STATE OF MICHIGAN

COURT OF APPEALS

DRAGO KOSTADINOVSKI and BLAGA KOSTADINOVSKI,

Plaintiffs-Appellants,

v

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

Defendants-Appellees.

UNPUBLISHED
March 11, 2021

No. 351773
Macomb Circuit Court
LC No. 2014-002247-NH

Before: SWARTZLE, P.J., and MARKEY and TUKEL, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right the trial court's order denying their motion to amend their complaint. This case has been before this Court once before. *Kostadinovski v Harrington*, 321 Mich App 736; 909 NW2d 907 (2017) (*Kostadinovski I*). In *Kostadinovski I*, this Court reversed the trial court's denial of plaintiffs' motion to amend and instructed the trial court to determine on remand whether plaintiffs were entitled to amend their Notice of Intent to File Claim ("NOI") under MCL 600.2301. *Kostadinovski I*, 321 Mich App at 753-754. Plaintiffs now appeal the decision on remand, in which the trial court denied their motion to amend their complaint, reasoning that the amended complaint was futile; the trial court ruled that amending the complaint would run afoul of the requirement of providing a Notice of Intent to sue prior to filing a complaint for medical malpractice. See MCL 600.2912b. For the reasons set forth below, we affirm.[1]

[1] Plaintiffs forthrightly and correctly note that because of the posture in which we receive this case, viz., an appeal from the trial court's actions following remand from this Court, "law of the case principles probably preclude this Court from revisiting" issues previously decided. Our review is very narrowly focused, in accordance with this Court's prior opinion, which we discuss below.

I. UNDERLYING FACTS

This Court's prior opinion set forth the operative facts and background of this case:

> On December 9, 2013, plaintiffs served defendants with the NOI, asserting that on December 14, 2011, the doctor [Dr. Steven D. Harrington] had performed robotic-assisted [mitral valve repair] surgery on Mr. Kostadinovski and that, as subsequently determined, Mr. Kostadinovski suffered a stroke during the course of the procedure. The NOI listed six specific theories with respect to the manner in which the doctor allegedly breached the applicable standard of care relative to the surgery and preparation for the surgery, along with identifying related causation claims. On June 4, 2014, an expert for plaintiffs executed an affidavit of merit that listed the same six negligence theories outlined in the NOI in regard to the alleged breaches of the standard of care. On June 5, 2014, plaintiffs filed their medical malpractice complaint against defendants, along with the affidavit of merit, alleging that the doctor breached the standard of care in the six ways identified in the NOI and affidavit of merit. The causation claims were also identical in all three legal documents.
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> On March 21, 2016, defendants filed a motion for summary disposition, arguing that, as revealed during discovery, plaintiffs' expert witnesses could not validate or support the six negligence theories set forth in the NOI, affidavit of merit, and complaint. On that same date, March 21, 2016, plaintiffs filed a motion to amend their complaint. Plaintiffs asserted that discovery had recently been completed and that discovery showed that Mr. Kostadinovski "was in a hypotensive state during the operation and was not adequately transfused." According to plaintiffs, this evidence was previously unknown and only came to light following the deposition of the perfusionist [Lynn Masinick], the continuing deposition of the doctor, and the depositions of plaintiffs' retained experts. Plaintiffs sought to amend the complaint to allege negligence against the doctor "for failing to adequately monitor Mr. Kostadinovski's hypotension during the operation and failing to transfuse the patient so as to maintain the patient's blood pressure." On March 28, 2016, a hearing was held on plaintiffs' motion to amend the complaint, and the trial court decided to take the matter under advisement. On April 25, 2016,

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"The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Ashker ex rel Estate of Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001) (citations omitted). "The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Id.*

> a hearing was conducted on defendants' motion for summary disposition, at which time plaintiffs agreed to the dismissal of their original complaint, given that their theories of negligence now lacked expert support, as did the causation claims that had been linked to the defunct negligence theories. Plaintiffs' motion to amend the complaint remained pending.
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> On April 29, 2016, the trial court issued a written opinion and order denying plaintiffs' motion to amend the complaint. [*Kostadinovski I*, 321 Mich App at 740-742 (footnotes omitted).]

As discussed earlier, this Court reversed the trial court's order denying plaintiffs' motion to amend. *Kostadinovski I*, 321 Mich App at 754. Relying on our Supreme Court's opinion in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), the *Kostadinovski I* Court stated:

> 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. 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. [*Kostadinovski I*, 321 Mich App at 750-751 (footnote omitted).]

This Court provided detailed directions for the trial court to follow on remand, stating:

> 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 [sic] 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* [*v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007)], 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. [*Id*. at 753-754 (footnote omitted).]

On remand, the parties submitted supplemental briefs addressing the application of MCL 600.2301 to plaintiffs' attempt to amend. In a written opinion and order, the trial court once again denied plaintiffs' motion to amend. The trial court held that permitting the amendment would implicate defendants' substantial rights to presuit notice, as required by MCL 600.2912b. Unlike *Bush*, which involved a defective NOI, in that it omitted some but not all of the relevant information, the trial court concluded plaintiffs' NOI was devoid of any reference to plaintiffs' new theories of liability that would enable defendants to understand the claims against them. The trial court also concluded that permitting the amendment would not further the interests of justice because plaintiffs had the relevant information to assert their new theories at the outset of the litigation, and could have done so from the suit's inception. This appeal followed.

II. STANDARD OF REVIEW

"Decisions granting or denying motions to amend pleadings, are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Doyle v Hutzel Hosp*, 241 Mich App 206, 212; 615 NW2d 759 (2000) (quotation marks, citation, and alteration omitted). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016). "This Court reviews a trial court's findings of fact for clear error." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 368; 937 NW2d 716 (2019). "A finding of fact is clearly erroneous when no evidence supports the finding or, on the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *King v Mich State Police Dep't*, 303 Mich App 162, 185; 841 NW2d 914 (2013).

In addition, "[t]his Court reviews questions of statutory interpretation de novo." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006). "The role of this Court in interpreting statutory language is to ascertain the legislative intent that may reasonably be inferred from the words in a statute." *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019) (quotation marks and citations omitted). "[W]here the statutory language is clear and unambiguous, the statute must be applied as written." *Id*. (quotation marks and citations omitted) (alteration in original).

III. AMENDMENT OF THE COMPLAINT AND NOI

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, which is a prerequisite to filing a valid medical practice suit. See MCL 600.2912b. Thus, this Court held in *Kostadinovski I* that "[t]he 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." *Kostadinovski I*, 321 Mich App at 753 (footnote omitted).

Under MCL 600.2301:

> 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.

Our Supreme Court has interpreted MCL 600.2301 as setting forth two factors which control the analysis of whether relief is appropriate:

> [T]he applicability of § 2301 rests on a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed "on such terms as are just." [*Bush*, 484 Mich at 177, quoting MCL 600.2301.]

"[T]he second prong of the test, which requires that the cure be in the furtherance of justice, is satisfied when a party makes a good-faith attempt to comply with the content requirements of § 2912b." *Id*. at 178.

Plaintiffs assert that no substantial interest of defendants would be affected by permitting plaintiffs' amendment, because, unlike in the case of a defective NOI, litigation already was ongoing between the parties, such that, per *Bush*, defendants already had notice that their conduct was under scrutiny. The *Bush* Court further noted the background and experience of a defendant in such a situation would allow that defendant to discern what was at issue in a particular case, and thus such a defendant would not be prejudiced by a lack of information. See *Bush*, 484 Mich at 156 ("Defendants who receive these notices are sophisticated health professionals with extensive medical background and training. . . . 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.").

The trial court concluded, however, that defendants' substantial interests were in fact implicated for a different reason. The trial court found that amendment of the NOI and complaint would deprive defendants of presuit notice and the opportunity to negotiate settlement without litigation. See MCL 600.2912b(1) ("[A] person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."); *Kostadinovski I*, 321 Mich App at 746, quoting *Bush*, 484 Mich at 174 ("The stated purpose of § 2912b was to provide a mechanism for promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs.").

In contrast with *Bush*, which concerned defects in the original NOI, plaintiffs' original NOI had no apparent defects on the face of the document. The only defect, to the extent that term is

appropriate, is that plaintiffs' original NOI did not include the theories of liability that plaintiffs later wanted to assert against defendants.

Nowhere in the NOI or complaint did plaintiffs refer to Drago's hypotension or the failure to transfuse Drago during the procedure. 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. See *Bush*, 484 Mich at 178. Unlike in *Bush*, defendants in this case did not have the ability to understand the nature of plaintiffs' claims regarding hypotension and transfusion because those claims were not even referenced in plaintiffs' NOI. Thus, the trial court did not err when it concluded that defendants' substantial interests were implicated. See *Tyra v Organ Procurement*, 498 Mich 68, 92; 869 NW2d 213 (2015) (holding that "just as in *Driver*, '[a]pplying MCL 600.2301 in the present case[s] would deprive [defendants] of [their] statutory right to a timely NOI followed by the appropriate notice waiting period[.]' "); *Driver v Naini*, 490 Mich 239, 255; 802 NW2d 311 (2011) (concluding that the trial court abused its discretion when it permitted amendment to NOI to add nonparty as a defendant because it would "deprive [the nonparty] of its statutory right to a timely NOI followed by the appropriate notice waiting period, and [the nonparty] would be denied an opportunity to consider settlement"). Because plaintiffs' proposed amendment of the complaint would deprive defendants of a substantial right, § 2301 is not available to remedy the flaws in the NOI.

With respect to whether plaintiffs' proposed amendment would be in furtherance of justice, plaintiffs argue their original NOI was drafted in good faith because it was drafted on the basis of the information they had at the time. Plaintiffs assert that they could not have included the claims of hypotension and transfusion before they deposed Dr. Harrington and Masinick because the records that would have revealed those claims were illegible. The trial court disagreed, and there is nothing in its fact finding in that regard which is clearly erroneous. See MCR 2.613(C) ("Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."). The trial court found, referring to plaintiff's perfusion record, that "While plaintiff claims this record was not legible, it was legible enough for plaintiffs' counsel to ask Dr. Harrington questions about Mr. Kostadinovski's HGB/HCT levels at his deposition, as well as the deposition of the perfusionist, Lynn Kathleen Mastick. The Court was also able to read and consider this record."

During Dr. Harrington's deposition, he was asked by plaintiffs whether he would be surprised if "the patient's 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." In addition, while reading from one of Drago's medical records, plaintiffs asked Dr. Harrington: "From 11:24 up until 11:51 the patient's hemoglobin was reported on three separate occasions as being 5.1, correct?"

It is clear from Dr. Harrington's deposition, which, according to the record, took place at least in part before any of the other depositions, that plaintiffs understood what Drago's blood levels were during the operation. This belies any claim by plaintiffs that the trial court erred in finding that discovery was unnecessary to uncover these claims. There was no technical "defect," on the face of plaintiffs' original NOI; nothing was omitted or overlooked, or given cursory treatment. Rather, the NOI simply did not address a theory of liability that plaintiffs could have made but did not. Plaintiffs' actions had the effect of depriving defendants, prior to the filing of a

complaint making the allegation, of the information necessary to understand what they were alleged to have done incorrectly. That is a "substantial right." *Tyra*, 498 Mich at 92. We need not determine whether plaintiffs' actions nonetheless constituted "a good-faith attempt to comply with the content requirements of § 2912b," *Bush*, 484 Mich at 178, because a plaintiff is required to show both good faith and the lack of prejudice to a substantial right of a defendant in order to invoke the saving provision of § 2301; the fact that defendant's amendment would impair a substantial right in and of itself makes § 2301 unavailable. See *Bush*, 484 Mich at 180–81 ("[W]e hold that the alleged defects can be cured pursuant to § 2301 because the substantial rights of the parties are not affected, and 'disregard' or 'amendment' of the defect is in the furtherance of justice when a party has made a good-faith attempt to comply with the content provisions of § 2912b.").

Plaintiffs contend that if the trial court's decision is allowed to stand, no plaintiff in a medical malpractice case will ever be able to assert a new claim on the basis of facts uncovered during discovery. Plaintiffs are wrong for more than one reason. First, and simply as a factual matter as discussed earlier, plaintiffs did not uncover the facts supporting their hypotension and transfusion claims during discovery; at best, discovery confirmed what they already suspected, i.e., that Drago's hemoglobin and hematocrit levels were low, and he was not transfused as plaintiffs allege he should have been. And second, plaintiffs never attempted to cure the omissions of their original NOI by sending an amended NOI to defendants. See *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 486-487; 679 NW2d 98 (2004) (stating that MCL 600.2912b "contemplates that additional notices of intent may be filed, and the defendant is required to respond to the notice of intent."). Thus, plaintiffs' argument regarding the effects of this case on the flexibility to amend a complaint are without merit.

IV. DISMISSAL WITH PREJUDICE

Plaintiffs also contend that if the trial court was not going to permit amendment of the complaint, it should not have dismissed their original claims with prejudice, which would have allowed them to continue to pursue those claims. Plaintiffs' assertion may be true as a general matter. See *Bush*, 484 Mich at 178 ("[O]nly when a plaintiff has not made a good-faith attempt to comply with § 2912b(4) should a trial court consider dismissal of an action without prejudice."). But plaintiffs' procedural predicament is a quandary of their own making. When it became clear that their original theories of liability were not supported by the testimony of their own experts, plaintiffs responded to defendants' motion for summary disposition regarding those theories, stating: "With regard to Plaintiffs' remaining theories of liability, Plaintiff [sic] will not be going forward with those theories of liability." At the hearing on defendants' summary disposition motion, plaintiffs agreed with the trial court's statement that "there is a stipulation as it relates to" dismissal of plaintiffs' original claims. Thus, by the time the trial court ruled on plaintiffs' motion to amend, it already had dismissed plaintiffs' initial claims with prejudice. In other words, if plaintiffs believed in the soundness of their original claims, plaintiffs could have conditioned their stipulation on the trial court's decision on their motion to amend. Despite now having seller's remorse over stipulating unconditionally to the dismissal of their original claims, plaintiffs cannot now change their minds and resurrect those claims. See *In re Koch Estate*, 322 Mich App 383, 402-403; 912 NW2d 205 (2017) ("A party may not appeal an error that the party created.").

V. LAW OF THE CASE

With respect to plaintiffs' final argument, that MCL 600.2912b does not apply to a party's attempt to amend a complaint, this Court resolved that issue for these parties in *Kostadinovski I*, when it was raised by plaintiffs. This Court stated:

> Plaintiffs argue that MCL 600.2912b 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 I*, 321 Mich App at 751 n 6.]

This Court rejected that argument:

> If this were the law, the entire analysis in *Decker* [*v Rochowiak*, 287 Mich App 666; 791 NW2d 507 (2010)] would have been completely unnecessary because a proper and compliant NOI had been served on the defendants, as judged on the date the original complaint was filed and by the language in that complaint. Moreover, the approach suggested by plaintiffs would undermine the legislative intent and purpose behind MCL 600.2912b. [*Id.*]

Based on this Court having previously decided this issue against them, plaintiffs' argument that MCL 600.2912b does not apply to an amended complaint is foreclosed as law of the case, as a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. See Note 1 of this opinion.[2]

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[2] And finally, as appellee notes, the implication of our holding that the trial court did not abuse its discretion in denying plaintiffs' motion to amend also is controlled by the law of the case doctrine. This Court held in *Kostadinovski I*:

> 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 an appeal on the § 2301 analysis. [*Kostadinovski I*, 321 Mich App at 753.]

The trial court did rule that "amendment or disregard of the defect would not be proper under MCL 600.2301," and thus "the court's prior futility analysis relative to plaintiffs' motion to amend the complaint," stood. Consequently, as directed by the previous panel, the trial court's denial on remand of the motion to amend "end[s] the case, subject of course to an appeal of the § 2301 analysis." The "appeal of the § 2301 analysis" has not changed that result, as this opinion sets forth. Consequently, under the previous order of this Court, this case is now ended. As this is an appeal from the trial court's grant of defendants' motion for summary disposition, the case already

VI. CONCLUSION

For the reasons stated in this opinion, the trial court's order denying plaintiffs' motion to amend their complaint is affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Brock A. Swartzle
/s/ Jane E. Markey
/s/ Jonathan Tukel

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is dismissed, so there is nothing further for the trial court to do. We note simply that under the decision in *Kostadinovski I*, the case has ended and the trial court may not entertain further attempts to pursue this case, absent an order from our Supreme Court to the contrary.