

STATE OF MICHIGAN  
IN THE SUPREME COURT

DRAGO KOSTADINOVSKI and,  
BLAGA KOSTADINOVSKI,

Supreme Court Nos.: 162909  
Court of Appeals No.: 351773  
Macomb CC No.: 2014-2247-NH

Plaintiffs-Appellants,  
vs.

STEVEN D. HARRINGTON, M.D., and  
ADVANCED CARDIOTHORACIC SURGEONS, PLLC

Defendants-Appellees.

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MICHIGAN ASSOCIATION FOR JUSTICE  
BRIEF *AMICUS CURIAE*

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STATEMENT OF QUESTIONS PRESENTED

**I. WHETHER MCL 600.2912b REQUIRES THAT A PLAINTIFF FILE A NEW NOTICE OF INTENT TO PURSUE NEW THEORIES OF RECOVERY WHICH ARISE DURING DISCOVERY AGAINST AN ALREADY-NAMED DEFENDANT?**

*Amicus Curiae* MAJ answers, "No."

Plaintiffs-Appellants answer, "No."

Defendants-Appellees answer, "Yes."

The MCOA answered, "Yes."

## STATEMENT OF INTEREST

The mission of the Michigan Association for Justice ("MAJ") is to promote a fair and effective justice system. We aim to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in Michigan's courtrooms, even when taking on the most powerful interests.

In courtrooms across this State, MAJ is the voice of the injured and damaged, who often have no other public voice.

As members of Michigan's bar, and as officers of the court, we recognize our responsibility to help the Court develop the State's jurisprudence; it is our mission to assist the Court in reaching decisions where all voices are heard and represented, in areas of law in which our members devote their professional lives.

This case involves the interpretation of the law controlling the characteristics and timing of notice of theories which arise after medical malpractice cases are filed. The Court of Appeals incorrectly determined that a plaintiff must file a new MCL 600.2912b Notice of Intent to advise defendants of new theories which arise during discovery, and that failure to file this document is fatal to a case. *Amicus curiae* MAJ submits that the Court of Appeals erred in this holding for a number of reasons. First, MCL 600.2912b by its plain language sets forth *pre-suit* requirements for the filing of a medical malpractice action; it contains no language requiring post-filing notice against an already-named defendant. The Legislative analysis of MCL 600.2912b prior to its enactment confirms that the intent of pre-suit, not intra-suit notice. Second, the affirmation which Defendants seek (and which the Court of Appeals endorsed) disproportionately penalizes plaintiffs in situations where new or different theories arise during the discovery period by elevating form over substance. This is because Defendants admittedly had actual notice of Plaintiffs' new claims before expert discovery was conducted. Third, the position taken by the Defendants-

Appellees ignores the body of law allowing for the expansion of legal theories to conform to the proofs up through the time of trial. Issues of fundamental fairness, judicial economy, and equitable expenditure of party resources favor reversal of the Court of Appeals.

## INTRODUCTION<sup>1</sup>

This Court granted oral argument on Plaintiffs-Appellants' Application for leave to address whether MCL 600.2912b applies where a plaintiff seeks to add new theories of recovery against an already-named defendant in a lawsuit, and if so, when and how such theories must be introduced in light of MCL 600.2912b, MCL 600.2301, and *Bush v Shabahang*, 484 Mich 156, 772 NW2d 272 (2009).

MAJ submits that the Court of Appeals erroneously held that Plaintiffs did not adequately comply with MCL 600.2912b where the statute requires only pre-suit notice. MAJ further submits that under a legal framework, Plaintiffs-Appellants substantively provided the requisite notice of theories developed as a result of discovery; to dismiss simply over the absence of a new MCL 600.2912b notice during litigation notwithstanding actual notice of new theories elevates form over substance.

Finally, the conclusion reached by the Court of Appeals ignores the body of Michigan law which allows for presentation of claims or theories to a jury where an adverse party has reasonable notice thereof, from *any* source. See *Weymers v Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997); *Phillips v Deihm*, 213 Mich App 389; 541 NW2d 566 (1995); *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127; 523 NW2d 849 (1994). The Court of Appeals' decision should be reversed.

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<sup>1</sup> Neither the parties nor their counsel contributed monetarily or to the authorship of this brief. No monetary contributions have been made by any party or entity in the preparation of this brief.

## STATEMENT OF FACTS

MAJ accepts the following facts to be true as set forth in parties' supplemental briefing, in the Court of Appeals' Opinion of October 24, 2017 (*Kostadinovski I*)<sup>2</sup>, as repeated in the Court of Appeals' Opinion of March 11, 2021 (*Kostadinovski II*)<sup>3</sup>.

As set forth in *Kostadinovski I*:

On December 9, 2013, plaintiffs served defendants with the NOI, asserting that on December 14, 2011, the doctor had performed robotic-assisted MVR surgery on Mr. Kostadinovski and that, as subsequently determined, Mr. Kostadinovski suffered a stroke during the course of the procedure. The NOI listed six specific theories with respect to the manner in which the doctor allegedly breached the applicable standard of care relative to the surgery and preparation for the surgery, along with identifying related causation claims. *Kostadinovski I*, 321 Mich App at 740-741.

The Notice of Intent also contained a seventh standard of care statement:

7. Dr. Harrington was required to adhere to any and all requirements of the standard of care as may be revealed through the discovery process.  
(Notice of Intent, Plf Appx. at 48a).

It is unclear if any MCL 600.2912b(7) response was filed by Defendants.

Suit was commenced by Plaintiffs on or about June 5, 2014, accompanied by the requisite MCL 600.2912d Affidavit of Merit. (*Kostadinovski I*, 321 Mich App at 740). Defendant Harrington sat for a deposition in May 2015, however, it was not completed on that date due to Defendant Harrington's surgical schedule. (Plfs Supp Brf at 2). In July 2015, Plaintiffs' Counsel first alerted Defense Counsel that he may have to add a new theory to the case. (Defs Supp Brf at 12).

Defendant Harrington sat for a second (completion) deposition in September 2015, at which time Dr. Harrington identified another witness present at Plaintiff's surgery.

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<sup>2</sup> *Kostadinovski v Harrington*, 321 Mich App 736; 909 NW 907 2d (2017).

<sup>3</sup> *Kostadinovski v Harrington*, unpublished per curiam opinion of the Court of Appeals, issued March 11, 2021 (Docket No. 351773).

(Plfs Supp Brf at 3-4). That witness (Ms. Masinick) was deposed in December 2015; Plaintiffs-Appellants submit that she provided additional information about the surgery. (Plfs Supp Brf at 5).

After that deposition, but before expert depositions took place, Plaintiffs' attorney notified Defendants' attorney of additional theories of liability which would be supported through expert testimony, arising out of the testimony of Defendant Harrington and Ms. Masinick. (Plfs Supp Brf at 5). Thereafter, expert depositions were taken and these additional theories were subject to cross-examination by Defense Counsel. (Plfs Supp Brf at 6).

After Plaintiffs' experts were deposed, Defendants moved for summary disposition on the basis that Plaintiffs' case centered on these new/additional theories, instead of those identified with specificity in Plaintiffs' pre-suit Notice of Intent. (*Kostadinovski I*, 321 Mich App at 741). Plaintiffs filed a motion to amend their complaint to comport with the proofs adduced during discovery. *Id.* The circuit court dismissed the complaint and denied Plaintiffs' motion to amend for the reason that the new/additional theories were not pled in a Notice of Intent. (*Kostadinovski I*, 321 Mich App at 742).

Plaintiffs appealed, and the Court of Appeals reversed and remanded for further proceedings. *Kostadinovski I*, 321 Mich App at 754. After a protracted appellate course, the case returned to the circuit court, which again denied Plaintiffs leave to amend for the reason that two new/additional theories were not pled in the pre-suit Notice of Intent, thereby, "depriv[ing Defendants] of their statutory right to receive timely notice of a claim of medical malpractice liability followed by the appropriate waiting period." (Opinion and Order, dated 11.18.19, at 7, Plf Appx at 231a).

Plaintiffs appealed, and the Court of Appeals affirmed the trial court. Plaintiffs-Appellants sought leave from this Honorable Court, and on November 23, 2021, this Honorable Court issued an Order directing the Clerk to schedule oral argument on

Plaintiffs' Application, and directing the parties to submit briefing on the following issues:

The appellants shall file a supplemental brief addressing: (1) whether MCL 600.2912b applies where the plaintiff seeks to add new theories of recovery against an already-named defendant; and (2) if so, when and how a plaintiff seeking to add such new theories may satisfy the requirements of MCL 600.2912b, see *Bush v Shabahang*, 484 Mich 156 (2009), and MCL 600.2301. *Kostadinovski v Harrington*, \_\_\_ Mich \_\_\_; 966 NW2d 152 (2021).

Having reviewed the supplemental briefing of the parties and the Opinion of the Court of Appeals, MAJ submits the instant Brief *Amicus Curie* in support of Plaintiffs-Appellants.

### STANDARD OF REVIEW

The questions articulated by this Court in its Order of November 23, 2021, involve the interpretation of statute. This Court reviews the interpretation and application of statutes *de novo*. *In re Ferranti*, 504 Mich 1, 14; 934 NW2d 610 (2019).

### LEGAL ARGUMENT

#### **MCL 600.2912b Does Not Require That a Plaintiff File a Formal Notice of Intent to Add New Theories of Recovery Against an Already-Named Defendant in an Existing Lawsuit.**

##### **I. MCL 600.2912b Only Requires Pre-Suit Notice.**

Notices of Intent are a statutory creation, introduced as a requirement in medical malpractice cases through the enactment of MCL 600.2912b, which provides in pertinent part (with emphasis added):

(1) Except as otherwise provided in this section, **a person shall not commence** an action alleging medical malpractice against a health professional or health facility unless the person has given the health

professional or health facility written notice under this section not less than 182 days before the action is commenced.

(2) The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.

(3) The 182-day notice period required in subsection (1) is shortened to 91 days if all of the following conditions exist:

(a) The claimant has previously filed the 182-day notice required in subsection (1) against other health professionals or health facilities involved in the claim.

(b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).

(c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).

(d) The claimant did not identify, and could not reasonably have identified a health professional or health facility to which notice must be sent under subsection (1) as a potential party to the action before filing the complaint.

(4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:

(a) The factual basis for the claim.

(b) The applicable standard of practice or care alleged by the claimant.

(c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

The requirements articulated in this statute did not exist at common law; they were created through the enactment of 1993 PA 78. This Act, commonly referred to as 'tort reform,' codified 1993 SB 270, which created a number of statutory requirements which shape the way in which medical malpractice actions are filed and litigated, including Notices of Intent, Affidavits of Merit, Affidavits of Meritorious Defense, and limitations

on non-economic damages to name a few.

Specific to the issue which this Court asked, “*whether MCL 600.2912b applies where the plaintiff seeks to add new theories of recovery against an already-named defendant,*” the Court need only look at the specific words of the statute and the Legislative history, neither of which explicitly nor implicitly mentions post-suit amendment. Rather, as set forth in the legislative analysis of 1993 SB 270, the purpose behind the enactment of MCL 600.2912b in its current form is as follows:

**Advance notice of suit.** For the stated purposes of promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs, the bill would require a plaintiff planning to file suit to notify a defendant at least 182 days before commencing court action. The notice could be filed later if a statute of limitations was about to apply. Meeting the 182-day requirement for one defendant would cover meeting it for any future defendants added to the suit. The notice would have to contain certain minimum information about the case and its basis.

The claimant and the defendant would have to give each other access to each other’s medical records within 91 days after the notice. A defendant’s failure to allow timely access to records would be penalized under provisions regarding affidavits of merit and interest on judgments (see below). Within 126 days after the notice, the defendant would have to furnish the claimant with a written response with certain information about the defense; failure to provide the information on time would entitle the claimant to file suit immediately.

This history demonstrates that an MCL 600.2912b notice was intended to serve as “Advance notice of suit,” and to, “notify a defendant...before commencing court action,” so as to afford for potential pre-suit resolution. This unambiguous language is not subject to extrapolative definition, nor is it reasonably applied to a case in suit.

As this Court is well-aware, the primary task in construing a statute is to give effect to the intent of the Legislature. *See, e.g., People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). The Legislature identified the intent behind MCL 600.2912b and has not opted to broaden it beyond pre-suit notification, despite having decades of opportunity to do so. Accordingly, *amicus curiae* MAJ submits that MCL 600.2912b, by its plain language and as evidenced by the authors' statements, does not apply to new theories arising against existing defendants during litigation.

## II. MCL 600.2301 Allows for the Amendment of Pleadings to Encompass New Theories or Defenses Which Arise During Litigation.

Where new theories or defenses arise during litigation, MCL 600.2301 expansively allows for "any" amendment, in "form or substance." As this Court recognized in *Bush v Shabahang*:

We recognize that § 2301 allows for amendment of errors or defects, whether the defect is in form or in substance, but only when the amendment would be "for the furtherance of justice." Additionally, § 2301 mandates that courts disregard errors or defects when those errors or defects do not affect the substantial rights of the parties. Thus, the applicability of § 2301 rests on a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed "on such terms as are just." *Bush v Shabahang*, 484 Mich 156, 177-78; 772 NW2d 272 (2009) (cleaned up).

If the amendment is in the furtherance of justice, it is allowed; if it is unjust, it is not.

By their nature, Notices of Intent are filed without the benefit of discovery and therefore without complete knowledge of all pertinent information at issue. While MCL 600.2912b notices must be sufficiently informative, they are necessarily shaped by the information available, which is typically limited to medical records.<sup>4</sup> Thereafter,

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<sup>4</sup> Often, a Notice of Intent is filed without the complete records of the putative defendant(s), as the obligation to produce full records is triggered by MCL 600.2912(5).

Complaints and Affidavits of Merit require specific identification of litigation and trial theories. Yet these latter filings, which require specificity, are subject to amendment to conform to the proofs where necessary. See *Legion-London v Surgical Inst of Mich Ambulatory Surgery Center, LLC*, 331 Mich App 364; 951 NW2d 687 (2020), lv denied \_\_\_ Mich 967 \_\_\_ NW2d 381 (2021); *Weymers v Khera*, 454 Mich at 659-660; 563 NW2d 647 (1997); *Phillips v Deihm*, 213 Mich App 389; 541 NW2d 566 (1995); *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127; 523 NW2d 849 (1994). But see also *King v Reed*, 278 Mich App 504, 516; 751 NW2d 525 (2008) (no amendment necessary to add new theories against existing Defendants to an Affidavit of Merit because, “[o]nce an action has been commenced and an affidavit of merit in compliance with the statute has been filed...the purpose of the statute has been fulfilled.”).

*Weymers* instructs that a motion to amend a complaint should be granted except under certain enumerated circumstances. 454 Mich 639, 658, citing *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649; 213 NW2d 134 (1973). The trial court herein refused to allow Plaintiffs-Appellants to amend their complaint to conform to the proofs because it determined that Defendants would experience “prejudice” from lack of an intra-suit Notice of Intent. Compare, *Weymers*, which identifies such prejudice to exist, “if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost.” *Weymers*, 454 Mich 639 at 659, paraphrasing *Fyke*, at 663. No such circumstances occurred here where notice was given and expert discovery undertaken on Plaintiffs’ new theories.

It is patently unfair to deny an injured party, including Plaintiffs herein, their day in Court because medical records produced pre-suit insufficiently allowed for identification of data or witnesses. As well, Defendants had ample notice of the revised theories which arose during discovery, and actually cross-examined the experts

about them. This type of development is commonplace in tort litigation and Notices of Intent are written - as was the instant notice - in a manner to raise the possibility of additional theories arising out of discovery. If medical malpractice Plaintiffs were forced to amend their Notices each time something slightly new or different arose after discovery or testimony in a case, then litigants would be caught in an endless cycle of amendment, re-notices, and a completely needless waste of resources "re-doing" the first part of the case while completely ignoring the goal of truth finding for both sides.

*Amicus curiae* MAJ submits that it would be patently unjust to elevate form over substance by validating a dismissal for lack of a post-discovery Notice of Intent where Plaintiffs-Appellants timely filed pre-suit notice which explicitly notified Defendants that their theories were subject to change based on discovery; where Defense Counsel was notified of new theories during discovery; and where Defense Counsel was able to conduct expert discovery on these new theories. This is especially true where such notice is unsupported by the language of and intent behind MCL 600.2912b.

### CONCLUSION

The language of MCL 600.2912b requires pre-suit notice only. To the extent that new or additional theories or defenses arise during litigation which require the addition of new or additional theories, MCL 600.2301 applies and allows for amendment of the pleadings to conform to the proofs. The Court of Appeals should be reversed.

Respectfully submitted,  
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