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STATE OF MICHIGAN

IN THE SUPREME COURT

DRAGO KOSTADINOVSKI and BLAGA KOSTADINOVSKI, as husband and wife,

Plaintiffs-Appellants,

-vs-

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

Defendants-Appellees.

_____/

Supreme Court No. 162909

Court of Appeals No. 351773

Macomb County Circuit Court No. 2014-2247-NH

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. MCL 600.2912b DOES NOT APPLY TO AN AMENDED COMPLAINT THAT ASSERTS ADDITIONAL THEORIES AGAINST AN ALREADY-NAMED DEFENDANT.

The first question that the Court has asked the parties to address in this case is whether MCL 600.2912b's notice of intent requirement applies to a claim against an existing defendant that is added to a medical malpractice action by amendment. The answer to this question is to be found in the first sentence of §2912b(1), which twice locates the point in time at which the notice of intent requirement is applicable - *before* the plaintiff commences a medical malpractice action.

The defendants vigorously argue that §2912b should be applicable in the circumstances of this case. They direct the Court to subsections (4) and (6) of §2912b in support of their argument that the text of the statute does not support plaintiffs' position that §2912b's notice requirement does not apply to amendments to add new theories against an existing defendant. But the answer to the first question that the Court has posed in its November 23, 2021 order is not to be found in §2912b(4) or (6). Rather, it is to be found in the first sentence of §2912b(1) - a sentence that defendants are basically compelled to ignore.

The defendants further assert that plaintiffs' argument as to the inapplicability of §2912b to amendments of a complaint would defeat the purposes behind that statute. The defendants' suggestion that the purpose behind the enactment of §2912b could serve to overcome the unambiguous statutory language chosen by the Legislature is dubious. *See Perkovic v Zurich American Ins Comp*, 500 Mich 44, 53; 893 NW2d 322 (2017) ("reliance on the perceived purpose of [a statute] . . . runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language."); *People v Pinkney*, 501 Mich 259, 272; 912 NW2d 535 (2018).

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But, even if what the defendants would describe as the purpose of §2912b could defeat the words selected by the Legislature in that statute, the defendant's argument would still fail. This Court has indicated that the purpose behind §2912b's presuit notice requirement is to promote settlement "without the need for formal litigation." *Bush v Shabahang*, 484 Mich 156, 174; 772 NW2d 272 (2009); *DeCosta v Gossage*, 486 Mich 116, 119; 782 NW2d 734 (2010). The purpose behind §2912b's notice requirement - providing a presuit waiting period to facilitate settlement without formal litigation - can hardly be served in cases where a complaint is being amended and the parties are already engaged in litigation.[1]

The defendants further suggest that there is support for their position to be found in §2912(6), which provides that only one 182 day tolling period will be allowed in a malpractice action. But, that subsection has nothing to do with amendments of medical malpractice complaints. MCL 600.2912b(6) has a role to play where a plaintiff serves the defendant with more than one notice of intent *prior to suit*. *See Mayberry v General Orthopedics, P.C.*, 474 Mich 1; 704 NW2d 69 (2005). But this subsection has no impact on the question of whether a new notice of intent must be served on a defendant who is already a party to the case.

The defendants further suggest that reading the first sentence of §2912b(1) as it is written

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[1]The defendants rely in part on the fact that the theories of malpractice contained in plaintiffs' original complaint were not supported by their experts and, therefore, summary disposition was granted on these original claims. The defendants intimate that this quirk places the theories that plaintiffs sought to add by amendment more in the realm of an original claim for relief, one that defendants should have received §2912b notice of before the amendment should be allowed. The Court should be aware of the fact that the circumstances of this case - in which plaintiffs seek to amend their complaint to add all new theories - is most unusual. The writer of this brief has never encountered this circumstance before. Rather, amendments in malpractice cases almost universally seek to add additional theories of liability to those already pleaded. And, as noted, in such circumstances the "purpose" of avoiding formal litigation would not be served.

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would reach a result that is at odds with the Court of Appeals decisions in *Gulley-Reeves v Baciewicz*, 260 Mich App 478; 679 NW2d 98 (2004) and *Decker v Rochowiak*, 287 Mich App 666; 791 NW2d 507 (2010), as well as this Court's decision in *Bush*. The defendants are wrong as to all three.

As defendants acknowledge in another part of their Supplemental Brief, "*Gulley-Reeves* didn't involve a proposed amendment to a complaint." Def's Supp Brf., at 23. This is correct. *Gulley-Reeves* addressed only the question of whether the plaintiff's *original* malpractice complaint could contain theories of recovery not identified in the plaintiff's presuit notice. Since *Gulley-Reeves* did not involve a request to amend the complaint, the Court of Appeals in that case was not called upon to decide whether §2912b's notice requirement would apply to such an amendment.

Decker did involve an amended complaint. But the Court of Appeals found in that case that the language of the plaintiff's original notice of intent was broad enough to encompass the additional theories that plaintiff sought to add by amendment. 287 Mich App at 676-682. In arriving at this conclusion, the *Decker* panel avoided any determination as to what §2912b would have to say if the plaintiff sought to amend a malpractice complaint to allege theories against an already-named defendant that were *not* in the original notice of intent.[2]

Finally, the defendants' suggestion that plaintiffs' position in this case is at odds with the

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[2]The plaintiff in *Decker* did make the same argument that the plaintiffs have raised in this case, *i.e.* that §2912b's notice requirement is inapplicable to amended theories added to a malpractice complaint against an already-named defendant. The *Decker* court did not have to reach this question because it found the plaintiff's original notice of intent sufficient to cover the theories being added to the case by amendment. But, the *Decker* Court fully grasped the textual argument that the plaintiff raised in that case, observing that "plaintiff was only required under MCL 600.2912b(1) to provide the statutory notice before he *commenced* his lawsuit against these same defendants . . . Plaintiff was not required to file a second NOI after he was granted leave to file his amended complaint . . . " 287 Mich App at 681 (emphasis in original).

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Court's decision in *Bush* is also completely wrong. In *Bush*, the Court stated the issue that was before it as follows: "We must now consider what a court must do when presented with a defective NOI." 484 Mich at 170. The *Bush* Court was, therefore, presented with the question of what was to happen if the presuit notice mailed by the plaintiff was defective under §2912b(4). *Bush* had nothing to do with the amendment of a malpractice complaint and the *Bush* Court had no reason to consider the applicability of §2912b's notice requirement to new theories added to such an action by amendment.[3]

The defendants, in short, have no argument that allows them to escape the unequivocal language of §2912b(1). The notice of intent requirement of §2912b is one that applies only before the commencement of a malpractice case; it does not apply to the circumstances of this case.[4]

II. IN THE EVENT THAT THIS COURT FINDS THAT §2912b APPLIES WHERE NEW THEORIES AGAINST AN EXISTING DEFENDANT ARE ADDED BY AMENDMENT, COMPLIANCE WITH THE REQUIREMENTS OF THAT STATUTE CAN BE ACHIEVED IN TWO WAYS.

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[3]The *Bush* decision became relevant in this case only after the Court of Appeals in *Kostadinovski v Harrington*, 321 Mich App 736; 909 NW2d 907 (2017) (*Kostadinovski I*) concluded that §2912b's notice requirement had a role to play where new theories are added to a malpractice case by amendment. In concluding that §2912b and its notice requirement were applicable to amendments, the Court in *Kostadinovski I*, in essence, found that plaintiffs' original notice of intent was "defective" for not including the theories sought to be added by amendment. This conclusion made the *Bush* Court's analysis relevant since the Court in *Kostadinovski I* was facing the same question as this Court faced in *Bush*: "What a court must do when presented with a defective NOI." 484 Mich at 170.

[4]The court should note that the Court of Appeals concluded over ten years ago that the sister statute to 2912b, MCL 600.2912d with its affidavit of merit requirement, was for similar textual reasons inapplicable to an amended complaint filed in a malpractice action. *King v Reed*, 278 Mich App 504, 519; 751 NW2d 525 (2008) ("Our examination of the language of MCL 600.2912d leads us to conclude that the clear language of the statute requires the filing of an affidavit of merit only with the original complaint.")

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The Court has also asked the parties to address the question of how, assuming §2912b's notice requirement applies to the amended theories added to this case, the plaintiffs could achieve compliance with that statute. As noted in plaintiffs' Supplemental Brief, there are two distinct ways in which the notice requirement could be satisfied if it applies in these circumstances.

A. Mailing A New Notice Of Intent And Observing The Mandatory Waiting Period.

The defendants cannot deny that one of the ways that a plaintiff seeking to amend a malpractice complaint might achieve compliance with §2912b's notice requirement is by mailing a new notice of intent containing these additional theories and then observing a mandatory waiting period[5] before filing the amended complaint. The defendants cannot deny that this is one way of achieving compliance with §2912b in these circumstances since it was the defendants who offered this method of compliance during the first round of appellate proceedings in this case.

Nor can defendants deny that, on remand following the Court of Appeals decision in *Kostadinovski v Harrington*, 321 Mich App 736; 909 NW2d 907 (2017) (*Kostadinovski I*), plaintiffs argued in the circuit court that the amendment that they sought could not be denied as futile for the reason that they could comply with the dictates of §2912b by mailing a new notice of intent containing a description of the additional theories to be added to the case. *See* Plaintiffs' Supplemental Brf on Remand, at 15-17 (App 219a-221a).

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[5]The defendants are apparently quite confident as to how long that waiting period would be - 182 days. Defs' Supp Brf., at 25. The defendants' confidence is misplaced. For the reasons discussed in plaintiffs' Supplemental Brief, the Legislature has prescribed only one mid-suit waiting period in §2912b and that mid-suit mandatory waiting period is 91 days, not 182 days. MCL 600.2912b(3). The fact is that the Legislature has never addressed the length of the mandatory waiting period in the circumstances of this case because §2912b, as written, has no application to amended complaints beyond §2912b(3).

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Faced with these facts, the defendants have added a new wrinkle to their argument as to why plaintiffs cannot use this method of complying with §2912b's notice requirement. According to the defendants: "The simplest way to add a new theory and satisfy the notice statute is to send a new notice. *When? Before moving for leave to amend the complaint.*" Defs' Supp Brf., at 30 (emphasis added). Thus, the defendants are of the view that a plaintiff can achieve compliance with §2912b's notice requirement by mailing a new notice of intent, but for some reason that new notice of intent must be mailed *before* the plaintiff moves to amend the complaint.

The source of this sequencing that defendants argue for is impossible to determine. The suggestion that a new notice of intent must precede the filing of a motion to amend is not to be found in §2912b since that statute, with one exception not applicable here, makes no reference to amendments of a complaint. Nor is the process that the defendants propose to be found in MCR 2.118, the court rule pertaining to amendments, or MCL 600.2301, its statutory counterpart.

The rather simple fact is that the defendants have made up this procedural requirement. There is nothing in Michigan law that dictates that a party seeking to amend a malpractice complaint to add a new theory of liability against a defendant already named in the case must first mail a new notice of intent and then, and only then, may that party move to amend the complaint.

Take the facts of this case. In March 2016, plaintiffs filed a motion to amend their complaint. At the time, plaintiffs' counsel, fully capable of reading the first sentence of §2912b(1), could arrive at the understandable conclusion that the notice of intent statute had no application to the amendment that plaintiffs were seeking. The defendants, however, insist otherwise and assert that §2912b's presuit notice requirement must be complied with or the amendment would be deemed futile. What is a court supposed to do in this circumstance if it agrees with the defendants that §2912b applies to

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new theories added by amendment? Is the court to determine that the amendment is not futile because the plaintiffs can comply with §2912b by preparing a new notice of intent and waiting a period of time? Or should the Court deem the amendment futile because the plaintiffs were guilty of what amounts to a timing error - they filed their motion to amend before mailing the new notice of intent? The defendants now assert that it is the latter course that the circuit court would have to file. This makes very little sense.

The defendants argument throughout this litigation has been that the amendment of the complaint that plaintiffs sought was futile because plaintiffs did not comply with the notice requirement of §2912b. But the defendants have acknowledged that there is what they have repeatedly characterized as a "simple" way that compliance with §2912b can be achieved. The "simple" cure that defendants themselves have proposed must be available to plaintiffs here. Assuming that §2912b applies to the amendment that the plaintiffs sought, that amendment could not be denied as futile because plaintiffs can comply with all of the requirements of the statute by mailing a new notice of intent and observing a mandatory waiting period.

B. Amending The Original Notice Of Intent To Correct The "Defects" In That Notice.

A second method for complying with §2912b is based on this Court's decision in *Bush,* which provided for curing a defective notice of intent through the provisions of a Michigan statute, MCL 600.2301. The Court of Appeals in *Kostadinovski I* adopted this as the method for complying with the notice of intent statute. As a result, it remanded the case to the circuit court for application of *Bush*'s two-part test.

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Under this Court's decision in *Bush*, a defective notice of intent[6] can be amended to comply with the requirements of §2912b under a two-part test. 484 Mich at 177-181. The circuit court on remand and the Court of Appeals in its March 11, 2021 decision misapplied that two-part test.[7]

The first time the circuit court addressed the plaintiffs' request to amend their compliant, it reached an extraordinary result. It held that a malpractice complaint could be amended to add new theories against a named defendant only if these new theories were contained in the plaintiffs' original notice of intent. This result would have meant that all of the theories that a plaintiff might pursue in a malpractice action, including those that first come to light during the course of discovery, had to be set out in a document prepared six months before the case was even filed.

The first time that this case went through the appellate process, the defendants did not even attempt to defend the circuit court's reasoning. But, following the remand in *Kostadinovski I* for consideration of the *Bush* test, the circuit court (and the Court of Appeals) managed to apply the *Bush* test to reach a result that was not appreciably different from the circuit court's original erroneous ruling.

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[6]The issue here is the appropriate treatment of a *defective* notice of intent, the argument being that plaintiffs' original notice of intent was "defective" in that it did not include the theories plaintiffs sought to add to the case by amendment. The case from this Court that addresses what a court is to do when presented with a *defective* notice of intent is *Bush*. Defendants introduce two other decisions of this Court, *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011) and *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68; 869 NW2d 213 (2015), and suggest that the holdings in these two cases cast doubt on the application of §2301 to these facts. *Driver* and *Tyra*, however do not involve a *defective* notice of intent. As such, they have no impact on the issue presented here.

[7]The defendants assert in their Supplemental Brief that the circuit court did not abuse its discretion in its application of the *Bush* test for the amendment of an NOI. This is not the appropriate review standard. The circuit court was not engaged in the exercise of its discretion when it misapplied the *Bush* test.

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In essence, what the circuit court and the Court of Appeals concluded on remand is that the *Bush* two-part test dictated the conclusion that where a plaintiff seeks to add theories of recovery in a malpractice complaint by amendment, compliance with §2912b's notice requirement can be achieved through the amendment of the original notice if the new theories that the plaintiff seeks to add were included in the original notice. The circuit court and the Court of Appeals have, in effect, arrived at the same erroneous result that led the circuit court to deny plaintiffs' original motion to amend.

RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellants, Drago Kostadinovski and Blaga Kostadinovski, request that this Court reverse the Court of Appeals March 11, 2021 decision and remand this case to the Macomb County Circuit Court for further proceedings.

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