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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. _____

Court of Appeals No. 351773

Macomb County Circuit Court No. 2014-2247-NH

PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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ORDER BEING APPEALED FROM AND RELIEF REQUESTED

Plaintiffs-Appellants, Drago Kostadinovski and Blaga Kostadinovski, seek leave to appeal from the Court of Appeals decision dated March 11, 2021. A copy of that Opinion is Exhibit K to this application. That opinion affirmed a circuit court ruling denying plaintiffs' request to amend their complaint and dismissing plaintiffs' medical malpractice action.

Plaintiffs-appellants request that this Court grant leave to appeal to consider the important legal questions presented in this case. In the alternative, plaintiffs request that the Court summarily reverse the Court of Appeals March 11, 2021 opinion and remand this case to the Macomb County Circuit Court for further proceedings.

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STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE NOTICE OF INTENT STATUTE, MCL 600.2912b, HAS ANY APPLICATION WHERE THE PLAINTIFF IN A MEDICAL MALPRACTICE ACTION SEEKS TO ADD NEW THEORIES OF RECOVERY AGAINST AN ALREADY-NAMED DEFENDANT?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

II. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER, ASSUMING THE NOTICE OF INTENT REQUIREMENT OF MCL 600.2912b APPLIES IN THIS CASE, SHOULD THE CIRCUIT COURT HAVE ALLOWED PLAINTIFFS TO COMPLY WITH THAT STATUTE BY MAILING A NEW NOTICE OF INTENT WITH THE ADDITIONAL CLAIMS PLAINTIFFS SOUGHT TO ADD BY AMENDMENT AND WAITING THE STATUTORILY PRESCRIBED PERIOD OF TIME BEFORE FILING THEIR AMENDED COMPLAINT?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

III. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT PLAINTIFFS COULD NOT COMPLY WITH MCL 600.2912b's NOTICE REQUIREMENT BY FILING AN AMENDED NOTICE OF INTENT UNDER THE PROCESS SET OUT IN THIS COURT'S DECISION IN *BUSH V SHABAHANG*, 484 MICH 156; 772NW2d 272 (2009)?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

IV. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER, ASSUMING MCL 600.2912b APPLIES IN THIS CONTEXT AND PLAINTIFFS WERE PRECLUDED FROM FILING AN AMENDED NOTICE OF INTENT, WHETHER THE CIRCUIT COURT SHOULD HAVE DISMISSED PLAINTIFFS' AMENDED THEORIES WITHOUT PREJUDICE?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

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This case, which presents the significant legal questions associated with the interplay between MCL 600.2912b, the notice of intent statute, and a request to amend a medical malpractice complaint, comes before this Court for a second time.

STATEMENT OF FACTS

This medical malpractice action arises out of a December 14, 2011 mitral valve repair surgery performed by Dr. Steven D. Harrington on Drago Kostadinovski. Complaint, ¶¶35-36. During the course of that surgery, Mr. Kostadinovski suffered a stroke. *Id.*, ¶¶55-56.

Mr. Kostadinovski retained an attorney to investigate a potential medical malpractice claim against Dr. Harrington. On December 9, 2013, counsel for Mr. Kostadinovski mailed a Notice of Intent to File Claim in compliance with MCL 600.2912b. A copy of that notice is Exhibit A to this application. That notice of intent identified seven ways in which Dr. Harrington breached the standard of care in conjunction with the mitral valve repair surgery he performed on Mr. Kostadinovski:

1. On December 9, 2011, and continuously thereafter, Dr. Harrington failed to perform and appreciate a thorough history and physical of Mr. Kostadinovski to insure that Mr. Kostadinovski was a proper surgical candidate for a DaVinci mitral valve repair, as was performed on December 14, 2011.

2. On December 9, 2011, and continuously thereafter, Dr. Harrington failed to order and review any and all pre-operative diagnostic studies to insure that Mr. Kostadinovski was a proper candidate for the DaVinci mitral valve repair surgery as was performed on December 14, 2011, which would include but not be limited to X-rays, CT scans, DT angiograms and any and all other radiograph diagnostic testing necessary in order to properly assess Mr. Kostadinovski;

3. On December 9, 2011 and December 14, 2011, and continuously thereafter, Dr. Harrington failed to refrain from performing a mitral valve replacement with bypass by use of EndoClamp as described during the December 14, 2011 DaVinci mitral valve repair;

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4. On December 9, 2011 and December 14, 2011 and continuously after December 9, 2011, Dr. Harrington failed to evaluate the risk for stenosis and calcification using intra-operative transesophageal echocardiogram and consult all other prior pre-operative studies, including, but not limited to CT studies and CT angiograms to determine whether an EndoClamp was indicated during the DaVinci mitral valve repair as was performed on December 14, 2011;

5. On December 14, 2011 and continuously thereafter, Dr. Harrington failed to immediately abort the DaVinci mitral valve repair due to the presence of thrombus, clot or calcium within the arterial tree;

6. On December 14, 2011 and continuously thereafter, Dr. Harrington failed to use the care and technique of a reasonable surgeon performing the DaVinci mitral valve repair surgery as performed on December 14, 2011 and to avoid disrupting any calcium, clot, thrombus or other build-up in the arterial tree during the DaVinci mitral valve repair;

7. Dr. Harrington failed to adhere to any and all additional requirements of the standard of care as may be revealed through the discovery process.

Notice of Intent (Exhibit A), at 10-11.

After waiting the period of time prescribed in MCL 600.2912b, Mr. Kostadinovski and his wife, Blaga Kostadinovski, filed this action in the Macomb County Circuit Court on June 5, 2014 against Dr. Harrington and Advanced Cardiothoracic Surgeons, PLLC, Dr. Harrington's professional corporation. A copy of plaintiffs' original complaint is Exhibit B to this application. The allegations in that complaint pertaining to the defendants' breaches of the standard of care mirrored those that were contained in the December 9, 2013 notice of intent. Complaint (Exhibit B), ¶69a-g.

In July 2014, within one month after filing the case, plaintiffs noticed the deposition of the defendant, Dr. Harrington. Tr. 3/28/16, Exhibit C to this application, at 4. The scheduling of that deposition proved to be difficult because of Dr. Harrington's busy schedule. Plaintiffs ultimately had to file a motion to compel Dr. Harrington's deposition. *Id*. He was finally produced for a

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deposition in May 2015. *Id*., at 5. That deposition could not be completed at that time because of Dr. Harrington's surgery schedule. His deposition was rescheduled and it was finally completed on September 22, 2015. *Id*.

At the second of these two depositions, Dr. Harrington acknowledged that, if Mr. Kostadinovski's arterial pressure and hemoglobin reached particular levels during his mitral valve surgery, he would be at risk for a stroke. Deposition of Steven Harrington, Exhibit I to this application, at 158-159. Dr. Harrington further testified that the arterial pressure, hemoglobin and hematocrit levels are monitored by the perfusionist, the assistant operating the heart/lung machine during mitral valve surgery. Harrington Dep (Exhibit I), at 147-148.

When these values reach a previously agreed-upon critical level, it is the responsibility of the perfusionist to alert the surgeon of this fact. *Id*., at 148-149. It is then the surgeon who must decide whether there is a need to respond to these readings by giving blood to the patient. *Id*., at 149-150.

At his September 2015 deposition, Dr. Harrington was shown the perfusionist's records from Mr. Kostadinovski's surgery. *Id*., at 152-165. Looking at the handwritten notes on these records, Dr. Harrington acknowledged some difficulty reading all of them, noting "I'm doing the best to interpret the shorthand . . . of the perfusionist's writing. This is not my writing, this is the perfusionist's." *Id*., at 153.

Dr. Harrington was then shown a number of hemoglobin and hematocrit readings on the perfusionist's records during Mr. Kostadinovski's surgery that were concerning. *Id*., at 154-159. He had no memory of whether the perfusionist alerted him to these readings. *Id*., at 155. Dr Harrington was asked at his deposition whether he could determine, based on the perfusionist records, whether Mr. Kostadinovski had been given blood during the time period that he was on the

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heart/lung machine. Dr. Harrington indicated in his testimony that he could not tell whether blood had been administered during surgery because he could not interpret the perfusionist's records. *Id*., at 159.

Dr. Harrington was, however, able to identify the name of the perfusionist who assisted in Mr. Kostadinovski's surgery as Lynn Masinick.[1] Dr. Harrington's deposition concluded with a discussion of Ms. Masinick's whereabouts - she no longer worked in Michigan, but had moved to California. *Id*., at 165.

Following Dr. Harrington's September 2015 deposition, the next step in plaintiffs' discovery was to locate and depose Ms. Masinick. The parties encountered some difficulty in scheduling that deposition. But, the deposition of Ms. Masinick was taken on December 17, 2015 in California. A copy of her deposition is Exhibit J to this application. In that deposition, Ms. Masinick provided certain information regarding Mr. Kostadinovski's surgery that Dr. Harrington had been unable to. She confirmed that during the surgery she would have reported to Dr. Harrington any abnormal readings on the various values that she was monitoring. *Id*., at 39-40. Ms. Masinick was also able to confirm based on her records of the surgery that, despite concerning hemoglobin and hematocrit readings during Mr. Kostadinovski's surgery, he was not transfused during the cardiopulmonary bypass:

> Q. Now, a couple other questions. If during this operation the patient was transfused with red blood cells or whole blood, would there been a recording of that?
>
> A. Yes.

---

[1]At the time of the 2011 surgery, the perfusionist's name was Lynn Flores. Harrington Dep. (Exhibit I), at 160. Four years later, when she was deposed in this case, her name was Lynn Masinick. This brief will use her name as of the date of her deposition.

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Q. And if the patient was transfused during the operation, where would that reporting have occurred?

A. It would have occurred underneath my blood gases. There's a transfusion record, blood unit number, and time given spot. And there was - it would be also indicated on page 1 in this plus column for pump volume, and it would have been written in RBCs and the total amount given.

Q. Okay. Based upon this recordkeeping, are you confident that the patient was not transfused during the operation?

A. During the cardiopulmonary bypass?

Q. Correct.

A. Yes.

Id., at 51.

In January and February 2016, plaintiffs' standard of care and causation experts were scheduled to be deposed. In advance of those depositions, plaintiffs' attorney contacted the defendants' counsel to inform them that, based on the information obtained from the depositions of Dr. Harrington and Ms. Masinick, plaintiffs' experts would be discussing Dr. Harrington's breach of the standard of care with respect to profusion errors during Mr. Kostadinovski's surgery, a theory of liability that had not been pleaded in plaintiffs' original complaint. Tr. 3/28/16 (Exhibit C), at 7.

Plaintiffs' medical experts, Dr. Edgar Chedrawy, Dr. Louis Samuels and Dr. Thomas Naidich, were deposed in early 2016. Each of these experts discussed during his deposition the additional theories that had come to light through discovery. Having been informed in advance of the experts' intent to present these new theories, counsel for defendants was able to cross-examine plaintiffs' experts on these subjects.

Based on the information that had come to light during discovery, plaintiffs' experts testified

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in their depositions that Dr. Harrington breached the standard of care by failing to monitor Mr. Kostadinovski's hypotension during his December 14, 2011 surgery and by failing to transfuse him during that surgery. While plaintiffs' three experts offered support for these theories of liability that had not yet been pleaded, they did not offer support for the theories of malpractice that had been asserted against Dr. Harrington in plaintiffs' original complaint.

On March 21, 2016, defendants filed a motion for summary disposition. In that motion, defendants argued that, based on the concessions made by plaintiffs' experts during their deposition testimony, all of the claims of malpractice alleged in the original complaint were subject to dismissal since there was no testimony from plaintiffs' experts to support them. In that same motion, defendants also sought to strike any allegations of malpractice that plaintiffs might pursue that were not alleged in the December 2013 notice of intent or their original complaint.

On the same day that defendants filed their motion for summary disposition, plaintiffs filed a motion to amend their complaint to include the additional theories of malpractice that had been developed during discovery and which had already been testified to by their experts during their depositions. Thus, plaintiffs moved to amend their complaint to include claims that Dr. Harrington was responsible for malpractice in (1) failing to recognize that Mr. Kostadinovski was in a hypotensive state during his mitral valve repair surgery; and (2) in failing to adequately perfuse him during that surgery.

In their response to plaintiffs' motion to amend, defendants proffered several reasons why, in their view, that motion should be denied. A copy of the defendants' response to plaintiffs' motion to amend is Exhibit D to this application. Defendants first contended that the motion should be denied as unduly prejudicial to the defense. Response (Exhibit D), at 2-5. They further argued that

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the amendment should be denied because adding the two new theories of liability that were the subject of the motion to amend would be futile.

The defendants' futility argument rested on two different grounds. First, they contended that the amendment to add the new claims would be futile because these additional claims would be barred by the statute of limitations. Defendants, therefore, asserted that the proposed amendment would be futile because it would not relate back to the date of the filing of the original complaint under MCR 2.118(D). Response (Exhibit D), at 2-3.

Second, defendants asserted that the amendment that plaintiffs' complaint would be futile for the failure to comply with the notice of intent statute, MCL 600.2912b, because the new theories that plaintiffs sought to add to the case by amendment were not included in their December 2013 presuit notice of intent. *Id*., at 6-9. According to defendants, plaintiffs could not add these new theories to the case unless these theories had been asserted in the December 2013 notice of intent. Thus, citing the contents of plaintiffs' presuit notice of intent, defendants argued in response to the motion to amend that the amendment would be futile because, "there is no mention, reference or inference [in the notice of intent] to an alleged failure by Dr. Harrington to transfuse the patient secondary to a decreased hemoglobin and hematoint during the December 14, 2011 surgery." *Id*., at 9.

A hearing was held on plaintiffs' motion to amend on March 28, 2016. At that hearing, the circuit court took plaintiffs' motion under advisement. Tr. 3/28/16, at 19.

On April 25, 2016, prior to issuing a decision on the pending motion to amend, the circuit court conducted a hearing on the defendants' motion for summary disposition on the claims of malpractice asserted in plaintiffs' original complaint. Plaintiffs offered no objection to the dismissal

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of the claims asserted in their original complaint. The circuit court signed an order dated April 25, 2016, dismissing the claims of professional negligence stated in the original complaint. A copy of the circuit court's April 25, 2016 order is Exhibit E to this application. The April 25, 2016 order noted that it was not a final order since the circuit court still had the plaintiffs' motion to amend under advisement.

The circuit court issued a written opinion addressing plaintiffs' motion to amend on April 29, 2016. A copy of that Opinion and Order is Exhibit F to this application. In that opinion, the circuit court first addressed the defendants' claim that the amendment that plaintiffs proposed would be futile based on the expiration of the limitations period. The circuit court rejected defendants' argument and concluded that, if allowed, plaintiffs' amendment would relate back to the filing of their original complaint under MCR 2.118(D) since it arose out of the same "conduct, transaction, or occurrence" as the claims made in the original complaint. Opinion (Exhibit F), at 3-6.

The circuit court then turned to the other component of the defendants' futility argument - that the proposed amendment should not be allowed because the additional theories that plaintiffs sought to add by amendment had not been included in the presuit notice of intent that their counsel mailed in December 2013. The circuit court found this argument persuasive, concluding that allowing the amendment that plaintiffs proposed would be inconsistent with the requirements set out in MCL 600.2912b:

> The Court finds that plaintiffs' NOI did not set forth the minimal requirements to provide notice of the claim of breach of the standard of care with regard to the failure to monitor hypotension levels during the operation and the failure to transfuse the patient was a potential cause of injury as required by MCL 600.2912b. Accordingly, defendants were not given the opportunity to engage in any type of settlement negotiation with regard to the hypotension and transfusion claims because they were not given notice of the existence of any such claims.

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Opinion (Exhibit F), at 8-9.

Thus, the circuit court concluded that the two new theories that plaintiffs sought to add to the case by amendment - that Dr. Harrington did not properly monitor Mr. Kostadinovski's hypotension levels during the December 14, 2011 surgery and that he failed to properly transfuse Mr. Kostadinovski - could not be added to the case because these theories had not been included in plaintiffs' presuit notice of intent. Based on its conclusion that plaintiffs had failed to comply with MCL 600.2912b's notice requirement, the circuit court determined that plaintiffs' motion to amend the complaint would to be denied as futile.

Plaintiffs appealed the circuit court's April 29, 2016 decision to the Court of Appeals. *Kostadinovski v Harrington*, Court of Appeals No. 333034. In their appellate brief, plaintiffs raised two issues. First, they contended that amendment of their complaint would not be futile on the basis of the notice of intent statute because that statute has no application to a new theory of recovery alleged in an amended complaint against an already-named defendant. Thus, based on the text of §2912b, plaintiffs argued on appeal that the notice called for by that statute was a presuit notice; it did not apply to amended complaints filed during the course of an existing case.

Second, plaintiffs argued in their appeal that, if compliance with §2912b's notice requirement was required when a plaintiff seeks to add theories to a medical malpractice claim by amendment, compliance with the notice statute could be achieved through the process outlined by this Court in its decision in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), which allowed for the amendment of the notice of intent under certain circumstances.

A panel of the Court of Appeals issued a published decision reversing the circuit court's denial of plaintiffs' motion to amend on October 24, 2017. *Kostadinovski v Harrington*, 321 Mich

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App 736; 909 NW2d 907 (2017) (hereinafter: *Kostadinovski I)*. In that opinion, the panel rejected plaintiffs' initial argument that §2912b had no application to the amendment of a complaint to add additional theories of recovery against an existing defendant. *Kostadinovski I*, 321 Mich App at 751, fn. 6.

The panel ruled, however, on the basis MCL 600.2301 and this Court's decision in *Bush*, that the case had to be remanded to the circuit court for a determination of whether plaintiffs should be given the opportunity to amend their notice of intent to add the theories that they sought to add to the case by amendment. 321 Mich App at 751-754. The panel ruled that the trial court "as opposed to automatically disallowing plaintiffs to amend their complaint because of the NOI connundrum that would be created - was required to assess whether the NOI defect could be disregarded or cured by an amendment of the NOI under MCL 600.2301. . ." 321 Mich App at 740.

In its October 24, 2017 opinion, the panel issued the following instructions as to the proceedings the circuit court was to conduct on remand:

> For purposes of guidance on remand, we provide the following direction. The trial court is to engage in an analysis under MCL 600.2301 to determine whether amendment of the NOI or disregard of the prospective NOI defect would be appropriate. If the trial court concludes that amendment or disregard of the defect would not be proper under MCL 600.2301, the court's prior futility analysis relative to plaintiff's motion to amend the complaint shall stand and the motion to amend the complaint shall be denied, ending the case, subject, of course, to appeal on the § 2301 analysis. If the trial court determines that MCL 600.2301 supports amendment of the NOI or disregard of the NOI defect, thereby negating the court's prior futility analysis, amendment of the complaint shall be allowed, with one caveat. Aside from futility, defendants had proffered additional reasons why amendment of the complaint should not be allowed, i.e., undue delay and undue prejudice, see *Miller*, 477 Mich. at 105, 730 N.W.2d 462, which were not reached by the trial court and are repeated by defendants in their appellate brief as alternative bases to affirm. The trial court shall entertain those arguments if the court rules in plaintiffs' favor on MCL 600.2301.

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321 Mich App 753-754.

The defendants filed an application for leave to appeal in this Court, seeking review of the Court of Appeals October 24, 2017 decision. Plaintiffs filed a cross application for leave to appeal, in which they raised the question of whether the notice of intent statute had any application to the amendment that they sought in this case.

On September 27, 2018, the Court issued an order directing the Clerk to schedule oral argument on both parties' applications for leave. *Kostadinovski v Harrington*, 503 Mich 869; 917 NW2d 403 (2018). In compliance with the Court's instructions, both parties filed additional briefing in this Court. Exhibit G to this application is the Supplemental Brief that the defendants filed in this Court in November 2018.

In that Supplemental Brief, the defendants no longer took the position that proved persuasive to the circuit court. In their Supplemental brief to this Court, the defendants did not argue that the amendment that plaintiffs proposed would be futile unless the new claims that plaintiffs sought to add by amendment were contained in plaintiffs' presuit notice of intent. Instead, the defendants asserted in their 2018 brief to this Court that all that plaintiffs had to do to comply with §2912b's notice requirement in these circumstances was to prepare a new notice of intent containing the new theories that plaintiffs sought to add to the case by amendment. As the defendants put it in their Supplemental Brief to the Court: "There was a simple way for Kostadinovski to comply with the NOI statute: he could have sent a new NOI." Defs' Supplemental Brf. (Exhibit G), at 8.

Plaintiffs continued to argue in their briefs before this Court that §2912b's notice requirement was inapplicable in these circumstances. But, plaintiffs agreed with defendants' updated argument that, if §2912b were applicable in these circumstances, plaintiffs could comply with that statute by

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doing what defendants acknowledged in their briefing before this Court – plaintiffs could prepare and mail a new notice of intent containing the theories they wished to add by amendment, observe §2912b's mandatory waiting period, and then file their amended complaint.

After conducting oral argument on the parties' competing applications for leave to appeal on April 10, 2019, this Court issued an order denying both applications nine days later. *Kostadinovski v Harrington*, 503 Mich 1009; 925 NW2d 202 (2019).

With the Court's denial of leave, the case was remanded to the circuit court for consideration on the basis of the Court of Appeals October 24, 2017 opinion. The circuit court conducted oral argument on the issues presented on remand on August 19, 2019. On November 18, 2019, the circuit court issued a written Opinion and Order in which it once again ruled that plaintiffs' proposed amendment of their complaint would be futile under §2912b and dismissed plaintiffs' case. A copy of the circuit court's November 18, 2019 opinion is Exhibit H to this application.

In its opinion on remand, the circuit court applied the two part test for the application of §2301 outlined by this Court in *Bush v Shabahang*. The circuit court found that allowing the amendment of plaintiffs' notice of intent would deprive the defendants of a "substantial right" because defendants would be "deprived of their statutory right to receive timely notice of a claim of medical malpractice liability followed by the appropriate waiting period." Opinion (Exhibit H), at 7.

The circuit court further found that allowing the amendment of the notice of intent would not be "in the furtherance of justice." *Id.*, at 8-11. In reaching this conclusion, the circuit court again relied on the fact that plaintiffs' original notice of intent did not mention the two theories that plaintiffs sought to add by amendment. *Id.*, at 8-10.

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Plaintiffs appealed the circuit court's November 18, 2019 ruling to the Court of Appeals. On appeal, plaintiffs raised four issues in support of the reversal of the circuit court's determination. First, plaintiffs argued that the circuit court had misapplied this Court's decision in *Bush* and its construction of MCL 600.2301.

Second, on the basis of the argument that the defendants made in their November 2018 Supplemental Brief that had been filed in this Court, plaintiffs argued that, even if the circuit court had correctly determined that plaintiff's amended claims did not come within this Court's decision in *Bush*, dismissal was not the appropriate remedy. Instead, the circuit court should have instructed plaintiffs that they could achieve compliance with the notice of intent statue by mailing a new notice of intent to defendants addressing the new theories of liability that plaintiffs sought to add to the case by amendment.

Plaintiffs' third argument that they raised in the Court of Appeals addressed a preliminary question that they had raised throughout this appeal – the language of the notice of intent statute unequivocally establishes that the notice requirement is inapplicable to the amendment of a medical malpractice complaint that seeks to add a new theory of recovery against a previously named defendant.

Finally, plaintiffs raised the argument that, under this Court's decision in *Bush*, any dismissal of plaintiffs' action based on a purported failure to comply with the notice of intent statute could only result in a dismissal of plaintiffs' amended theories without prejudice.

On March 11, 2021 a panel of the Court of Appeals issued an opinion affirming the circuit court's decision denying plaintiffs' request to amend their complaint to add two new theories and it affirmed the circuit court's dismissal of plaintiffs' case. A copy of the Court of Appeals March 11,

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2021 decision (hereinafter: *Kostadinovski II*) is Exhibit K to this application.

The Court of Appeals in *Kostadinovski II* noted that several of the issues that plaintiffs sought to raise in their second appeal were foreclosed by law of the case principles.[2] As to the application of this Court's decision in *Bush* to the theories that plaintiffs sought to add through their proposed amendment, the Court of Appeals agreed with the circuit court that plaintiffs could not satisfy either prong of the two-part test that this Court set out in *Bush*. *Kostadinovski II* (Exhibit K), at 5-7. The Court of Appeals further rejected plaintiffs' argument based on this Court's decision in *Bush* that the dismissal of plaintiff's cause of action should have been without prejudice. *Kostadinovski II* (Exhibit K), at 7-8.

[2]The Court of Appeals in its earlier decision in this case had held that §2912b's notice requirement would be applicable to plaintiffs' amended complaint. *Kostadinovski I*, 321 Mich App at 751, fn. 6. The Court in *Kostadinovski II* considered itself bound by that decision. Furthermore, the panel's remand instructions in *Kostadinovski I* specified that the circuit court was to apply *Bush* and its construction of MCL 600.2301 to determine if an amendment of plaintiffs' notice of intent would be appropriate to comply with §2912b's notice requirement. The *Kostadinovski I* remand instructions further stated that if the circuit court determined that amendment of the notice of intent was not appropriate under *Bush* and MCL 600.2301, "the court's prior futility analysis relative to plaintiffs' motion to amend the complaint shall stand and the motion to amend the complaint shall be denied, ending the case. . ." 321 Mich App at 753. Based on that restriction in the *Kostadinovski I*'s remand instructions, the Court in *Kostadinovski II* concluded that it could not consider plaintiffs' alternative argument that compliance with §2912b's notice requirement could be achieved by doing what defendants suggested should be done – filing a new notice of intent containing the additional theories that plaintiffs sought to add by amendment.

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ARGUMENT

The lower courts presented with the legal issues involved in this case have had multiple opportunities to decide this case correctly. They have not. In fact, the courts below have not even come close to deciding this case correctly. As will be seen, there are at least four distinct reasons why the circuit court's and the Court of Appeals' treatment of the issues presented in this case has been wrong.

On the previous occasions that this case was before this Court, the Court deemed it necessary to take a closer look at this case, granting oral argument on the parties' applications for leave. The Court now needs to take an even closer look at what is a totally unjust and totally inappropriate result.

I. THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER MCL 600.2912b HAS ANY APPLICATION TO A PROPOSED AMENDED COMPLAINT IN A MALPRACTICE ACTION SEEKING TO ADD NEW THEORIES OF RECOVERY AGAINST AN EXISTING DEFENDANT.

The circuit court has twice ruled in this case that plaintiffs could not amend their complaint to allege new theories against the defendants because that amendment was futile due to the operation of MCL 600.2912b, the notice of intent statute. The Court of Appeals initially reversed the circuit court's denial of plaintiffs' motion to amend, ruling that the plaintiffs' right to amend their complaint was dependent on whether the plaintiffs could achieve compliance with §2912b by meeting the requirements of this Court's decision in *Bush v Shabahang*. *Kostadinovski I*, 321 Mich App at 746-754. The second time this case was before the Court of Appeals, the panel affirmed the circuit court's determination that this Court's ruling in *Bush* did not represent a basis on which the plaintiff could achieve compliance with §2912b's notice requirement. *Kostadinovski II* (Exhibit K), at 4-7.

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The lower courts have, therefore, concentrated their attention on the question of *how* the plaintiffs, in seeking to amend their complaint to add new theories of liability against already-named defendants, can achieve compliance with §2912b's notice requirement. But, the preliminary question the lower courts should have been addressing is *whether*, in seeking to amend their complaint to add these additional theories, the plaintiffs were required to comply with §2912b.

The lower courts did not need to reach the question of how plaintiffs could meet the dictates of the notice of intent statute. There was a much simpler reason why plaintiffs should have been allowed to amend their complaint – the notice of intent statute has no application to additional theories asserted against existing defendants added to a medical malpractice case through an amendment of the complaint. This is an important issue of Michigan law that should be addressed by this Court.

The central assumption underlying the lower courts' rulings in this case is that §2912b actually applies to additional theories of recovery pleaded against existing defendants that are added to a malpractice case by amendment. This basic assumption that lies behind the rulings below is incorrect.[3] The substance of the notice of intent requirement is set out in the first subsection of §2912b. That subsection provides:

> 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

[3]The Court of Appeals in *Kostadinovski II* was constrained by law of the case principles from addressing this preliminary question. *See* fn. 2, *supra*. But even that Court seemed to express some degree of doubt about the law it was compelled to apply. The panel noted in its March 11, 2021 opinion, "Plaintiffs sought to amend the complaint to add a new theory of liability which was not alleged in the initial complaint; such an amendment *arguably* also would require an amendment of the Notice of Intent to sue. . ." *Kostadinovski II* (Exhibit K), at 4 (emphasis added).

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section not less than 182 days *before the action is commenced.*

MCL 600.2912b(1) (emphasis added).

MCL 600.2912b clearly compels a medical malpractice plaintiff to provide to a prospective defendant a notice of his/her intent to sue *prior to commencing* a circuit court action. The time frame in which the notice of intent statute operates is absolutely clear from its text. MCL 600.2912b specifies the nature of the notice that a plaintiff must provide to the defendant "*before the action is commenced."* Thus, §2912b's notice requirement applies at a time before suit is filed; it does not apply to an amended complaint filed later in the proceedings against an already-named defendant.

This conclusion is reinforced by another subsection of the notice of intent statute, §2912b(3). That provision addresses the situation in which the plaintiff in an already-pending medical malpractice action seeks to add a new defendant to the case. MCL 600.2912b(3) establishes that where the plaintiff adds a new defendant by amendment to a pending medical malpractice action, that new defendant must first be mailed a notice of intent and the plaintiff must then wait a prescribed period of time - 91 days - before filing suit against that new defendant.

Thus, while §2912b decrees the nature of the notice that a prospective medical malpractice plaintiff must provide *before* commencing a suit as well as the notice that a plaintiff must provide if he/she seeks to amend an existing complaint to add a new defendant, §2912b contains no provision dictating that a party who amends a complaint to raise new theories of recovery against an already-named defendant must provide advance notice of such claims and also comply with §2912b's mandatory waiting period.

By its express language, §2912b has no application to the situation presented in this case in

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which the plaintiffs fully complied with §2912b before suit was commenced[4] and later sought to add new theories by amendment against a defendant previously named in the case. The circuit court's conclusion that the amendment plaintiffs requested would be futile under §2912b fails for the simple reason that this statute, by its unambiguous wording, has no application to the amendment that plaintiffs proposed.

The caselaw with respect to §2912b confirms the meaning of the literal language of that statute and its inapplicability to an amended complaint that does not name a new defendant. This Court explicitly recognized in *Roberts v Mecosta County General Hospital (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004), that §2912b "precludes a medical malpractice claimant from *commencing* suit against a health professional. . . unless written notice is provided to that professional . . . *before the action is commenced*." *Id*. at 685 (emphasis added). *See also Boodt v Borgess Medical Center*, 481 Mich 558, 562-563; 751 NW2d 44 (2008) ("a plaintiff cannot *commence* an action before he or she files a notice of intent that contains all of the information required under §2912b(4))" (emphasis added); *Morrison v Dickinson,* 217 Mich App 308, 317; 551 NW2d 449 (1996), (noting that §2912b, "simply mandates notice *before a complaint is filed*.") (emphasis added); *Neal v Oakwood Hospital Corp*., 226 Mich App 701, 718; 575 NW2d 68 (1997), ("§2912b(1) . . . merely provides a brief temporal restriction *before suit may be commenced*.")

[4]In the papers that they filed in the circuit court, defendants conceded (as they had to) that plaintiffs' notice of intent mailed in December 2013 fully complied with §2912b at least as to the theories that were pleaded in the plaintiffs' original complaint. The assertions of professional negligence claimed in that notice of intent perfectly matched the allegations of malpractice alleged in plaintiffs' original complaint. *See* Notice of Intent (Exhibit A), at 10-11; Complaint (Exhibit B), ¶69a-g. Moreover, prior to commencing their malpractice action in June 2014, plaintiffs waited the appropriate period of time required by §2912b. Thus, plaintiffs' notice of intent and complaint fully complied with §2912b at the one point in time that this statute actually matters, *i.e.*, at the time *before* the commencement of the cause of action.

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(emphasis added).[5]

These cases serve to confirm that §2912b's notice requirement must be satisfied at one particular point in time in the litigation process - *before any suit is filed.* The notice of intent statute says nothing about what a plaintiff must do in amending a complaint to add a new theory against an existing defendant. Nothing in the text of §2912b supports the lower courts' conclusion that a plaintiff must comply with §2912b both "before the action is commenced," as that statute expressly provides, and also at some later point in the litigation process when an amended theory against an already-named defendant is added to a case.[6]

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[5]In addition to these decisions, there are numerous other cases describing §2912b as requiring a *presuit* notice. *See e.g. Mayberry v General Orthopedics, P.C.*, 474 Mich 1, 8; 704 NW2d 69 (2005); *Progress Michigan v Attorney* General, 506 Mich 74, 105; 954 NW2d 475 (2020) (McCormack, CJ, concurring); *Ligouri v Wyandotte Hospital*, 253 Mich App 372, 374; 655 NW2d 592 (2002); *Rheaume v Vandenberg*, 232 Mich App 417, 420; 591 NW2d 331 (1998). It is, therefore, unremarkable (and at the same time rather remarkable in light of the ultimate conclusion it reached) that the Court of Appeals twice in its March 11, 2021 decision affirming the circuit court's ruling that plaintiffs had not complied with §2912b could refer to the notice required by §2912b as "presuit notice." *Kostadinovski II* (Exhibit K), at 4, 5.

[6]At one point in time, a panel of the Court of Appeals correctly interpreted the unambiguous language of §2912b, as it found that this statute did not apply to amended complaints. In *Decker v Rochowiak*, 287 Mich App 666; 791 NW2d 507 (2010), the Court of Appeals held:

> Thus, *plaintiff was only required under MCL 600.2912b(1) to provide the statutory notice before she commenced her lawsuit* against these same defendants and it is undisputed that the requisite notice was provided. *Plaintiff was not required to file a second notice of intent with regard to these defendants after she was granted leave to file her amended complaint*, a complaint which merely clarified plaintiff's claims against the Spectrum defendants. *The purpose of the notice requirement - to promote settlement without the need for formal litigation - cannot be realized under these circumstances.*
>
> *Id*. at 681 (emphasis added).

Somehow, *Decker*, a decision that unquestionably contains the clearest indication that the presuit

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As is true of any other statute, in interpreting §2912b, a court is prohibited from adding language to that statute that the Legislature failed to include. *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 72; 894 NW2d 535 (2017) ("nothing may be read into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."); quoting *Roberts v Mecosta County General Hospital*, 466 Mich 57, 63; 642 NW2d 663 (2002). The Court has also emphasized repeatedly that where a statute's language is clear, "we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *Omelenchuck v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002); *Martin v Beldean*, 469 Mich 541, 546; 677 NW2d 312 (2004). Here, the Legislature has passed a statute that, with one exception not applicable here, imposes a burden on a malpractice plaintiff only *before* such a case is commenced. It was error for the courts below to apply that statute beyond its literal text to apply to the amended complaint that plaintiffs sought to file in this case.

The suggestion that an amendment to a medical malpractice complaint to add a new theory against an existing defendant must comply with the requirements of §2912b is not only at odds with the text of that statute, it is also inconsistent with the basic rationale behind this statutory notice provision. As this Court recognized in *Bush*, the purpose of the notice of intent statute is to "promote[] settlement without the need for formal litigation." 484 Mich at 174; *see also Driver v Naini*, 490 Mich 239, 254; 802 NW2d 311 (2011).[7]

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notice required by §2912b does not apply to an amended complaint, became the basis for footnote 6 in *Kostadinovski I*, the footnote in which the Court of Appeals' d,isposed of plaintiffs' argument that §2912b has no application to an amended complaint asserting new theories against an already-named defendant. *Kostadinovski I*, 321 Mich App at 751-752, fn. 6.

[7]Plaintiff would note that this stated purpose behind §2912b has found its way into both Court of Appeals decisions in this case. *Kostadinovsk I*, 321 Mich App at 746; *Kostadinovski II*

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The unambiguous text of §2912b must control this case. Plaintiffs would again ask this Court to take up the preliminary question of whether §2912b's notice requirement applies to the filing of an amended complaint which only seeks to add new theories of recovery against an already-named defendant.

II. ASSUMING THAT §2912b APPLIES TO A REQUEST TO AMEND TO ADD NEW THEORIES AGAINST AN EXISTING DEFENDANT, THE COURTS BELOW ERRED IN ASSESSING HOW PLAINTIFFS WERE TO ACHIEVE COMPLIANCE WITH §2912b'S NOTICE REQUIREMENT.

There is another, independent reason why the amendment that plaintiffs have proposed would not be futile because of the purported failure to comply with §2912b's notice requirement. It is important to note that this additional reason was urged *by the defendants* in a brief that they filed in this Court the first time this case was before this Court.

The position that defendants took in this case with respect to the purported futility of plaintiffs' proposed amendment transformed rather substantially while this case was making its way up the appellate ladder for the first time. When this case was originally in the circuit court, the defendants argued that plaintiffs' proposed amendment to add two new theories could only be allowed in a manner consistent with §2912b if those new theories had been contained in the notice of intent that was mailed before the case was filed. Response (Exhibit D), at 6-9.

On appeal, the defendants dramatically altered their position. By the time this case got to the this Court following the Court of Appeals October 2017 decision, defendants discarded any suggestion that the amended theories that plaintiffs sought to add would be futile because these

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(Exhibit K), at 5. Neither one of these decisions paused to consider the ramifications of this stated purpose.

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theories were not contained in plaintiffs' December 2013 notice of intent. Instead, defendants took the position in briefing before this Court that plaintiffs could have easily avoided any such futility.[8]

The defendants, in their November 2018 Supplemental Brief to this Court, made the following statement as to three "options" that the parties were offering as to how this case could be approached so that a proposed amendment could achieve compliance with §2912b's notice requirement:

> This case involves the procedure when a plaintiff gives notice of one claim, but later wants to add an entirely new claim against an existing defendant. The parties and the Court of Appeals have come up with three options:
>
> (1) Plaintiffs must serve a notice for the new theory, wait the notice period, and then move to amend their complaint.
>
> (2) Plaintiffs are free to amend new claims into their complaint even if they weren't in a notice.
>
> (3) Plaintiffs may amend their original notice under MCL 600.2301 to include the new claims and then address whether they can amend their complaint.

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[8]The reason why the defendants altered their position when this case reached this Court for the first time was fairly obvious. In the circuit court, the defendants had argued a truly radical position that the circuit court adopted. They contended in that court that a plaintiff in a medical malpractice case could *never* amend his/her complaint to add a new theory of liability uncovered during the course of discovery unless that theory was set out in the presuit notice. Since *no* presuit notice will ever contain a theory of liability that is first uncovered during discovery, the defendants were advocating (at least in the circuit court) the position that no amendments to add new theories developed in discovery would *ever* be allowed in medical malpractice cases. Thus, defendant's original position in this case would have dictated the conclusion that, regardless of what additional evidence turned up in the course of discovery, the theories to be pursued in a medical malpractice case would, in essence, be "frozen" six months before suit was even filed, when the presuit notice required by §2912b was prepared. Defendants' appellate counsel was well aware of the fact that this Court would never adopt such a view of the law. Hence, the defendants' substantial change of position in this Court when it acknowledged to the Court that plaintiffs could easily comply with §2912b's notice requirements in these circumstances merely by filing a new notice of intent containing the additional theories that plaintiffs sought to add by amendment and then waiting the prescribed period of time before filing their amended complaint.

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Defs' Supplemental Brief (Exhibit G), at 1.

What defendants asserted in this Court was that the relatively simply solution to this entire case was to be found in the first of these three options. As the defendants stated later in their Supplemental Brief to this Court: "The cure for the Kostadinovski's problem was simple - serve an NOI that described the new claim and wait the notice period. Nothing prevented Kostadinovski from doing so." Supplemental Brief (Exhibit G), at 20.

What the defendants argued the first time this case was in this Court was directly at odds with what defendants had asserted in the circuit court originally. When this case was first before that court, defendants argued that the amendment that plaintiffs proposed was futile *unless* the amended claims were also contained in plaintiffs' original notice of intent. Response (Exhibit D), at 6-9. But, by the time this case got to this Court, the defendants conceded that there was a very simple way for plaintiffs to avoid this purported futility. All plaintiffs had to do was draft a new notice of intent containing the new theories that plaintiffs sought to add by amendment, wait the mandatory waiting period applicable under §2912b,[9] and then file their amended complaint.

For the reasons that have been discussed in the previous section of this brief, plaintiffs were not required to follow the procedure that the defendants advocated before this Court. But, if §2912b

[9]The precise measurement of the mandatory waiting period that would apply in this context further highlights the inapplicability of §2912b that was discussed in the prior section of this brief. If, as defendants conceded, plaintiffs could achieve compliance with §2912b by filing a new notice of intent containing the theories to be added by amendment and then, "wait the notice period," Supplemental Brief (Exhibit G), at 20, the question that would be presented is how long would that notice period be? MCL 600.2912b(1) calls for a 182-day notice period prior to commencing suit and §2912b(3) calls for a 91-day period where the plaintiff seeks to amend the complaint to name a new defendant. Neither of these provisions apply to these facts. So, a court fixing the length of the notice period under the defendants' theory of how plaintiffs could have complied with §2912b would necessarily be choosing between two textually inapplicable time periods in setting the "appropriate" notice period in a case such as this.

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does apply to the amendment that plaintiffs sought in this case, it was totally inappropriate for the circuit court and the Court of Appeals to conclude that this amendment had to be rejected as futile for failure to comply with §2912b's notice provision.

The defendants have conceded in this Court that plaintiffs could comply with §2912b's notice requirement by making a new notice of intent and waiting the notice period before filing an amended complaint. In light of that concession, it was totally inappropriate for the circuit court and the Court of Appeals to conclude that plaintiffs' request to amend was futile because plaintiffs could not file an amended complaint that satisfied the dictates of §2912b. The defendants have acknowledged that this assessment was wrong; if §2912b applies to the amendment the plaintiffs proposed, compliance with §2912b's notice requirement can be easily achieved.

Thus, if the Court were to find that §2912b does, in fact, apply to an amended complaint adding new theories of recovery against an already-named defendant, plaintiffs should have been given the right to achieve that compliance in the manner that defendants acknowledged in their November 2018 brief to this Court. Under these circumstances, it was totally inappropriate for the circuit court and the Court of Appeals to conclude that the amendment was futile because it could not comply with §2912b's notice requirement.

III. ASSUMING THAT PLAINTIFFS' PROPOSED AMENDMENT HAD TO COMPLY WITH §2912b'S NOTICE REQUIREMENT, THIS COURT'S DECISION IN *BUSH* PROVIDED A BASIS FOR COMPLYING WITH THAT STATUTE.

As addressed in the last two sections of this brief, the Court of Appeals in its decisions in this case erred in concluding that §2912b on its notice requirement applies in this case. But, even if it did, that compliance could be achieved by the filing of a new notice of intent containing the new theories

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that plaintiffs asked to add by amendment.

The Court of Appeals in *Kostadinovski I* identified another method of complying with §2912b grounded in this Court's 2009 decision in *Bush*. The Court of Appeals held in its October 24, 2017 decision that this Court's decision in *Bush* "controls our analysis" on the question of whether plaintiffs should have been allowed to amend their complaint to allege new theories of recovery that were not included in their original notice of intent. *Kostadinovski I*, 321 Mich App at 750.

In *Bush*, the Court found that the plaintiff's presuit notice of intent did not fully comply with the requirements of the notice of intent statute, §2912b(4). 484 Mich at 178-181. The issue the Court was asked to decide in *Bush* was "what a court must do when presented with a defective NOI." *Id*., at 170. The defendant in *Bush* argued that a defective notice of intent should result in the dismissal with prejudice of the plaintiff's malpractice claims. This Court in *Bush* rejected that argument.

The Court in *Bush* began its analysis by noting that §2912b was "silent regarding the consequences of filing a defective NOI." 484 Mich at 172. And, after examining the legislative history behind §2912b and the presuit notice requirement, the *Bush* Court determined that "the Legislature did not intend for a defect in an NOI to be grounds for dismissal with prejudice based on §2912b." 484 Mich at 173.

The Court in *Bush* ruled, instead, that the Revised Judicature Act provided a mechanism for curing any defects in a notice of intent through the amendment of that notice. The basis for the right to amend identified by the Court in *Bush* was a Michigan statute, MCL 600.2301, which provides:

The court in which any action or proceeding is pending, has power to amend any

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> process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.
>
> MCL 600.2301.

MCL 600.2301 gives a court the authority to amend any "process, pleading or proceeding" in the furtherance of justice. The Court ruled in *Bush* that the mailing of a notice of intent is part of the "process" or "proceeding" of a malpractice case and could, therefore, be amended under §2301. 484 Mich at 176. The *Bush* Court further found that §2301 required application of a two-pronged test governing circumstances in which a court should permit the amendment of a notice of intent to correct a defect in that notice:

> 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.
>
> *Id*., at 177-178.

This Court in *Bush* held that the first of these two requirements - whether a substantial right of a party is implicated by the amendment - is met in medical malpractice cases based on the nature of notice of intent and the sophistication of the doctors and institutions served with such notices:

> Given that NOIs are served at such an early stage in the proceedings, so-called "defects" are to be expected. The statute contemplates that medical records may not have been turned over before the NOI is mailed to the defendant. Defendants who receive these notices are sophisticated health professionals with extensive medical background and training. Indeed, these same defendants are allowed to act as their

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> own reviewing experts. A defendant who has enough medical expertise to opine in his or her own defense certainly has the ability to understand the nature of claims being asserted against him or her even in the presence of defects in the NOI. Accordingly, we conclude that no substantial right of a health care provider is implicated.
>
> *Id*., at 178.

The Court in *Bush* ruled that the second prong of the analysis under §2301, which requires that the amendment be in "the furtherance of justice," is satisfied where a party "makes a good-faith attempt to comply with the content requirements of §2912b." 484 Mich at 178. Thus, the Court found in *Bush* that it is only when a plaintiff in preparing his/her original notice of intent "has not made a good faith attempt to comply with §2912b(4) that a trial court should consider dismissal of an action without prejudice." 484 Mich at 178.

Applying this two part test, the Court went on to rule in *Bush* that, despite the fact that the plaintiff's notice of intent in that case was found to be defective under §2912b(4), plaintiff had made a good faith attempt to comply with §2912b(4) in drafting his original notice. 484 Mich at 179-181. As a result, the Court held in *Bush* that any defect in a plaintiff's notice of intent could be corrected through amendment. On that basis, the Court ruled that the plaintiff's cause of action was not to be dismissed because of a defect in the presuit notice.

In its October 24, 2017 decision in *Kostadinovski I*, the Court of Appeals found the defendants' challenge to the addition of the two theories that plaintiffs sought to add by amendment had to be governed by the analysis employed by this Court in *Bush*. The Court of Appeals reasoned that what the defendants were arguing was that plaintiffs' presuit notice was "defective" for not containing the additional theories that they sought to add to the case by amendment. Thus, the Court of Appeals held in *Kostadinovski I*:

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> If MCL 600.2301 is implicated and potentially applicable to save a medical malpractice action when an NOI is defective because of a failure to include negligence or causation theories required by MCL 600.2912b(4), then, by analogy, MCL 600.2301 must likewise be implicated and potentially applicable when an NOI is deemed defective because it no longer includes the negligence or causation theories required by MCL 600.2912b(4) and alleged in the complaint due to a postcomplaint change in the theories being advanced by a plaintiff as a result of information gleaned from discovery.
>
> 321 Mich App at 750.

On remand, the circuit court and the Court of Appeals seriously misapplied the two-part *Bush* test in refusing to allow plaintiffs to file an amended notice of intent to comply with §2912b. On the first of the two considerations mandated by *Bush* - whether a substantial right of the party is implicated - the circuit court concluded that allowing plaintiffs to amend their notice of intent would deprive defendants of a substantial right: "the right to receive a written NOI and the right to a 182-day notice period [before] a medical malpractice action can be commenced against them." Opinion and Order (Exhibit H), at 5.

Based on this reasoning, the circuit court ruled that the first of *Bush*'s two-part test weighed against allowing an amendment of the plaintiffs' notice of intent because plaintiffs' original notice did not contain the theories that plaintiffs sought to add by amendment:

> In this case, Plaintiffs' NOI failed to allege a breach of the standard of care with regard to an entirely new theories of liability, the failure to monitor hypotension levels during the operation and the failure to transfuse the patient as a potential cause of injury. Unlike *Bush*, where the plaintiff's defective NOI included enough information to give the defendants notice of the asserted claims, it is undisputed that Plaintiffs' NOI did not include *any information* about this newly asserted theories of medical malpractice liability.
>
> *Id*., at 7.

The Court of Appeals upheld this aspect of the circuit court's ruling. The Court of Appeals

held that this prong of the *Bush* analysis weighed in favor of the defendants because, "[n]owhere in the NOI or complaint did plaintiffs refer to Drago's hypotension in the failure to transfuse Drago during the procedure." *Kostadinovski II* (Exhibit K), at 6.

Thus, both the circuit court and the Court of Appeals held that the first aspect of the *Bush* Court's analysis had to be construed in the defendants' favor because there was no mention of the theories that plaintiffs sought to add by amendment in plaintiffs' notice of intent or their original complaint.

The problem with this analysis is that theories of liability that are uncovered in a medical malpractice action during the course of discovery will *never* be included in the plaintiffs' presuit notice of intent or the original complaint. This analysis, therefore, completely ignores this Court's discussion of this observation that began its own analysis of this first factor in *Bush*. The Court, in addressing whether a substantial right of the opposing party is implicated, observed, . . . : "[g]iven that NOI's are served at such an early stage in the proceedings, so-called 'defects' are to be expected." *Bush*, 484 Mich at 178.

The circuit court and the Court of Appeals concluded that the first *Bush* factor was to be decided in defendants' favor because plaintiffs were attempting to raise new theories that had not been pleaded in their original complaint. But, as this Court acknowledged in *Bush*, notices of intent are filed months before a case has even been filed, usually before all relevant records have been obtained and certainly before *any* discovery has been taken. Just as *Bush* recognized that at this earliest of stages in the process errors can be made, it stands to reason that the first *Bush* factor cannot weigh against amendment of the notice of intent where that amendment is designed to add to the case new theories of liability that have been developed through the course of discovery.

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If the circuit court and the Court of Appeals were correct, a new theory of recovery developed during the course of discovery would *never* satisfy the first prong of the *Bush* test. This is because, under their misguided analysis, a new theory of discovery that was uncovered for the first time during discovery will *always* be one that was not included in plaintiff's original notice of intent. Thus, the manner in which the courts below interpreted this first prong of the *Bush* test could *never* support the amendment of a notice of intent to add a new theory of liability developed during discovery.

This reasoning runs directly contrary to a simple observation this Court made in *Roberts v Mecosta County General Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004). In *Roberts*, the Court noted that a notice of intent must be mailed months before the case is even filed, before any discovery on the claim has been conducted and most likely before all relevant documents have been obtained. Under these circumstances, the Supreme Court in *Roberts* recognized that it is impossible to expect that such a notice could be "crafted . . . with omniscience." *Id*., at 691. Yet, that is exactly what the Court of Appeals reasoning in this case would require of a plaintiff. A plaintiff must draft a notice of intent with complete omniscience, including in that notice not only all theories supportable at that time the notice is being prepared, while also anticipating every possible theory that could be developed during the discovery that is to follow.

The second prong of the *Bush* test for the amendment of a notice of intent focuses on whether the plaintiffs in drafting their original notice of intent "made a good faith attempt to comply with the content requirements of §2912b." 484 Mich at 178. This question should have been resolved in favor of the plaintiffs for one simple reason - plaintiffs' original notice of intent *did* comply with the content requirements of §2912b at the time it was drafted. The defendants have never suggested that,

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in terms of the allegations contained in plaintiffs' original complaint, the notice of intent mailed by plaintiffs' counsel in December 2013 was in any way defective. That notice only became "defective" in defendants' view when it failed to include the two theories of liability that plaintiffs sought to add by amendment. Thus, there really could be no dispute as to the plaintiffs' good faith in drafting the presuit notice.

In its decision in *Kostadinovski I*, the Court of Appeals specifically recognized why this second *Bush* factor had to be decided in plaintiffs' favor. The panel recognized that this was a particularly appropriate case for the application of the amendment process set out in *Bush* and §2301 since plaintiffs' original notice of intent was *not* defective as to the claims included in the original complaint:

> There is no sound or valid reason that the principles from *Bush* should not be applied here. Indeed, as a general observation, the factual circumstances are even more compelling for the invocation of MCL 600.2301 when an NOI is not defective from the outset but becomes defective because discovery has shed new light on the case and given rise to a new liability theory.
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> 321 Mich App at 750-751.

Despite the clear direction provided on this point in this Court's October 2017 decision, the circuit court on remand and the Court of Appeals in its March 11, 2021 decision concluded otherwise. The circuit court first found in its November 2018 decision that it could disregard *Bush* because "Plaintiff's NOI wholly failed to allege any facts regarding the failure to monitor Mr. Kostadinovski's low blood pressure and transfuse him. Accordingly, this Court finds *Bush* is distinguishable." Opinion (Exhibit H), at 9.

In making this observation, the circuit court was apparently of the view that a "good faith" compliance with the requirements of §2912b demanded that plaintiffs not only mail a notice of intent

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that fully complied with that statute with respect to the theories of liability asserted in the original complaint, but that presuit notice also had to contain the theories of recovery that plaintiffs sought to add to the case by amendment.

The circuit court, ignoring the Court of Appeals explicit indication in *Kostadinovski I* as to how the "good faith" component of the *Bush* test should have been resolved, added the following:

> Moreover, the Court does not find Plaintiffs' claim of "good faith" premised on the assertion that the NOI was not defective from the outset because it included all of the allegations raised in the complaint to be persuasive. The Court of Appeals expressly rejected Plaintiffs' argument that §2912b "simply requires the service of an NOI before suit is filed and that once this is accomplished through the service of a proper and compliant NOI, *as judged at the time suit is filed and by the language in the original complaint*, the requirements of the statute have been satisfied, absent the need to revisit the NOI even if a new theory of negligence or causation is later developed that was not included in the NOI and that forms the basis of an amended complaint." *Kostadinovski*, 321 Mich App at 751, fn. 6. As stated by the Court of Appeals, "the approach suggested by plaintiffs would undermine the legislative intent and purpose behind MCL 600.2912b." *Id*. Plaintiff makes the same argument but now in the context of the "good faith" prong of the *Bush* test. This Court similarly finds that such an approach, especially where Defendants substantial rights have been implicated as in this case, would undermine the legislative intent and purpose behind MCL 600.2912b.
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> Opinion (Exhibit H), t 9-10.

The circuit court misapplied the second prong of this Court's *Bush* test. The precise issue under consideration for purposes of the second prong of the *Bush* analysis focuses on the question of whether the original notice of intent that plaintiffs mailed was drafted in good faith. This inquiry has absolutely nothing to do with the question of whether the amendment of the notice of intent that the plaintiffs seek would "undermine the legislative intent and purpose behind MCL 600.2912b" as the circuit court suggested.

What this Court decided in *Bush* was that courts in this state would apply a two-part test

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under §2301 in determining under what circumstances the requirements of §2912b would be satisfied through the amendment of a notice of intent. What the circuit court did, instead, was to ignore this two-part test offered by this Court in *Bush* (not to mention the Court of Appeals express directive in *Kostadinovski I* as to how the second prong of this two-part test was to be applied in this particular case) and determine at some nebulous level that the amendment of plaintiffs' notice of intent "would undermine the legislative intent and purpose behind MCL 600.2912b." Opinion (Exhibit H), at 10.

Finally, the circuit court suggested in its November 18, 2019 ruling that there was no support for plaintiffs' claim that the new theories of liability they were seeking to add by amendment were developed during discovery. Opinion (Exhibit H), at 10-11.

The Court of Appeals affirmed the circuit court on this aspect of the *Bush* test as well, concluding that there is "nothing in its fact finding in that regard that is clearly erroneous." The Court of Appeals ruled, based on a stilted examination of the trial court record, that this aspect of the *Bush* test weighed in defendants' favor because, "the NOI simply did not address a theory of liability that plaintiffs could have made but did not." *Kostadinovski II* (Exhibit K), at 6.

Thus, according to the Court of Appeals, "plaintiffs did not uncover the facts supporting their hypotension and profusion claims during discovery; at best, discovery confirmed what they already suspected. . ." *Id.*, at 7. Thus, like the circuit court, the Court of Appeals apparently came to the conclusion that the second of the *Bush* factors should be decided in defendants' favor because plaintiffs' counsel should have been able to ascertain the theories that he later sought to add by amendment at the time counsel filed the original complaint.[10]

[10]The analysis employed by the circuit court and the Court of Appeals on the second *Bush* factor, suggesting that plaintiffs' counsel was somehow remiss in failing to identify at the presuit stage the additional theories that plaintiffs later sought to add by amendment, is completely

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This represents a rather flattering view of the medical sophistication of plaintiffs' counsel at the time he was drafting the notice of intent since it would mean that plaintiffs' counsel had a greater understanding of Dr. Harrington's potential malpractice than Dr. Harrington had. Plaintiffs presented evidence that Dr. Harrington in his depositions was unable to say if he had been advised of certain readings during the course of Mr. Kostadinovski's surgery. Nor was Dr. Harrington able to say, based on the perfusionist's records, whether any blood had been administered to Mr. Kostadinovski while he was on the heart/lung machine. The answers to these two questions had to await the completion of the deposition of the perfusionist, Ms. Masinick. That deposition was taken in December 2015 and, three months later, plaintiffs filed the motion to amend their complaint that is the subject of this appeal.

The Court of Appeals asserted in its March 11, 2021 opinion that the theories that plaintiffs sought to add by amendment were merely theories that plaintiffs' counsel "already suspected." *Kostadinovski II* (Exhibit K), at 7. Presumably, the Court of Appeals was of the view that counsel's "suspicions," in the absence of actual evidence to support those suspicions is what is supposed to

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unmoored to the reality of medical malpractice litigation. The circuit court on remand and the Court of Appeals in its March 2021 decision appeared to be operating under the impression that a plaintiff's attorney in a medical malpractice action talks to the client, examines the available records and then drafts a notice of intent. This is not the way the process works. What happens in this area is that, after discussing the case with the client and gathering the available records, the case is sent out to be examined by a qualified expert. It is on the basis of what that expert reports that the notice of intent is generated. In drafting the notice of intent, plaintiffs' counsel is relying on the information provided by the expert and what gets put into the notice of intent is what is reported as a potential theory of liability by the expert. Thus, in a case such as this one, had an expert at the presuit stage identified Mr. Kostadinovski's hypotension or the failure to perfuse him during surgery as potential breaches of the standard of care, *these theories would have been included in the notice of intent*. But, despite the lower courts' suggestion that these additional theories could have been identified as potential malpractice claims in the presuit period, does not in any way reflect on plaintiffs' or plaintiffs' counsel's good faith in not including them when a retained expert does not identify these as potential theories of liability.

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find its way into a notice of intent and ultimately a complaint. That may be what the Court of Appeals believes, but it would appear that MCR 1.109(D) might well counsel that, beyond suspicions, allegations that are contained in a complaint should have at least some factual support behind them. In this case, Dr. Harrington's deposition and the follow-up deposition of Ms. Masinick demonstrate that the *facts* needed to support the theories that plaintiffs sought to add by amendment were not present in this case until discovery was conducted.

For the reasons discussed in the first two sections of this brief, there was no reason (other than the *Kostadinovski I* misguided remand order) for the circuit court or the Court of Appeals to address whether compliance with §2912b's notice requirement required consideration of this Court's decision in *Bush*. But, if consideration of the *Bush* factors was relevant to the question of whether §2912b was complied with here, the circuit court and the Court of Appeals erred in their treatment of this issue.

IV. THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE CIRCUIT COURT'S DISMISSAL OF PLAINTIFFS' CLAIMS SHOULD HAVE BEEN WITHOUT PREJUDICE.

The final argument that plaintiffs made for reversal of the circuit court's ruling was also based on this Court's *Bush* decision. The Court made it clear that in that case that, even if a notice of intent is deemed defective in some respect, the dismissal *with* prejudice of the plaintiffs' claim based on such a defect is not appropriate. 484 Mich at 174-175. Instead, the Court held in *Bush* that "only when a plaintiff has not made a good faith attempt to comply with §2912b(4) should a court consider dismissal of an action without prejudice." 484 Mich at 178 (emphasis added). The end result of a defective notice of intent is therefore, at most, a dismissal of the claim without prejudice.

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See also Swanson v Port Huron Hospital (On Remand), 290 Mich App 167, 181; 800 NW2d 101 (2010).

Thus, in a situation covered by *Bush*, even if the plaintiffs are unable to satisfy the two-part test for the application of §2301, the end result would *not* be the dismissal of the plaintiffs' claims *with* prejudice. Rather, the dismissal would be without prejudice to the plaintiffs' right to refile those claims. The same thing should hold true here where the plaintiff seeks to add theories by an amendment of the complaint. Obviously, *Bush* did not involve a theory that the plaintiff sought to add by amendment; it was a case in which the original complaint was possibly subject to dismissal because of a failure to comply with the requirements of §2912b. But, *Bush*'s holding that, at most, non-compliance with §2912b gives rise to a dismissal *without* prejudice should have been given effect in this context as well.

To be consistent with the Court's ruling in *Bush,* what the circuit court should have done to comply with this aspect of the *Bush* holding is that, rather than granting summary disposition on plaintiffs' case, the court should have ordered the dismissal of the claims that plaintiffs sought to add by amendment *without* prejudice to plaintiffs' right to bring a separate claim based on these theories.

The Court of Appeals grasped the essence of this Court's holding in *Bush*, noting that plaintiffs' argument for a dismissal without prejudice "may be true as a general matter." *Kostadinovski II* (Exhibit K), at 7. The Court of Appeals ruled, however, that plaintiffs could not obtain dismissal of these claims without prejudice.

The Court of Appeals predicated this conclusion on the fact that the circuit court on April 25, 2016 issued an order granting summary disposition on the theories of liability pleaded in plaintiffs' original complaint. Opinion and Order (Exhibit E). According to the Court of Appeals, "by the time

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the trial court ruled on plaintiffs' motion to amend, it had already dismissed plaintiffs' initial claims with prejudice." *Kostadinovski II* (Exhibit K), at 7.

This is a true statement; the April 25, 2016 order dismissed the claims contained in plaintiffs' original complaint with prejudice. But, that order also specifically indicated that it was not the final order in the case since the circuit court still had under advisement plaintiffs' request to amend their complaint. Order (Exhibit E).

The final circuit court order in this case was the November 18, 2019 Opinion and Order that rejected plaintiffs' request to amend their complaint. Contrary to the Court of Appeals conclusion, there is nothing in the April 25, 2016 order, which addressed only the claims contained in plaintiffs' original complaint, that would have any impact on plaintiffs' argument that, on the basis of this Court's reasoning in *Bush*, the November 2019 denial of plaintiffs' right to amend their complaint should have been without prejudice to plaintiffs right to pursue *these* claims in a subsequent case.

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RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellants, Drago Kostadinovski and Blaga Kostadinovski, request that this Court grant leave to appeal and give full consideration to the legal issues presented in this application. In the alternative, plaintiffs request that this Court summarily 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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Dated: April 22, 2021