the Court has to make. As I read
13:55:20 19 them, it is whether or not the amendment to the
13:55:23 20 NOI, which would be adding these two claims, or
13:55:28 21 disregard the effect would not be proper under
13:55:31 22 600.2301. They are not arguing that side. I
13:55:34 23 thought that is what I was here for.

13:55:35 24 MR. COOK: The query under 600.2301 is
13:55:42 25 step one: Does it affect a substantial right.

13:55:48 1 If your answer is no, then you go on to
13:55:50 2 step two. If your answer is yes, then they can't
13:55:53 3 amend.

13:55:55 4 So that is, it's a two part. They have
13:55:57 5 to meet both.

13:55:58 6 THE COURT: You mean on the good faith
13:56:00 7 now.

13:56:00 8 MR. COOK: Good faith is step two.
13:56:02 9 Step one: Does it affect the substantial right.
13:56:05 10 Step two is did they show good faith.

13:56:08 11 THE COURT: Okay. What are you citing.

13:56:10 12 MR. COOK: If they don't show --

13:56:20 13 THE COURT: What are you citing.

13:56:23 14 MR. COOK: THE COURT: This is Bush.

13:56:24 15 This is Bush sets up the --

13:56:28 16 Let's see. I have it in my brief, Your
13:56:30 17 Honor.

13:56:30 18 THE COURT: I have it would not be, and
13:56:32 19 this is under Bush. And it --

13:56:37 20 MR. COOK: The Court explained that.

13:56:39 21 Quote, this is from Bush. Page 177. The
13:56:43 22 applicability of Section 2301 rests on a
13:56:46 23 two-prong test.

13:56:47 24 First, whether a substantial right of a
13:56:51 25 party is implicated. And second, whether a cure

13:56:57 1 is in the furtherance of justice. They need to
13:57:00 2 show both. If they don't show both, then they
13:57:02 3 don't get to amend and the case, the Court of
13:57:04 4 Appeals is over.

13:57:06 5 So my argument on the first: Whether
13:57:09 6 it affects a substantial right of a party. In
13:57:11 7 Bush they --

13:57:12 8 THE COURT: How does it no not affect
13:57:14 9 the substantial right of a party.

13:57:15 10 MR. COOK: It does. We're entitled to
13:57:17 11 pre-suit filing of the complaint notice.

13:57:20 12 THE COURT: I mean, your side. I
13:57:21 13 thought it would be their side.

13:57:23 14 MR. COOK: Would affect us. Your
13:57:25 15 Honor. In Bush, if you continue down to --

13:57:32 16 This is on page ten of my brief. If
13:57:35 17 you continue --

13:57:36 18 THE COURT: Hold on. Stop talking.
13:57:37 19 You might have a disagreement, but it is
13:57:39 20 disrespectful.

13:57:41 21 MR. MEYERS: I apologize Judge.

13:57:43 22 MR. COOK: If you continue down, Bush
13:57:45 23 explained in that case you wouldn't affect the
13:57:47 24 substantial rights of the Defendant to allow an
13:57:49 25 amendment because there is enough in the NOI for

13:57:52 1 those defendants to understand the theory the
13:57:55 2 Plaintiff was bringing forth.
13:57:56 3 That is not true here. There is
13:57:58 4 nothing in --
13:57:59 5 THE COURT: It does say substantial
13:58:01 6 right of the parties. Don't I have to analyze
13:58:03 7 both?
13:58:03 8 MR. COOK: Well, I think if it affects
13:58:05 9 ours, then they can't meet the test.
13:58:07 10 THE COURT: Okay. And yours would be
13:58:08 11 what.
13:58:09 12 MR. COOK: Our substantial right to
13:58:10 13 receive the notice through NOI and have that
13:58:14 14 pre-filing notice, inability to work up the case
13:58:17 15 under the NOI notice period.
13:58:20 16 THE COURT: How do you address their
13:58:21 17 substantial right. It is not discoverable unless
13:58:24 18 you are in a case and you discover this thing and
13:58:27 19 it is absolutely not discoverable. How does it
13:58:29 20 not affect their substantial rights and in the
13:58:32 21 balance how, how does theirs not trump yours.
13:58:35 22 MR. COOK: If it would affect ours then
13:58:37 23 amendment is allowed. I understand if you want
13:58:39 24 to continue down the road and decide whether or
13:58:44 25 not it affects theirs. In my response to Your

13:58:48 1 Honor on that and this kind of bleeds into --

13:58:51 2 THE COURT: I don't understand what you
13:58:52 3 are saying. Let's me make sure.

13:58:54 4 You are saying I only have to analyze
13:58:59 5 your substantial, not both parties' substantial
13:59:01 6 rights.

13:59:01 7 MR. COOK: Yeah, if it harms our
13:59:03 8 substantial rights, then you cannot allow the
13:59:05 9 amendment.

13:59:06 10 There are two supreme court cases that
13:59:08 11 deal with this. It is Driver and (inaudible).

13:59:13 12 THE COURT: What if it affects your
13:59:14 13 both substantial rights, then what do I do.

13:59:17 14 MR. COOK: Then you can't do it to
13:59:19 15 prejudice ours. Your Honor --

13:59:20 16 THE COURT: Why.

13:59:20 17 MR. COOK: Because they are the one
13:59:22 18 seeking the amendment.

13:59:22 19 THE COURT: What do you mean.

13:59:23 20 MR. COOK: They are the ones that need
13:59:25 21 to seek the relief.

13:59:27 22 THE COURT: Well, under your theory
13:59:28 23 then there could be no amendment ever.

13:59:31 24 MR. COOK: That is not true, Your
13:59:35 25 Honor.

13:59:35 1 THE COURT: Stop agreeing with me and
13:59:37 2 nodding your heads. I haven't decided. Stop
13:59:39 3 doing that.

13:59:39 4 Based on your theory then, it could
13:59:41 5 never been amended, of course, as it relates to a
13:59:45 6 new claim right.

13:59:45 7 MR. COOK: As it relates to a new
13:59:49 8 claim, yes, Your Honor, I would.

13:59:51 9 THE COURT: The Court of Appeals could
13:59:53 10 have said that, too, right?

13:59:55 11 MR. COOK: They could have, but they
13:59:57 12 remanded to Your Honor.

13:59:57 13 THE COURT: They didn't say that,
13:59:59 14 right?

13:59:59 15 MR. COOK: For you to make that
14:00:00 16 decision.

14:00:01 17 THE COURT: You made that argument in
14:00:05 18 front of them, right.

14:00:05 19 MR. COOK: I did not --

14:00:06 20 Well, things have gone on so long in
14:00:10 21 the case, Your Honor. The original briefing on
14:00:13 22 2301 was very curtailed. It was first brought up
14:00:18 23 in my first response and that was a waiver.

14:00:22 24 THE COURT: What.

14:00:26 25 MR. COOK: Waiver. And then they --

14:00:28 1 And the response to my waiver argument,
14:00:30 2 I believe, was fine. We'll send it back down for
14:00:33 3 the trial court to make the ruling on it. Then
14:00:36 4 you don't have a waiver argument.

14:00:40 5 THE COURT: Okay. Go ahead. I think
14:00:42 6 it's interesting you guys are arguing what you
14:00:44 7 argued in front of the Court of Appeals. They
14:00:46 8 didn't necessarily agree with either one of you
14:00:48 9 or maybe they did.

14:00:49 10 MR. COOK: And they are leaving Your
14:00:50 11 Honor to decide the case. So if you want to look
14:00:52 12 at the Plaintiff's substantial rights then I
14:00:55 13 think, Your Honor --

14:00:55 14 THE COURT: Well, this is even --

14:00:57 15 If I'm reading Bush, it says:

14:00:59 16 We hold the alleged defects can be
14:01:03 17 cured pursuant to 2301 because the substantial
14:01:06 18 rights of the parties are not affected, and
14:01:11 19 disregard amendment of the defect is in
14:01:14 20 furtherance of justice.

14:01:16 21 Your argument is by allowing this,
14:01:19 22 allowing an entirely new claims, which was never
14:01:21 23 done before, it is --

14:01:22 24 Essentially eliminates the exact reason
14:01:26 25 why I have and we have the NOI, and that is so

14:01:29 1 the Defendant has notice. But what if there is
14:01:32 2 no possible way to discover the claim.

14:01:36 3 MR. COOK: If there is no possible way
14:01:38 4 for them to discover the claim.

14:01:41 5 THE COURT: But through discovery
14:01:43 6 process, which is what their argument is. Their
14:01:47 7 argument is: Hey, we could never have know this.

14:01:50 8 MR. COOK: And this goes into the --

14:01:51 9 THE COURT: We would never have known
14:01:53 10 this.

14:01:54 11 MR. COOK: Yeah, the undue delay, bad
14:01:57 12 faith argument, Your Honor. And in this case
14:01:58 13 they had the relevant record at the start of the
14:02:02 14 case but they just didn't send it to their
14:02:05 15 expert. When they said that they discovered the
14:02:08 16 case in July 2015 they didn't take any steps then
14:02:11 17 to seek amendment or send a new NOI outlining the
14:02:15 18 claim. They didn't depose the perfusionist for
14:02:20 19 another five months.

14:02:23 20 Once they deposed the perfusionist they
14:02:25 21 waited three months and us filing summary
14:02:27 22 disposition motion before they sought leave to
14:02:29 23 amend.

14:02:30 24 So, Your Honor, when it comes to their
14:02:31 25 substantial rights I don't think it really

14:02:33 1 affects them because they sat on them for so
14:02:36 2 long.

14:02:36 3 THE COURT: Well, okay. What is your
14:02:38 4 argument with respect to that. Hold on.

14:02:41 5 MR. GRANZOTTO: I'll address the second
14:02:43 6 part.

14:02:43 7 THE COURT: I'll come back to you. My
14:02:45 8 brain, and I'm giving you guys a lot of latitude
14:02:48 9 because this is an important issue and
14:02:50 10 complicated.

14:02:52 11 And so how do you answer the issue that
14:02:55 12 he just addressed, which is --

14:02:57 13 MR. GRANZOTTO: May I? I'll give you
14:02:59 14 the overview.

14:03:00 15 THE COURT: Because your argument
14:03:02 16 doesn't, your argument essentially eliminates the
14:03:04 17 NOI requirement.

14:03:06 18 MR. GRANZOTTO: No, it does not
14:03:08 19 eliminate the NOI requirement because --

14:03:12 20 THE COURT: I mean, let's say if --
14:03:13 21 Wait. Wait. Let me finish my
14:03:15 22 scenario.

14:03:15 23 If what is being stated to me is
14:03:17 24 correct and the information is available to the
14:03:19 25 plaintiff, but it doesn't end up in the NOI.

14:03:22 1 Okay. So it is available pre, and it doesn't --

14:03:26 2 MR. GRANZOTTO: That is not this case.
14:03:27 3 Understand that is not this case.

14:03:28 4 THE COURT: Okay. It is not. I'm not
14:03:30 5 saying it is or it isn't. What if it was? How
14:03:33 6 does that affect your analysis?

14:03:36 7 MR. GRANZOTTO: It might affect my
14:03:38 8 analysis because then you --

14:03:41 9 You might come to the conclusion under
14:03:43 10 the Bush test, the second prong of the Bush test
14:03:47 11 that, in fact, it was not a good faith NOI at the
14:03:50 12 beginning.

14:03:50 13 THE COURT: Yeah, correct, that
14:03:54 14 potentially would be a basis for not good faith.

14:03:59 15 MR. GRANZOTTO: That would be a basis
14:04:00 16 perhaps, but that is not this case. Let me --

14:04:03 17 THE COURT: I'm not done with him and I
14:04:05 18 gave you a lot of time and I have people waiting.

14:04:08 19 Go ahead and finish.

14:04:10 20 MR. COOK: One of my responses to the
14:04:12 21 substantial rights issue, Your Honor, is had,
14:04:16 22 when they discovered this claim in July of 2015,
14:04:19 23 they sent a new NOI we would not be here.

14:04:23 24 MR. GRANZOTTO: If they let us file it
14:04:27 25 today.

14:04:28 1 MR. COOK: That is what I'm saying.

14:04:29 2 MR. GRANZOTTO: We can do it today.

14:04:31 3 THE COURT: I don't hear you when you
14:04:32 4 are interrupting him. I don't hear you.

14:04:36 5 MR. COOK: That is what I would say
14:04:38 6 would demonstrate good faith. Had they taken
14:04:40 7 that step and sent a new NOI that would have
14:04:45 8 demonstrated good faith on their part.

14:04:47 9 My point, he is going to say I can send
14:04:50 10 a new NOI today. The reason that isn't true in
14:04:53 11 this case, Your Honor, is because it is very
14:04:56 12 expressed in the Court of Appeals opinion at the
14:04:58 13 end of it. It says:

14:04:59 14 If you don't get relief under 2301,
14:05:02 15 then the case is over. This court's futile
14:05:05 16 analysis stands and the case is over.

14:05:07 17 So no, they cannot send a new NOI
14:05:10 18 today. They cannot send an NOI tomorrow. They
14:05:14 19 cannot file this new claim outside of the case
14:05:17 20 because at the Court of Appeals very succinctly
14:05:20 21 stated if the trial court concludes that
14:05:22 22 amendment, or disregard of the defect would not
14:05:26 23 be proper, under MCL 600.2301 the Court prior
14:05:31 24 futility analysis relative to plaintiff's motion
14:05:33 25 to amend the complaint shall stand. The motion

14:05:36 1 to amend the complaint shall be denied ending the
14:05:39 2 case. So that is why I started out by saying --

14:05:42 3 THE COURT: That doesn't affect what my
14:05:44 4 analysis was, what I thought is, and whether or
14:05:48 5 not they can file the amended NOI with the
14:05:52 6 additional claim.

14:05:53 7 MR. COOK: What I'm explaining --

14:05:54 8 THE COURT: Is it one claim or two
14:05:56 9 claims.

14:05:58 10 MR. COOK: Good faith. They had a way
14:06:01 11 to show good faith. If this is something that
14:06:04 12 springs up in the middle of the case.

14:06:06 13 THE COURT: Now you are saying the Bush
14:06:15 14 analysis. Good faith is good faith. What they
14:06:20 15 do subsequent, not in the filing of the original
14:06:20 16 --

14:06:23 17 You are saying if I read Bush I'm going
14:06:26 18 to read Bush to say. Okay. That I can do good
14:06:30 19 faith along the entire way. No. That maybe it --

14:06:36 20 Doesn't Bush deal with the original
14:06:37 21 NOI.

14:06:38 22 MR. COOK: It is good faith with
14:06:39 23 respect to the claims that they are trying to
14:06:42 24 assert.

14:06:43 25 THE COURT: I'll read Bush.

14:06:44

1

MR. COOK: In Bush --

14:06:45

2

Keep in mind in Bush there was

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3

something in that NOI that addressed the claims

14:06:51

4

they are trying to assert.

14:06:53

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THE COURT: So counsel.

14:06:53

6

MR. COOK: Here there is nothing in the

14:06:55

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original NOI. They had to do something else as

14:06:59

8

to NOI as to these new hypotension claims. That

14:07:02

9

is my point as to good faith.

14:07:04

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THE COURT: Yeah, I understand.

14:07:05

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MR. COOK: And there is the --

14:07:08

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So that is Bush. The two prong test.

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They have to show substantial rights of the

14:07:13

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parties and good faith.

14:07:15

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If Your Honor decides that they can't

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amend under the statute as the Court of Appeals,

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the case is over. They have raised an argument

14:07:22

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that addressed dismissing without prejudice or

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19

with prejudice.

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That is wrong headed in my opinion,

14:07:31

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Your Honor. There is a stipulated dismissal with

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prejudice of the pleaded claims. We're not here

14:07:37

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on summary disposition. We're here on a motion

14:07:39

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for leave to amend or not really a motion, but

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25

we're here --

14:07:42 1 THE COURT: I'm on remand from the
14:07:44 2 Court of Appeals.

14:07:47 3 MR. COOK: On whether or not they can
14:07:48 4 amend the complaint. That is not a with or
14:07:51 5 without. That is an: I'm denying your relief
14:07:54 6 under 2301. That is not a with or without
14:07:58 7 prejudice. This case is over with prejudice
14:08:00 8 under the prior ruling that dismissed the only
14:08:06 9 pled claims with prejudice.

14:08:08 10 So, you know, they are going to argue
14:08:11 11 this with or without prejudice issue. It is with
14:08:14 12 prejudice because it is already with prejudice,
14:08:20 13 and you are just addressing an amendment.

14:08:23 14 THE COURT: In fairness the only thing
14:08:25 15 that is dismissed with prejudice is the other
14:08:29 16 claims.

14:08:30 17 MR. COOK: Right. And the way this
14:08:31 18 would --

14:08:31 19 THE COURT: Anyway it's not in front of
14:08:33 20 me. I'm just going to be very clear to you guys.
14:08:36 21 I'm looking at the Court of Appeals opinion. Any
14:08:38 22 issue, unless there is a motion in front of me,
14:08:42 23 independent of this concerning what is prejudice
14:08:44 24 or not prejudice. The Court is focusing on the
14:08:44 25 --

14:08:50 1 Are you both satisfied now? One issue
14:08:53 2 that has come up is whether or not the Plaintiff
14:08:56 3 had knowledge of these claims back in 2015 as
14:09:00 4 argued. Is that an issue that I need in the
14:09:04 5 record.

14:09:06 6 MR. GRANZOTTO: No. Because there is
14:09:08 7 no record of that because it's not true.

14:09:11 8 THE COURT: So what record are you
14:09:12 9 putting in front of me? Is that something they
14:09:15 10 need to vet out.

14:09:16 11 MR. COOK: There is record of that,
14:09:17 12 Your Honor.

14:09:18 13 THE COURT: What would be the record?
14:09:19 14 Have you cited it?

14:09:20 15 MR. COOK: They have the medical
14:09:23 16 record. There has never been a dispute that they
14:09:25 17 did not receive the medical record at the earlier
14:09:28 18 point in the case. MR. MEYERS. During the last
14:09:30 19 time this issue was argued in front of this
14:09:33 20 court. Said in July 2015. We cited the
14:09:37 21 transcript of him saying that. It's in the
14:09:41 22 record. In July 2015 I told defense counsel
14:09:44 23 about this hypotension issue. So that is in the
14:09:47 24 record as of that date. They knew about it. And
14:09:50 25 they also said what it is based on. It's based

14:09:53 1 on this perfusionist record.

14:09:56 2 THE COURT: That is in your briefing.

14:09:58 3 MR. COOK: That is in the briefing.

14:09:59 4 The perfusionist record is attached. They said
14:10:05 5 they couldn't raise it because that record is
14:10:09 6 illegible.

14:10:11 7 We have attached that record. You can
14:10:13 8 look at two things, Your Honor. You can look at
14:10:15 9 the record to show it is legible as to when it
14:10:18 10 shows the hypertensive status started.

14:10:23 11 You can also look at the deposition of
14:10:25 12 the Defendant where they are going over the time
14:10:29 13 and the numbers in that document.

14:10:31 14 It wasn't because of illegibility, Your
14:10:34 15 Honor. They had the record. They can see the
14:10:35 16 drop that just for some unknown reasons, waited
14:10:38 17 until after discovery disclosed. Discovery was
14:10:41 18 closed and we moved for summary disposition.

14:10:45 19 THE COURT: All right. Do you want to
14:10:46 20 respond to that.

14:10:48 21 MR. MEYERS: Yes, judge. So I'm in --

14:10:49 22 THE COURT: This is the last thing. I
14:10:51 23 have too many people waiting.

14:10:52 24 MR. MEYERS: I'm in the deposition of
14:10:54 25 the Defendant, and from your prior record you

14:10:56 1 will see that deposition was noticed like five
14:10:59 2 times.

14:11:00 3 Final deposition of him and finally
14:11:04 4 allowed to take him through all the records
14:11:05 5 pertaining to the operation. And these are
14:11:08 6 handwritten perfusionist notes.

14:11:10 7 And he tells me in the deposition: I
14:11:12 8 can't tell you what is going on because they are
14:11:16 9 illegible. You are going to have to talk to the
14:11:20 10 perfusionist. The perfusionist has since moved
14:11:25 11 to California.

14:11:27 12 We immediately took steps to get her
14:11:29 13 deposition in California. Took about four months
14:11:32 14 to get the deposition. We took her deposition
14:11:35 15 and at that time I asked her specifically to
14:11:39 16 interpret the record. What she does, what it
14:11:42 17 means and how she writes it and the time and how
14:11:44 18 it all corresponded and did she provide this
14:11:48 19 information to the defendant. This is really
14:11:50 20 important during the operation. Something that
14:11:53 21 we had no way of knowing at all at any point in
14:11:57 22 time prior to her --

14:11:58 23 THE COURT: I presume you added that
14:11:59 24 transcript to your brief.

14:12:01 25 MR. COOK: I will. If it is not, I

14:12:03 1 will. You will have it today that.

14:12:05 2 THE COURT: You can supplement. You
14:12:10 3 said you didn't. I get it. You say he did. Did
14:12:12 4 you say you didn't.

14:12:14 5 MR. MEYERS: She says at that point I
14:12:16 6 did tell how --

14:12:17 7 I would have told Dr. Harrington about
14:12:19 8 all these things that were going on, and that is
14:12:22 9 nowhere in the record.

14:12:24 10 As an officer of the Court I represent
14:12:28 11 to you in the four thousand pages of records that
14:12:31 12 are there. So what we did --

14:12:33 13 THE COURT: I'll let you --

14:12:35 14 I'll let you --

14:12:36 15 I'd rather let you supplement within
14:12:39 16 seven days with that information. You can
14:12:41 17 respond so I have it. That is an issue that you
14:12:45 18 briefed out your supplement. Okay.

14:12:48 19 MR. MEYERS: The final point is this,
14:12:51 20 and I'll be quiet. Immediately I get on the
14:12:54 21 phone and call Nat Thomas before he's expert's
14:12:58 22 deposition so as to eliminate any argument that
14:13:01 23 we're sandbagging them. I call him and say:
14:13:05 24 Man, look, there is now this issue in the case.
14:13:07 25 Be aware of it.

14:13:08 1 I then take his expert's deposition and
14:13:12 2 his expert says: I have known about this theory
14:13:15 3 for months. So there is no surprise. There is
14:13:19 4 no prejudice. There is no -- -

14:13:20 5 There is no hiding in the weeds for
14:13:23 6 anybody. Under a traditional amendment analysis
14:13:26 7 his expert testified that he knew about the
14:13:28 8 element for months.

14:13:29 9 THE COURT: Okay. You can supplement.

14:13:32 10 MR. MEYERS: I will.

14:13:33 11 THE COURT: You have seven days to
14:13:34 12 submit the supplement.

14:13:36 13 You have seven days to respond to it.

14:13:38 14 And otherwise I presume based on your
14:13:40 15 briefs I have everything in front of me, all
14:13:42 16 issues including the issue about whether or not I
14:13:45 17 should allow the Plaintiff under a traditional
14:13:57 18 amendment analysis.

14:14:00 19 MR. GRANZOTTO: Correct Your Honor.

14:14:00 20 THE COURT: I'll issue an opinion.

14:14:02 21 MR. MEYERS: How much time would you
14:14:03 22 like on the brief.

14:14:04 23 THE COURT: Seven days for you. It's
14:14:05 24 limited. I don't want 25 page.

14:14:07 25 MR. MEYERS: It's limited to our

14:14:09 1 question of good faith.

14:14:10 2 THE COURT: Which I (inaudible).

14:14:13 3 MR. COOK: Good faith as to the
14:14:14 4 amendment of complaint under 2.118. Is that
14:14:39 5 correct (that is the defense counsel.

14:14:41 6 THE COURT: Your argument as to the
14:14:45 7 amendment. Again, you guys keep trying to make
14:14:48 8 the distinction. The original motion in front of
14:14:50 9 me was to amend the complaint, but we are here
14:14:53 10 under Bush, which discusses the amendment of the
14:14:55 11 NOI.

14:14:56 12 And so once I determine the NOI
14:14:59 13 question then I go to amendment of the complaint.
14:15:02 14 I think argument, I thought the argument you made
14:15:05 15 related to the argument to the NOI.

14:15:07 16 MR. COOK: Yes as --

14:15:09 17 Okay. I understand, Your Honor. I
14:15:10 18 understand. I understand what you are saying.

14:15:12 19 THE COURT: It discusses the NOI,
14:15:16 20 doesn't it.

14:15:17 21 MR. COOK: Yes. It ends up melding
14:15:19 22 into two parts of our argument on the complaint
14:15:22 23 was undue delay and bad faith which meld with
14:15:30 24 what we just --

14:15:33 25 THE COURT: I understand. Again and I,

14:15:35 1 I know this for, being repetitious --

14:15:38 2 Although I let you guys be repetitious.

14:15:41 3 The Court analyzes a motion to amend the

14:15:44 4 complaint that did discuss Bush or the amendment

14:15:47 5 of the NOI. It was looking at fully, which was

14:15:51 6 in front of me and I didn't --

14:15:53 7 We are not under that construct. Bush

14:15:56 8 was analyzed by the Court of Appeals and Bush as

14:16:01 9 far as I could tell was a discussion of the NOI.

14:16:06 10 MR. COOK: Amending the complaint is

14:16:09 11 the second (inaudible).

14:16:09 12 THE COURT: And certainly the second

14:16:11 13 question. That is the second question. It's

14:16:13 14 under a traditional motion to amend. 2.118.

14:16:18 15 I don't think that is what is being

14:16:20 16 argued to me. If it is both, right? Why I

14:16:23 17 delayed. I --

14:16:23 18 It would apply to both issues, right?

14:16:26 19 Is it undue delay and what is the prejudice? The

14:16:30 20 argument on this side is what he made the

14:16:32 21 argument. On your side, which applies to both

14:16:34 22 issues, I think, good faith and undue delay.

14:16:37 23 I'm satisfied I can make that

14:16:40 24 distinction. Okay. All right. I'll issue an

14:16:42 25 opinion. Thank you for all the hard work.

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CERTIFICATE OF REPORTER.

STATE OF MICHIGAN)

) SS

COUNTY OF MACOMB)

I, Deborah J. Doyle, a Certified Shorthand Reporter for the State of Michigan, do hereby certify that this transcript, is a complete, true and correct transcript, to the best of my ability, of the proceedings and testimony taken in this case and that this is a full, true, complete and correct transcription of said proceedings.

I further certify that this transcript was prepared by me, or under my supervision, from a videotape copy supplied to me by the Circuit Court of Macomb County Court, the original of which was duly recorded by means of videographic technology, monitored and logged by the Court on the date(s) and time(s) set forth herein.

_____/s/ Deborah J.____

Doyle

Deborah J. Doyle, RPR, CSR 2179

DATE: 12-19-19

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