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State of Michigan

In the Supreme Court

DRAGO KOSTADINOVSKI and BLAGA KOSTADINOVSKI, as Husband and Wife,	Supreme Court No. 162909 Court of Appeals No. 351773
Plaintiffs-Appellants,	
v.	Macomb County Circuit Court No. 14-2247-NH Hon. Kathryn A. Viviano
STEVEN D. HARRINGTON, M.D. and ADVANCED CARDIOTHORACIC SURGEONS, P.L.L.C.,	
Defendants-Appellees.	**Filed under AO 2019-6**

Defendant-Appellees Steven D. Harrington, M.D. and Advanced Cardiothoracic Surgeons, P.L.L.C.'s Answer to Application for Leave to Appeal

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Attachment Index

Attachment	*Title*
1	Perfusion Record
2	Opinion and Order dated Nov. 18, 2019

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Counterstatement Regarding Jurisdiction

Defendants-appellees Steven D. Harrington, M.D. and Advanced Cardiothoracic Surgeons, P.L.L.C. do not contest this Court's jurisdiction to consider plaintiffs-appellants Drago and Blaga Kostadinovski's application for leave to appeal.

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Counterstatement of Questions Presented

Issue I

> Once again, Kostadinovski[1] argues that notice of one claim is notice of all claims. It's a novel way to subvert the legislated notice requirement for medical-malpractice claims. The Court of Appeals rejected Kostadinovski's argument in a published opinion. After supplemental briefing and argument, this Court denied leave to appeal. Kostadinovski's current application repeats the argument. Could he add entirely new claims without giving defendants the opportunity to address them outside of formal litigation?

Plaintiffs-appellants answer, "yes."

Defendants-appellees answer, "no."

The trial court answered, "no."

The Court of Appeals answered, "no."

Issue II

> The notice statute doesn't require plaintiffs to get permission from the court (or anyone else) to send a notice. And it contemplates that a plaintiff may send more than one notice. Despite that, Kostadinovski never sent a new notice for his new hypotension claims. Was Kostadinovski prevented from sending a new notice?

Plaintiffs-appellants answer, "yes."

Defendants-appellees answer, "no."

The trial court answered, "no."

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[1] Blaga Kostadinovski's loss-of-consortium claim is derivative of her husband's claims. So, for simplicity, this brief refers to Drago Kostadinovski as "Kostadinovski."

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The Court of Appeals answered, "no."

Issue III

> Kostadinovski tried to raise claims that weren't in his notice of intent to sue. He had the medical record that the claims are based on from the outset, but, for unknown reasons, he didn't send it to his medical expert. He also could have but didn't send a new notice for the new claim. Based on those facts and defendants' substantial right to notice, was relief under MCL 600.2301 required?

Plaintiffs-appellants answer, "yes."

Defendants-appellees answer, "no."

The trial court answered, "no."

The Court of Appeals answered, "no."

Issue IV

> Kostadinovski stipulated to dismissing his pleaded claims with prejudice. The trial court denied him leave to amend his complaint to add new claims. Should his new claims, which weren't dismissed, have been dismissed without prejudice?

Plaintiffs-appellants answer, "yes."

Defendants-appellees answer, "no."

The trial court answered, "no."

The Court of Appeals answered, "no."

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Introduction

This case returns two years after this Court heard argument on the parties' cross-applications and denied them. Kostadinovski's lead argument is unchanged—he says that the Court of Appeals published opinion in the prior appeal is wrong. This Court already gave that issue more attention than most. While not binding, this Court's prior leave denial isn't meaningless. This Court decided to leave the Court of Appeals' precedential rejection of Kostadinovski's argument in place. Kostadinovski's re-argument of that issue doesn't merit additional time and resources from this Court.

After his rehashed lead argument, Kostadinovski raises only a series of arguments unique to him, which doesn't merit this Court's review. Kostadinovski says that the trial court should have allowed him to send a new notice of intent to sue before the first appeal. But no one, including the trial court, prevented him from doing so. He simply chose not to send a new notice, which leads to the next point.

Kostadinvoski's argument for amendment of his notice under MCL 600.2301 is unique to him. Plaintiffs who send a new notice for theories uncovered during discovery don't need to rely on that statute. Blind to that reality, Kostadinovski argues that amendment to add a new claim under MCL 600.2301 must always be permitted; the trial court had no discretion, he says. He's wrong.

Whether to grant relief under MCL 600.2301 is a matter of discretion; it always has been. And the trial court's written opinion exemplifies a proper exercise of discretion. It's backed by two of this Court's opinions (that Kostadinovski has never addressed) and the reality that Kostadinovski could have sent a new notice. The court also debunked Kostadinovski's assertion that the claim was first revealed during discovery. None of that evinces an abuse of discretion.

Last, Kostadinvoski argues that the trial court should have dismissed his new claims without prejudice. But the trial court didn't dismiss or grant summary disposition on the new claims. Kostadinovski

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stipulated to dismissing his pleaded claims with prejudice. The trial court denied leave amend the complaint to add the new claims. Because the new claims weren't dismissed, Kostadinovski's argument that they should have been dismissed without prejudice is misguided.

While the medical-malpractice-law overlay obscures it, the result in this case is unremarkable. Kostadinovski litigated a claim for nearly two years. Though he knew of entirely new claims at least eight months earlier, he moved to add them when discovery was closed and defendants moved for summary disposition. Trial courts don't abuse their discretion when they deny amendments under those circumstances. Because the result is unremarkable and none of Kostadinovski's issues hold jurisprudential significance, this Court should deny leave to appeal.

Counterstatement of Facts

A. Kostadinovski served an NOI and filed a complaint alleging medical-malpractice claims that his experts refused to support.

In December 2011, Dr. Harrington performed a minimally invasive surgery rather than open-heart surgery on Kostadinovski's mitral valve. (Complaint, ¶¶35-36). Dr. Harrington performed the surgery with the assistance of a da Vinci robot and used an EndoClamp. (*Id.*, ¶¶35-36, 41-42). Kostadinovski suffered a stroke after the surgery. (*Id.*, ¶53).

In December 2013, Kostadinovski served an notice of intent to sue. It was expressly based on Kostadinovski's medical records:

> The statements set forth in this Notice are based upon entries made within the records of Henry Ford Macomb Hospital, Dr. Harrington, Dr. Al-Zagoum, M.D., Cardiovascular Institute of Michigan, Advanced Cardiothoracic Surgeons, PLLC, the Hartford Rehabilitation Institute, and Dr. Abas Jafri. [NOI, p. 2].

The notice also provided specific details of the surgery from those records. (NOI, pp. 5-6).

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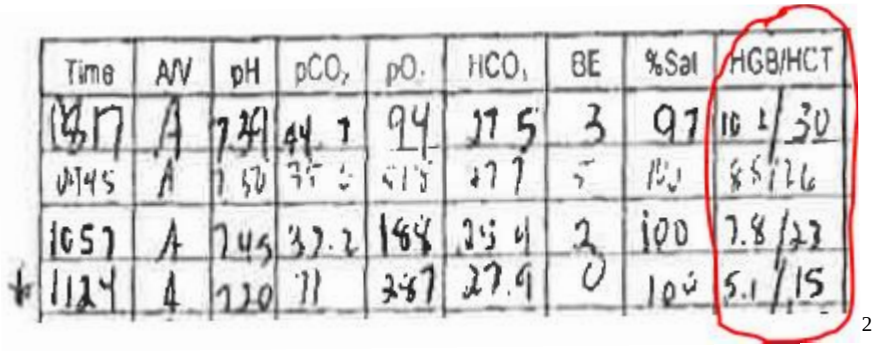
The notice claimed that Dr. Harrington should have discovered a clot in Kostadinovski's arterial tree before the surgery, which, Kostadinovski alleged, should have led Dr. Harrington to determine that he couldn't use an EndoClamp during the surgery. (NOI, pp. 10-11). The causation theory was that the EndoClamp "broke[] loose" a clot that moved to his brain, causing his stroke. (NOI, pp. 13-14; see also Complaint, ¶¶75-77).

After waiting the applicable notice period, Kostadinovski filed a complaint with an affidavit of merit from Dr. Edgar Chedrawy, a cardiothoracic surgeon, in June 2014. The claim alleged in the complaint and the affidavit of merit were identical to the notice. (NOI, pp. 10-11; Complaint, ¶70; Dr. Chedrawy Affidavit of Merit, ¶10). Kostadinovski's wife alleged a derivative loss-of-consortium claim. (Complaint, ¶¶81-82).

The parties worked together to schedule and complete Dr. Harrington's deposition, which took time due to his busy surgery schedule.

In July 2015, which was after Dr. Harrington's first deposition, Kostadinovski's attorney "alerted" defense counsel to a new theory based on Kostadinovski's blood pressure during the surgery. (3/28/16 Hrg. Tr., p. 6 ("I alerted Mr. Manion … on July the 8th there may be an issue with regard to the perfusionist issue …."). The new theory was that Dr. Harrington failed to recognize and address Kostadinovski's low blood pressure (hypotension) during the surgery and that led to his stroke. (Proposed Amended Complaint, ¶¶45-46, 71(g)-(h), 72(g)-(h), 80). But Kostadinovski didn't move to amend his NOI or the complaint at that point.

Kostadinovski's hypotension theory was based on a surgical record. (**Attachment 1**, Perfusion Record). His attorney questioned Dr. Harrington about the record during his second deposition. (Dr. Harrington Dep., vol. II, pp. 154-155). The surgical record (shown below) has a very legible change from 7.8/23 to 5.1/15 in the relevant category, which was the basis for Kostadinovski's hypotension claim:



Time	A/V	pH	pCO_2	pO_2	HCO_3	BE	%Sat	HGB/HCT
1817	A	7.39	44.7	94	27.5	3	97	10.2/30
0745	A	7.50	[illegible]	[illegible]	27.7	5	[illegible]	8.5/26
1057	A	7.45	37.2	188	25.4	2	100	7.8/23
* 1124	A	7.20	71	287	27.9	0	100	5.1/15

[2]

Kostadinovski's counsel read from the perfusion record when questioning Dr. Harrington:

> Q. So if the patient's – if the patients' hemoglobin was running at 5 during a number of the blood draws and it got up to 6 or 7 but never above 8 during the entire operation would that surprise you?
>
> A. That would surprise me.
>
> * * *
>
> Q. … From 11:24 up until 11:51 the patient's hemoglobin was reported on three separate occasions as being 5.1, correct?
>
> A. It would appear that way, yes. (Dr. Harrington Dep., vol. II, pp. 151, 155).

The perfusion record didn't include a blood-unit number or time entry for a transfusion:

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[2] The perfusionist put the asterisk next to the reading at 11:24 during the surgery. See Masinick Dep., pp. 43-44, 66.

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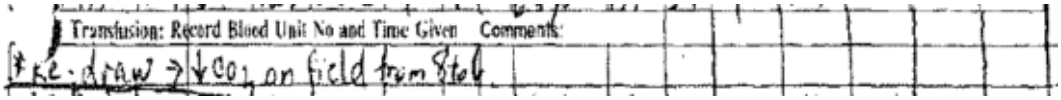
Transfusion: Record Blood Unit No and Time Given Comments:
Pre-draw → ↓CO2 on field from Stat.

Kostadinovski didn't send the perfusion record to his expert for his initial review—for unexplained reasons. (Dr. Chedrawy Dep., pp. 26, 31-32). He also didn't depose the perfusionist, who monitored blood pressure during surgery and created the record, until December 2015.

When Kostadinovski's experts were deposed in early 2016, they didn't support the pleaded claim. Dr. Chedrawy, who signed the affidavit of merit, and Dr. Louis Samuels testified that the conduct alleged in the complaint didn't violate the standard of care. (Dr. Chedrawy Dep., pp. 28-29; Dr. Samuels Dep., pp. 45-46). Likewise, Kostadinovski's causation expert, Dr. Thomas Naidich (a neuroradiologist), testified that he didn't see any evidence of a clot in the imaging studies of Kostadinovski's brain. (Dr. Naidich Dep., pp. 36-37, 42-43). It was a complete abandonment of the claims that Kostadinovski used to initiate this action.

B. Kostadinovski stipulated to summary disposition on his pleaded claims, but moved to amend his complaint to add claims that he never put in a notice of intent to sue.

Dr. Harrington and Advanced Cardiothoracic moved for summary disposition and to preclude Kostadinovski from pursuing new theories. Kostadinovski stipulated to dismiss his pleaded claims with prejudice. (Order, dated April 25, 2016). But he moved to amend his complaint to raise completely new claims: that Dr. Harrington breached the standard of care by "fail[ing] to appreciate Mr. Kostadinovski's hypotensive [low blood pressure] status and transfuse the patient" during surgery, which, he claimed, led to "inadequate supply of oxygen and nutrients" to Kostadinovski's brain and caused his stroke. (Proposed Amended Complaint, ¶¶45-46, 71(g)-(h), 72(g)-(h), 80).

Kostadinovski didn't move to amend his notice of intent or request relief under (or even cite) MCL 600.2301. The parties' arguments focused on MCR 2.118, specifically whether amending the complaint was futile and whether Kostadinovski unduly delayed seeking the amendment.

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C. The trial court denied leave to amend the complaint because it was futile to add a new claim that Kostadinovski never put in an notice of intent to sue.

The trial court issued a written opinion. (Opinion and Order, dated Apr. 29, 2016). Though the amendment would relate back to the original complaint, (*id.*, pp. 3-6),[3] the court held that the amendment was futile because Kostadinovski didn't comply with the notice requirements for the new claim. (*Id.*, pp. 8-9). Since the futility analysis was dispositive, the court didn't address the undue-delay issue.

D. The Court of Appeals reversed based on relief that Kostadinovski didn't request and a statute that he didn't cite in the trial court.

Kostadinovski appealed, arguing that the notice statute doesn't apply to amended complaints because, if it did, he would have been required to draft his notice with omniscience. (Kostadinovski Brief on Appeal in Docket No. 333034, pp. 7-19). Dr. Harrington and Advanced Cardiothoracic explained that the notice statute applied and omniscience wasn't required—Kostadinovski could have sent a new notice when he discovered the new claims. (Defendants Brief on Appeal in Docket No. 333034, p. 17). The court rejected Kostadinovski's argument, explaining that it wasn't supported by Michigan law and conflicted with the purpose of the notice requirement. *Kostadinovski v Harrington*, 321 Mich App 736, 752 n 6; 909 NW2d 907 (2017) ("*Kostadinovski I*").

But Kostadinovski's appeal brief also raised a new issue. He argued that, even if the notice statute applied to his hypotension claims, the trial court erred because it should have allowed him to amend his notice under MCL 600.2301 and *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009). (Kostadinovski Brief on Appeal in Docket No. 333034, pp. 19-23). He omitted that he never cited MCL 600.2301 or asked to amend his notice in the trial court. (*Id.*).

Dr. Harrington and Advanced Cardiothoracic explained that Kostadinovski waived relief under MCL 600.2301 because he didn't raise

[3] Defendants didn't dispute this point in the prior appeal.

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it in the trial court. (Defendants Brief on Appeal in Docket No. 333034, pp. 18-19). But the panel, without mentioning waiver or addressing the lack of preservation, framed the issue as "whether the *Bush* Court's application of MCL 600.2301 in a case involving a defective NOI governs the approach to be applied in the context of the procedural circumstances present in the instant case …." *Kostadinovski I*, 321 Mich App at 746. It held that "*Bush* controls our analysis" and MCL 600.2301 was "potentially applicable:"

> 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. [*Kostadinovski I*, 321 Mich App at 750.]

The panel expressed no opinion on whether relief under MCL 600.2301 was warranted: "We conclude that it would not be proper for us to conduct the analysis under MCL 600.2301 in the first instance; that, at least initially, is the trial court's role, which we shall not intrude upon." *Id.* at 753 n 7. It also made it unmistakable that, absent relief under MCL 600.2301, Kostadinovski's request to amend his complaint was futile:

> 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** …. [*Id.* at 753.]

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In other words, the trial court's futility analysis and ruling were correct based on the arguments presented to it.

E. This Court denied both parties' request for leave to appeal.

Dr. Harrington and Advanced Cardiothoracic filed an application for leave to appeal in this Court. Kostadinovski filed a cross-application for leave to appeal. This Court ordered argument on the application and the cross-application. *Kostadinovski v Harrington*, 503 Mich 869; 917 NW2d 403 (2018). But it denied both after the oral argument. *Kostadinovski v Harrington*, 503 Mich 1009; 925 NW2d 202 (2019).

F. On remand, the trial court denied relief under MCL 600.2301.

The parties submitted supplemental briefs to the trial court on remand. After hearing argument and taking the matter under advisement, the court issued a written opinion. It held that relief under MCL 600.2301 wasn't warranted and, as the Court of Appeals directed, denied Kostadinovski leave to amend his complaint. (**Attachment 2**, Opinion and Order, pp. 11-12).

The court explained that whether to grant relief under MCL 600.2301 "rests on the two-pronged test set forth in *Bush*, specifically: (1) whether a substantial right of a party is implicated and (2) whether a cure is in the furtherance of justice." (*Id.*, p. 3). It rejected Kostadinovski's argument that medical-malpractice defendants' substantial rights are never implicated under *Bush*. "[T]he Michigan Supreme Court has recognized that the Legislature's enactment of [MCL 600.2912b] granted healthcare providers 'substantial rights' …" (*Id.*, p. 5, citing *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011) and *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68; 869 NW2d 213 (2015). Plus, "[u]nlike *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 theor[y] of medical malpractice liability." (Attach. 2, Opinion and Order, p. 7). So *Bush* wasn't dispositive and "Defendants' substantial rights are implicated." (*Id.*).

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The court also concluded that relief under MCL 600.2301 wouldn't be in the furtherance of justice. Kostadinovski argued that his original notice showed good faith. The trial court rejected that argument for the same reasons the Court of Appeals rejected his argument based on his original notice:

> 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. [*Id.*, p. 10.]

Kostadinovski also never even attempted to send a new notice for the new claim. (*Id.*, p. 8).

In addition, the court debunked Kostadinovski's argument that the new claim was based on information obtained during discovery. The new claim is based on Kostadinovski's surgical records, which his notice states were reviewed and provides specific details from. (*Id.*, pp. 10-11, citing NOI, pp. 2, 5-6). So "the record demonstrates that the relevant medical records were in [Kostadinovski's] possession before the NOI and complaint were drafted." (Attach. 2, Opinion and Order, p. 11). Kostadinovski claimed that the perfusion record wasn't legible. But "it was legible enough for Plaintiffs' counsel to ask Dr. Harrington questions about Mr. Kostadinovski's HGB/HCT levels at his deposition." (*Id.*). He also used it during the perfusionist's deposition and the court was "able to read and consider" it. (*Id.*). Last, Kostadinovski didn't cite any specific testimony that he needed before he could send an NOI raising the new theory. (*Id.*). So the court concluded that "amendment of the NOI or disregard of the prospective NOI defect is not 'in the furtherance of justice.'" (*Id.*).

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Based on *Bush*'s two-prong test, the court found "that § 2301 is not applicable in this case." (*Id.*). So, as the Court of Appeals directed, it denied Kostadinovski leave to amend his complaint. (*Id.*, p. 12).

G. The Court of Appeals affirmed the trial court's ruling.

The Court of Appeals (Judges Swartzle, Markey, and Tukel) affirmed. *Kostadinovski v Harrington*, unpublished per curiam opinion of the Court of Appeals, issued March 11, 2021 (Docket No. 351773) ("*Kostadinovski II*").

The panel agreed with the trial court's distinction of *Bush*. *Kostadinovski II*, slip op, p. 6. The notice "in *Bush*, although defective, still included enough information for the defendants to understand the nature of the claims raised against them." *Id.* This case is "quite different" because Dr. Harrington and Advanced Cardiothoracic couldn't understand the nature of Kostadinovski's new hypotension claims from his notice. *Id.* So "the trial court did not err when it concluded that defendants' substantial interests were implicated." *Id.*, citing *Tyra*, 498 Mich at 92 and *Driver*, 490 Mich at 255.

The panel also agreed with the trial court's rejection of Kostadinovski's argument on good faith. Kostadinovski argued that his "original NOI was drafted in good faith because it was drafted on the basis of the information [he] had at the time." *Kostadinovski II*, slip op, p. 6. But the record "belies any claim by plaintiffs that the trial court erred in finding that discovery was unnecessary to uncover these claims." *Id.* As the panel observed, "the NOI simply did not address a theory of liability that plaintiffs could have made but did not." *Id.*

The panel also disposed of Kostadinovski's arguments that denying amendment means that medical-malpractice plaintiffs can never raise claims uncovered during discovery and that his new claims should have been dismissed without prejudice. Kostadinovski could have sent a new notice and he stipulated to the with-prejudice dismissal of his pleaded claims. *Id.*, p. 7.

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Standard of Review

Kostadinovski's application doesn't address the standard of review. This Court reviews a ruling on a motion to amend a complaint for an abuse of discretion. *Weymers v Khera,* 454 Mich 639, 654; 563 NW2d 647 (1997). Likewise, this Court reviews the denial of relief under MCL 600.2301 for an abuse of discretion. *Fred Gibbs, Inc v Old Colony Ins Co*, 30 Mich App 352, 355; 186 NW2d 396 (1971); see also *McLaughlin v Aetna Life Ins Co of Hartford, Conn*, 221 Mich 479, 486; 191 NW 224 (1922) ("The denial of the motion [to amend] was within the discretion of the trial court and will not be reviewed by this court");[4] *Konstantine v City of Dearborn*, 280 Mich 310, 314; 273 NW 580 (1937) ("[T]his matter of amending the pleadings is one of discretion with the trial court" and "such matters should not be disturbed except upon a showing of an abuse of discretion.");[5] *Simonelli v Cassidy*, 336 Mich 635, 639; 59 NW2d 28 (1953) ("[A]mendment to pleadings may be ordered in the discretion of the court ….").[6]

The abuse-of-discretion standard "'involves far more than a difference in judicial opinion.'" *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007), quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004). It acknowledges that "[t]here are circumstances where a trial court must decide a matter and there will be no single correct outcome; rather, there may be more than one reasonable and principled outcome." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). The trial court only abuses its discretion when "its decision falls outside this range of principled outcomes." *Id.*

[4] Applying predecessor statute, 3 Comp Laws 1915, § 12478.
[5] Applying predecessor statute, 3 Comp Laws 1929, § 14144.
[6] Applying predecessor statute, Comp Laws 1948, § 616.1.

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Argument

A. This Court was right to deny leave the first time. Kostadinovski's argument doesn't reconcile with the statutory text, the purpose of the notice requirement, or case law.

Kostadinovski would like this Court to hold that notice of one claim is notice of all claims. It's a fix for a problem unique to him. There's was a simple way for Kostadinovski (and all plaintiffs like him) to avoid needing such a fix—send a new notice when the new claim is discovered. Because he didn't send a new notice for his hypotension claims, Kostadinovski is asking this Court to effectively overrule three published Court of Appeals opinions and part of this Court's opinion in *Bush*.

There are several reasons to deny leave. Those reasons start with the text of the notice statute and include preserving the purpose of the notice requirement. Add that this Court already received supplemental briefing and oral argument on the issue and decided to leave the published opinion rejecting Kostadinovski's argument in place. This issue doesn't warrant more of this Court's time and resources.

1. The notice statute's structure and purpose.

The notice statute, MCL 600.2912b, gives medical-malpractice defendants a "statutory right to a timely [notice of intent to sue] followed by the appropriate notice waiting period." *Tyra v Organ Procurement*, 498 Mich 68, 92; 869 NW2d 213 (2015), quoting *Driver v Naini*, 490 Mich 239, 255; 802 NW2d 311 (2011). It's written in mandatory terms. Plaintiffs must give "written notice under this section." MCL 600.2912b(1). That notice must "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

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> 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**. [MCL 600.2912b(4) (emphasis added).]

The content of the written notice is claim specific. The notice statute doesn't require the plaintiff to describe merely "a" claim. The plaintiff must state the "factual basis for **the claim**" and identify the would-be defendants receiving notice "in relation to **the claim**." MCL 600.2912b(4)(a), (f) (emphasis added). Between those bookends, the statute requires the plaintiff to describe "the applicable standard," how it was breached, and how that breach was "the proximate cause." MCL 600.2912b(4)(b)-(e).

The purpose of the notice requirement is to promote settlement without the expense and burdens of formal litigation. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997). Defendants can't consider and settle a claim outside of litigation if they don't receive notice of it. So, to effectuate the notice statute's purpose, plaintiffs are prohibited from commencing an action on a claim if they didn't give the statutorily required notice of it. MCL 600.2912b(1); *Boodt v Borgess Med Ctr*, 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 the information required under § 2912b(4).").

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A related concept is that notice of one claim isn't notice of all claims. So, for example, *Gulley-Reaves v Baciewicz*, 260 Mich App 478; 679 NW2d 98 (2004) ordered summary disposition when the plaintiff's complaint added a vicarious-liability claim against a hospital that wasn't in the NOI that the plaintiff sent to the hospital. *Id.* at 485 ("[T]he complaint must be limited to the issues raised in the notice of intent ....").

In *Gulley-Reaves*, the plaintiff served a notice on a hospital asserting that it was vicariously liable for a surgeon and residents. But her complaint added a claim that the hospital was vicariously liable for an anesthesiologist and nurse anesthetist. The hospital moved for partial summary disposition, arguing that the notice deficiently described the anesthesia claims. The trial court denied the motion. The Court of Appeals held that the notice was deficient and reversed. The notice statute specifically "contemplates that additional notices of intent may be filed." *Gulley-Reaves*, 260 Mich App at 486, citing MCL 600.2912b(6). The plaintiff didn't serve a notice adding the anesthesia claim. So she "failed to provide notice of the claim of breach of the standard of care with regard to administration of anesthesia" and "the trial court erred in denying defendants' motion for summary disposition." *Id.* at 490.

Gulley-Reaves didn't involve a proposed amendment to a complaint. But *Decker v Rochowiak*, 287 Mich App 666; 791 NW2d 507 (2010) did.

In *Decker*, the court allowed an amended complaint that "merely clarified plaintiff's claims against the Spectrum defendants." *Id.* at 681. The plaintiff served several defendants with a notice of intent to sue. After filing his complaint and conducting some discovery, the plaintiff moved to amend his complaint. He argued that the amendment "merely clarified allegations and issues." *Id.* at 671. The trial court and the Court of Appeals agreed with him.

The Court of Appeals repeatedly stated that *Gulley-Reaves* didn't apply because the amendments didn't set forth a new potential cause of the injury:

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- "Contrary to the Spectrum defendants' argument, plaintiff's subsequently filed **amended complaint did not assert any 'new' potential causes of injury**." *Id.* at 678 (emphasis added).

- "[T]he allegations in plaintiff's amended complaint **merely set forth more specific details, clarifying plaintiff's claims** against the Spectrum defendants, including the registered nurses and physicians involved in Eric's medical management." *Id*. (emphasis added).

- "Unlike the plaintiff in *Gulley-Reaves*, plaintiff's amended complaint **did not allege any other potential cause of Eric's injury**." *Id.* at 680 (emphasis added).

- "**This is not a case where, as in *Gulley-Reaves*, the plaintiff set forth a totally new and different potential cause** of injury in an amended complaint compared to the potential cause of injury set forth in her NOI …." *Id.* (emphasis added).

- The Court rejected the defendants' argument that the plaintiff had to wait out a new NOI period because, "The amended complaint did not name new defendant parties, MCL 600.2912b(3), and **it did not set forth any new potential causes of injury**." *Id.* at 681 (emphasis added).

Decker's analysis leaves no doubt that if the amendment had set forth a new claim, it wouldn't have been allowed.

2. Though he could have, Kostadinovski didn't send a new notice for his new claim.

Gulley-Reaves and *Decker* are rooted in the text and purpose of the notice statute. MCL 600.2912b. Again, the statute is mandatory and there's

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no dispute that Kostadinovski didn't send a notice with any of the detail required for his hypotension claims. MCL 600.2912b(4)(a)-(e).

There was a simple way for Kostadinovski to comply with the notice statute: he could have sent a new notice. The notice statute specifically "contemplates that additional notices of intent may be filed." *Gulley-Reaves*, 260 Mich App at 486, citing MCL 600.2912b(6).[7] Kostadinovski didn't send one, so he can't maintain a malpractice action based on the hypotension claims. *Gulley-Reaves*, 260 Mich App at 490; *Boodt*, 481 Mich at 562-563.

3. The text of the notice statute doesn't support Kostadinovski's argument.

Kostadinovski argues that the notice statute didn't apply to his new claim because he gave sufficient notice of the claims that he abandoned. In other words, he argues that the notice statute only requires notice of "a" claim. He's wrong.

The statute requires specifics on "the claim" that the plaintiff intends to sue on. MCL 600.2912b(1), (4)(a). "The" is a definite article that has a "specifying or particularizing effect" when placed before a noun. *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010), quoting *Massey v Mandell*, 462 Mich 375, 382 n. 5; 614 NW2d 70 (2000). Kostadinovski never sent a notice for the hypotension claims. His argument only works if the statute requires notice of "a" claim; it doesn't.

In an effort to make the statutory text work for him, Kostadinovski questions which notice period would apply to his new notice. It's the usual 182-day notice period. The notice statute provides a shortened 91-day period when adding a new defendant. MCL 600.2912b(3). That

[7] MCL 600.2912b(6) prohibits "tacking or addition of successive 182-day periods." So, for example, if a plaintiff sends 3 notices, the notice period isn't 546 days. It's 182 days from each notice. Likewise, if a plaintiff sends a notice but discovers another claim before the original notice period expired, a new notice doesn't tack 182 days onto the original wait period. Each notice has its own 182-day notice period.

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balances the interests of those in litigation and those who would join it midstream. With an existing defendant, there's no competing interests to balance. So there's no exception. There's no need for one. A defendant can waive the notice period if he doesn't want to exercise his statutory right to 182 days. MCL 600.2912b(9). If he does, he gets the same benefit that he had for the original claim. The exception for claims against new parties doesn't support Kostadinovsi's argument.

4. Kostadinovski's argument undermines the purpose of the notice procedure.

As the Court of Appeals correctly stated, "the approach suggested by plaintiffs would undermine the legislative intent and purpose behind MCL 600.2912b." *Kostadinovski I*, 321 Mich App at 751 n. 6. If defendants aren't given notice of the claim, they can't consider and settle it "without resort to formal litigation." *Neal*, 226 Mich App at 705.

This case illustrates the point. Kostadinovski gave notice of meritless claims that his experts would later abandon. Dr. Harrington and Advanced Cardiothoracic, of course, didn't agree to settle those claims. If the trial court allowed Kostadinovski's proposed amendment, Dr. Harrington and Advanced Cardiothoracic would have been deprived of their statutory right to consider Kostadinovski's hypotension claims "without resort to formal litigation." *Neal*, 226 Mich App at 705.

Consider another scenario based on *Gulley-Reaves*. The plaintiff sends a hospital notice that he intends to sue based on a surgeon's alleged error. The parties are unable to resolve the claim during the notice period. After the plaintiff files his complaint and the hospital answers, he amends his complaint as of right to add a slew of theories alleging errors by nurses, anesthesiologists, and new surgical errors. The hospital had no opportunity to resolve those claims outside formal litigation. The notice procedure was a farce. That's where Kostadinovski's argument leads.

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5. Kostadinovski's argument fights with *Gulley-Reaves*, *Decker*, and this Court's holding in *Bush*.

Kostadinovski's argument would also upend established case law. He isn't only asking this Court to overrule *Kostadinovski I*. Adopting his argument would effectively overrule *Gulley-Reaves*, *Decker*, and *Bush*—all because Kostadinovski didn't send a new notice.

The Court of Appeals observed that "[i]f [Kostadinovski's argument] were the law, the entire analysis in *Decker* would have been completely unnecessary …." *Kostadinovski I*, 321 Mich App at 751 n. 6. *Decker* diligently compared the original and amended complaint to determine whether the plaintiff was adding a new claim. That was pointless if, as Kostadinovski contends, the plaintiff was free to add new claims regardless whether they were in a notice of intent to sue.

Gulley-Reaves's analysis would also become moot. Instead of putting new theories in their original complaint, plaintiffs could simply amend them in after the defendant answers. So even when plaintiffs discover a new theory **before** litigation, they wouldn't have to give the statutorily required notice of it, nor include it in their complaint. They would be encouraged to sandbag and add it in an amended complaint.

Kostadinovski's argument would gut *Gulley-Reaves* and *Decker*. But it wouldn't stop there. His argument would also make this Court's analysis in *Bush* moot.

In *Bush*, the plaintiff's notice of intent to sue sufficiently described several claims, but defectively described others. This Court held that plaintiffs can cure notice deficiencies under MCL 600.2301 if they satisfied a two-pronged test. *Bush*, 484 Mich at 177. Kostadinovski's argument says that MCL 600.2301 and its two-prong test were irrelevant. According to him, the plaintiff in *Bush* was free to add the defectively described claims in an amended complaint because he sufficiently described at least one claim. So, though he doesn't acknowledge it, Kostadinovski's argument effectively asks this Court to overrule *Bush*.

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6. Kostadinovski's two policy-based arguments don't withstand scrutiny.

Kostadinovski has offered two policy-based arguments. First, he argued that plaintiffs would need to be omniscient to comply with the notice requirement for claims uncovered during discovery. (Plaintiffs Cross-Application in Docket No. 156850, p. 13). Not true. Sending a new notice for the new claim doesn't require omniscience; it requires treating newly discovered claims like all other claims.

Second, Kostadinovski's fought the premise of a notice period—he argued that if plaintiffs who discover new claims during litigation must send a new notice, "the court, the lawyers and the litigants would be compelled to sit around for a period of six months presumably doing nothing while §2912b's mandatory waiting period expires." (Plaintiffs Cross-Application in Docket No. 156850, p. 15). That's hyperbolic and improperly dismissive of the legislated notice procedure.

If the parties don't embrace its purpose, the same dismissive critique could apply to the original notice period—it forces everyone to "sit around for a period of six months presumably doing nothing …." This Court doesn't share Kostadinovski's dim view of the notice period. It has emphasized that the notice period is a "statutory right" that courts cannot ignore. *Tyra*, 498 Mich at 92; *Driver*, 490 Mich at 255.

Kostadinovski's "presumably doing nothing" criticism is also overstated. Defendants can waive the notice period. MCL 600.2912b(9). If they don't, the parties can continue litigating the original claims during the notice period. For example, Kostadinovski's attorney knew about the new claim at least 8 months before he tried to raise it. (See 3/28/16 Hrg. Tr., p. 8). The waiting period wouldn't have delayed anything if he had sent a new notice 8 months earlier. Plus, any potential delay in a case is attributable only to defendants' statutory right to consider and attempt settlement before retaining experts and starting discovery on the claim. *Tyra*, 498 Mich at 92; *Driver*, 490 Mich at 255. That isn't a reason to excuse Kostadinovski or any other plaintiff from the notice requirement.

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7. Conclusion: Kostadinovski's argument is unworkable. It doesn't reconcile with the statutory text, the purpose of the NOI requirement, or case law.

Adopting Kostadinovski's argument would effectively wipe out *Gulley-Reaves*, *Decker*, and *Bush*. It would also subvert the notice requirement, undermine its purpose, and deny defendants their statutory right to notice. This Court already considered this issue in this case and, without dissent, denied leave. It should do so again.

B. It's too late for Kostadinovski to send a new notice.

Kostadinovski's second issue goes deep into the unique circumstances of his situation and far from jurisprudential significance. He argues that he "should have been given the right to achieve" compliance with the notice statute. (Application, p. 24). But he was given that right. No one prevented him from sending a new notice. Just like the notice he sent in December 2013, Kostadinovski didn't need anyone's permission to send a new notice. He never did. That's why his proposed amendment was futile.

Kostadinovski also says that it was "totally inappropriate for the [lower courts] to conclude that the amendment was futile because [he] could not comply with §2912b's notice requirement." (Application, p. 24). That isn't what they concluded. The lower courts held that his amendment was futile because Kostadinovski **did not** comply with the notice requirement.

Much of Kostadinovski's argument is dedicated to a now-recurrent canard. He says that defendants took a new position during the prior appeal that contradicted their trial court argument. It's a fictional story.[8]

Kostadinovski says that defendants originally argued that he was limited to his notice and, on appeal, they argued that he could have sent a new notice. There's no change in there. Kostadinovski sent only one

[8] Interestingly, Kostadinovski's argument for relief under MCL 600.2301 in the first appeal was the only new argument raised on appeal in this case.

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notice. So **he is** forever limited to the claims in his notice because that's the **only** notice that he sent. That has always been defendants' argument.[9]

Kostadinovski's story omits that he didn't articulate his argument that MCL 600.2912b doesn't apply or his omniscience argument until the appeal. He didn't address *Gulley-Reaves*, *Decker*, or *Bush* in the trial court at all. So when he finally explained his position on appeal, defendants explained its flaws, including that medical-malpractice plaintiffs who send new notices for their new claims don't face the problem that Kostadinovski does.

The point here is simple—Kostadinovski was free to send a new notice, but never did. The case is over. Kostadinovski stipulated to dismiss his pleaded claims with prejudice and the trial court denied his motion for leave to amend. That was the final order. MCR 7.202(6); (Plaintiff Brief on Appeal in Docket No. 351773, p. vi). It's too late for him to send a new notice. *Kostadinovski II*, slip op, p. 8 n.2.

C. The trial court did not abuse its discretion in denying relief under MCL 600.2301.

On remand, the trial court had to determine "whether amendment of the NOI or disregard of the prospective NOI defect would be appropriate" under MCL 600.2301. *Kostadinovski I*, 321 Mich App at 753. It applied the two-prong test established in *Bush* and denied relief under MCL 600.2301 for several reasons. Those reasons included that Kostadinovski had the information that he needed to raise the new claims when he filed this case and he could have raised them in a new notice months before he actually tried to raise them. Because the trial court

[9] In a footnote, Kostadinovski says that defendants' argument in the trial court was that medical-malpractice plaintiffs can never add claims uncovered during discovery. (Application, p. 22 n. 8). Malarkey. Defendants argued that Kostadinovski's "failure to adhere to the statutory mandates makes any proposed amendment futile …." (Defendants Response to Plaintiffs' Motion to Amend Complaint, p. 9). Their argument concerned Kostadinovski, not medical-malpractice plaintiffs in the abstract.

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didn't err, much less abuse its discretion, the Court of Appeals correctly affirmed.

1. Courts consider a two-pronged test when deciding whether to grant relief under MCL 600.2301.

MCL 600.2301 allows amendments or disregard of defects when doing so is for the furtherance of justice and wouldn't affect the parties' substantial rights:

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

Bush was the first case to endorse relief under MCL 600.2301 in decades. It allowed an amendment to better describe claims, not to add new claims. In *Bush*, "the vast majority of the plaintiff's NOI was in compliance with [the NOI statute]." 484 Mich at 178. It sufficiently described several claims against various defendants. But the notice also defectively described direct-liability theories concerning hiring and training:

> The notice merely provides that [West Michigan] Cardiovascular should have hired competent staff members and properly trained them.
>
> * * *
>
> Although plaintiff's notice alleges errors on the part of Spectrum Health's nursing staff and physician assistants, the notice does not purport

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> to state a separate standard of care for the nurses and physician assistants.
>
> * * *
>
> Likewise, to the extent that plaintiff purported to give notice that Spectrum Health could be held directly liable for Bush's injuries on the basis of the theories that it negligently hired or failed to train its staff, for the same reasons we explained with regard to [West Michigan] Cardiovascular, we conclude that the notice did not meet the requirements of MCL 600.2912b. [*Bush*, 484 Mich at 179-180, quoting *Bush v Shabahang*, 278 Mich App 703, 711; 753 NW2d 271 (2008).]

So the notice in *Bush* referred to the direct-liability claims, but it didn't fully describe them as required by the notice statute. *Bush*, 484 Mich at 179-180.

Bush considered whether MCL 600.2301 allowed the trial court to "amend" the notice or "disregard" the defects in it. This Court explained that "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." *Bush*, 484 Mich at 177.

In *Bush*, the defendants' substantial rights weren't implicated because they had "the ability to understand the nature of the claims being asserted against him or her even in the presence of defects in the NOI." *Id.* at 178. The notice stated that the defendant should have hired competent staff and properly trained them. *Id.* at 179. It simply didn't delineate the specific standards for doing so or how failure to do so led to the plaintiff's injury. *Id.* Amendment was in the furtherance of justice because the plaintiff "made a good-faith attempt to comply with the content requirements of § 2912b." *Id.* at 161, 180-181. In short, the notice gave enough information about the defectively described claims to give the defendants notice of them and show good faith.

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2. The trial court diligently applied *Bush*'s two-prong test to conclude that relief under MCL 600.2301 isn't warranted.

The trial court analyzed both prongs of *Bush*'s test. It determined that Kostadinovski couldn't satisfy either (much less both). So it denied relief under MCL 600.2301. It didn't abuse its discretion in doing so.

a. The trial court is correct that amendment of the notice or disregarding its defects would affect defendants' substantial rights.

The trial court concluded that granting relief under MCL 600.2301 would affect Dr. Harrington and Advanced Cardiothoracic's substantial rights. It followed two post-*Bush* Supreme Court decisions in acknowledging that the statutory notice procedure implicates a defendant's substantial rights. And it distinguished *Bush*. Its analysis was correct. Kostadinovski's criticism of it are the product of his truly unique circumstance.

Kostadinovski relies heavily on *Bush*. But the lower courts correctly distinguished it. *Kostadinovski II*, slip op, p. 6 ("That fact makes this case quite different from *Bush*, because the NOI in *Bush*, although defective, still included enough information for the defendants to understand the nature of the claims raised against them."); Attach. 2, Opinion and Order, pp. 11-12 ("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 th[ese] newly asserted theories of medical malpractice liability."). As the trial court stated, "*Bush* does not stand for the proposition that a healthcare provider's substantial rights cannot be implicated in a medical malpractice action." (Attach. 2, Opinion and Order, p. 6). Two of this Court's opinions after *Bush* confirm that statement.

In *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), this Court held that MCL 600.2301 can't cure the plaintiff's failure to serve an NOI during a lawsuit and before the limitation period expired on a claim against a nonparty. *Id.* at 255. In *Tyra v Organ Procurement*, 498 Mich 68; 869 NW2d 213 (2015), this Court held that MCL 600.2301 can't cure a

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plaintiff's failure to wait the NOI period before filing his or her complaint. *Id.* at 92.

Driver and *Tyra* emphasized that allowing the amendment "'would deprive defendants of their statutory right to a timely NOI followed by the appropriate notice waiting period." *Id.*, quoting *Driver*, 490 Mich at 255 (cleaned up). And both opinions held that doing so "would not be 'for the furtherance of justice' and would affect defendants' 'substantial rights.'" *Tyra*, 498 Mich at 92; *Driver*, 490 Mich at 254.

The trial court correctly followed *Tyra* and *Driver*. Depriving defendants of their statutory right to a notice of the claim and an opportunity to decide whether to resolve it outside of litigation affects their substantial rights. *Tyra*, 498 Mich at 92; *Driver*, 490 Mich at 254.

Kostadinovski ignores *Tyra* and *Driver*. He has never cited *Tyra*. And while he cites *Driver* (for the first time) in his application, he does so only for the purpose of a notice of intent. (Application, p. 20). He has never addressed *Driver*'s holding. See *Gonzalez-Servin v Ford Motor Co*, 662 F3d 931, 934 (CA 7, 2011) ("The ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist … is pointless." (quotation omitted)). Simply put, the lower courts didn't err in following this Court's precedent.

Ignoring *Driver* and *Tyra*, Kostadinovski argues that amending a notice under MCL 600.2301 can never affect a defendant's substantial rights. He says that the lower courts' analyses require omniscience. Two facts refute his premise: (1) he had the perfusion record when he sent the notice, but, for unexplained reasons, he didn't send it to his expert (Dr. Chedrawy Dep., pp. 26, 31-32), and (2) he could have sent a new notice.

Kostadinovski confuses requiring diligence with requiring omniscience. While notices may be sent "before all relevant records have been obtained," (Application, p. 29), this isn't a case in which the relevant record was unavailable when Kostadinovski sent his notice. Kostadinovski had the perfusion record and the relevant portions were legible. (Attach. 2, Opinion and Order, pp. 10-11; *Kostadinovski II*, slip op,

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p. 6). So this case pits defendants' statutory right to notice against Kostadinovski's unexplained failure to send the perfusion record to his expert. The trial court didn't abuse its discretion by favoring the statutory right to notice.

The trial court's analysis wouldn't prevent all medical-malpractice plaintiffs from raising new theories revealed through discovery. It just prevented Kostadinovski from denying Dr. Harrington and Advanced Cardiothoracic their right to notice of the hypotension claims when Kostadinovski had the relevant information from the outset and could have sent a new notice. See *Tyra*, 498 Mich at 92; *Driver*, 490 Mich at 254.[10] The trial court didn't abuse its discretion.

b. The trial court correctly determined that relief under MCL 600.2301 wouldn't be in the furtherance of justice because Kostadinovski hasn't shown good faith.

Relief under MCL 600.2301 "is in the furtherance of justice 'when a party makes a good-faith attempt to comply with the content requirements of [MCL 600.2912b]." (Attach. 2, Opinion and Order, p. 9, quoting *Bush*, 484 Mich at 178). Kostadinovski didn't show good faith for several reasons.

First, though he could have, "it is undisputed that Plaintiffs have never filed or served Defendants with an amended NOI." (Attach. 2, Opinion and Order, p. 8); MCL 600.2912b(6); *Gulley-Reaves*, 260 Mich App at 486. Based on that fact alone, the trial court didn't err in concluding that Kostadinovski didn't make a good-faith attempt to comply with the notice statute.

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[10] If relief under MCL 600.2301 were allowed, defendants would lose another substantial right—a statute-of-limitations defense. The hypotension claims would be time barred, but for Kostadinovski inexplicably filing a complaint with a false affidavit of merit. It's not an abuse of discretion to prevent a plaintiff from circumventing the statute of limitations with a false affidavit.

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Second, "the record demonstrates that the relevant medical records were in [Kostadinovski's] possession before the NOI and complaint were drafted." (Attach. 2, Opinion and Order, p. 11). The perfusion record is legible. (Attach. 2, Opinion and Order, p. 11; *Kostadinovski II*, slip op, p. 6; see Dr. Harrington Dep., vol. II, pp. 154-155). It shows a drop in hemoglobin and that no transfusion was given. (Attach. 1, Perfusion Record). And while the trial court gave him an opportunity to supplement the record, (8/19/19 Hrg. Tr., p. 59), Kostadinovski has never cited any specific testimony that he needed before he could send a new notice. (See Attach. 2, Opinion and Order, p. 11 ("Although Plaintiffs also claim that depositions were necessary before their new theory of medical malpractice liability based on the failure to adequately monitor Mr. Kostadinovski's hypotension and transfuse him, they cite to no specific testimony ….")).

Kostadinovski says that "the reality of medical malpractice litigation" is that "the case is sent out to be examined by a qualified expert" and the notice is based on "what that expert reports." (Application, p. 33-34 & n. 10). Fair enough. The reality in this case is that Kostadinovski didn't send his expert the perfusion record. (Dr. Chedrawy Dep., pp. 26, 31-32). He has never said why.

So, the point remains: Kostadinovski had the necessary information from the outset yet he didn't put it in his notice or send a new notice. The trial court wasn't required to find that he nevertheless made a good-faith attempt to comply with the notice requirement for his hypotension claims. Its conclusion that he didn't certainly wasn't an abuse of discretion.

3. The trial court's ruling aligns with over 100 years of this Court's precedent on MCL 600.2301 and its predecessor statutes.

MCL 600.2301 isn't a new statute. It has been in Michigan's statutory compilations since the mid-1800s. See *Bigelow v Walraven*, 392 Mich 566, 572; 221 NW2d 328 (1974). So it has over 100 years of precedent behind it. And that precedent aligns with the trial court's ruling.

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MCL 600.2301 used to govern all amendments in litigation. That changed when this Court adopted the court rules, which superseded MCL 600.2301 on certain filings like complaints. See *LaBar v Cooper*, 376 Mich 401, 407–08; 137 NW2d 136 (1965). Kostadinovski turned to MCL 600.2301 because the court rules don't permit amending notices of intent to sue. So the case law interpreting and applying MCL 600.2301 applies here, and it's more restrictive than the court rule.

Under MCL 600.2301, "[i]t is well settled that it is error to allow a declaration to be amended so as to introduce and set up a new cause of action." *Angell v Pruyn*, 126 Mich 16, 19; 85 NW 258 (1901); see *LaBar*, 376 Mich at 407 ("Under prior decisions, before adoption of the General Court Rules of 1963, we have generally followed the rule that an amendment which states a new cause of action is barred."). Even when the amendment involved the same type of claim, amendments to add a new or "separate and distinct" claim were prohibited. *id.*; *Conn Fir Ins Co v Monroe Cir Ct Judge*, 77 Mich 231, 236; 43 NW 871 (1889). A claim was new or distinct if it required different evidence. See *Angell*, 126 Mich at 19; *Conn Fir Ins*, 77 Mich at 236; 43 NW 871 (1889). In contrast, if the amendment was requested to "properly describe" the original claim, it was permitted. See *Jones v Pendleton*, 151 Mich 442, 444-445; 115 NW 468 (1908).

LaBar cited *Bockoff v Curtis*, 241 Mich 553; 217 NW 750 (1928) as an example of the rule under the statute. In *Bockoff*, the plaintiff's complaint alleged that it was malpractice to treat his recurrent pain with an injection in his sciatic nerve. During trial he presented an alternative theory: even if the treatment were appropriate, the defendant committed malpractice because he didn't obtain the plaintiff's informed consent. The jury returned a verdict for the plaintiff. This Court reversed and ordered a new trial because the alternative theory "state[d] a cause of action different in the nature of the liability and of the proofs needed to support it from that stated in the declaration …." *Id.* at 558.

LaBar also cited *Talbot v Stoller*, 366 Mich 296; 115 NW2d 81 (1962), in which this Court affirmed the denial of an amendment. The original claim was that the defendant negligently administered a drug that caused

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disfigurement. The amendment would have alleged that the injection was unnecessary and increased her risk of sarcoma, which caused her mental anguish. This Court rejected the amendment because "the theory of the action, the issues, the evidence, and the measure of damages would not be the same if the amendments were allowed." *Id.* at 301.

Over 100 years have passed and nothing has changed. *Bush* is an apt example of allowing an amendment to "properly describe" a claim. Again, the notice in *Bush* referred to the direct-liability claims, but it didn't fully describe them. See 484 Mich at 179-180. So *Bush* aligns with how this Court has always interpreted and applied MCL 600.2301. Kostadinovski's requested relief in this case doesn't; he seeks to add an entirely new theory based on different evidence.

Since the trial court's ruling aligns with over 100 years of this Court's precedent addressing MCL 600.2301's provisions, it didn't abuse its discretion. This Court should deny leave to appeal.

D. There's no issue involving dismissal with or without prejudice.

Kostadinovski asserts that "the circuit court's dismissal of [his] claims should have been without prejudice." (Application, p. 35). It's a misguided argument. Kostadinovski **stipulated to** dismissing his pleaded claims with prejudice. (Order, dated April 25, 2016; April 25 Hrg. Tr., p. 9). His new hypotension claims were not dismissed with or without prejudice; the court denied leave to amend his complaint to include those claims.

Since Kostadinovski stipulated to dismissing his claims with prejudice and the trial court didn't dismiss his hypotension claims, his argument that the trial court should have dismissed his hypotension claims without prejudice is misguided. At best, he's seeking a truly unique form of relief applicable to him and him only. That does not warrant this Court's review under MCR 7.305(B). Nor has Kostadinovski shown why such unique relief is warranted since he had numerous opportunities to properly raise his new claim from the beginning of the case.

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Conclusion

Kostadinovski portrays this case as something it's not. It isn't a case in which the plaintiff, though no fault of his own, was unable to raise a new theory in his original notice and complaint. Kostadinovski had the relevant information; he just didn't send it to his expert. This also isn't a case closing the door to the addition of claims uncovered during discovery in medical-malpractice cases. Kostadinovski could have sent a new notice.

The reality is that medical-malpractice plaintiffs should never need MCL 600.2301 to raise a new theory. They can simply send a new notice, wait the notice period, and move to amend their complaint if the parties don't settle during the notice period. Kostadinovski only resorted to MCL 600.2301 because he didn't send a new notice when he had the chance. In fact, he didn't even raise MCL 600.2301 until the prior appeal. The Court of Appeals generously gave Kostadinovski a limited remand for the trial court to consider that unpreserved issue.

Whether to grant relief under MCL 600.2301 is a discretionary decision. The trial court didn't abuse its discretion. It relied on two, post-*Bush* Supreme Court cases that Kostadinovski has never addressed. It relied on the fact that Kostadinovski never sent a new notice for his new theory. And it relied on the fact that Kostadinovski had the medical records to raise the hypotension theory from the outset. Its denial of relief also aligns with a century of this Court's precedent.

Strip away the medical-malpractice law complexity. Kostadinovski sat on a claim until the end of discovery and the defendant moved for summary disposition on the pleaded claims. It wasn't an abuse of discretion to deny leave to amend. See *Siewert v Sears, Roebuck & Co*, 177 Mich App 221, 224; 441 NW2d 9 (1989) (affirming denial of leave to amend because "no motion to amend was filed in the intervening five months during which discovery was completed and mediation held"); *Taylor v Detroit*, 182 Mich App 583, 586; 452 NW2d 826 (1989) (affirming denial of motion to amend filed 29 months into litigation because "[p]laintiff was aware of [the basis for the new claim] at the beginning of the suit"); *Ball v Render*, 64 Mich App 148; 235 NW2d 90 (1975) (plaintiff giving basis for

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new claim during her deposition 7 ½ months earlier didn't justify delay); *Weymers v Khera,* 454 Mich 639, 658; 563 NW2d 647 (1997).

The lower courts didn't err and this Court has already spent enough time on Kostadinovski' unique circumstance. This Court should deny leave to appeal.

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Dated: May 17, 2021

Certificate of Compliance

I certify that the Brief of Defendants-Appellees complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this brief. This brief uses a 12-point proportional font (Book Antiqua), and the word count for this brief is 9,276.

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