STATE OF MICHIGAN

IN THE SUPREME COURT

DRAGO KOSTADINOVSKI and BLAGA KOSTADINOVSKI, as Husband and Wife,

Plaintiffs/Appellees/Cross-Appellants,

-vs-

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

Defendants/Appellants/Cross-Appellees.
_____/

Supreme Court No. 156850

Court of Appeals No. 333034

Macomb County Circuit Court No. 14-2247-NH

PLAINTIFFS/CROSS-APPELLANTS' CROSS APPLICATION FOR LEAVE TO APPEAL

MARK GRANZOTTO, P.C.
MARK GRANZOTTO (P31492)
Attorney for Plaintiffs/Appellees/Cross-Appellants
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

MORGAN & MEYERS PLC

JEFFREY T. MEYERS (P34348)
TIMOTHY M. TAKALA (P72138)
Attorneys for Plaintiffs/Appellees/Cross-Appellants
3200 Greenfield, Suite 260
Dearborn, MI 48120
(313) 961-0130

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES iii

ORDER BEING APPEALED FROM AND RELIEF REQUESTED v

STATEMENT OF QUESTIONS PRESENTED vi

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS 1

ARGUMENT 7

I. THIS COURT SHOULD REVIEW THE QUESTION OF WHETHER MCL 600.2912b HAS ANY APPLICATION TO THEORIES OF RECOVERY ADDED TO A PENDING MEDICAL MALPRACTICE ACTION BY AMENDMENT. 7

RELIEF REQUESTED. 16

INDEX OF AUTHORITIES

Cases **Page**

American Federation of State County and Municipal Employees v City of Detroit, 468 Mich 388; 662 NW2d 695 (2003) 8, 9, 10, 11

Boodt v Borgess Medical Center, 481 Mich 558; 751 NW2d 44 (2008) 9

Bush v Shabahang, 484 Mich 156; 772 NW2d 272 (2009) 11

Doyle v Hutzel Hospital, 241 Mich App 206; 615 NW2d 759 (2000) 4

Gulley-Reaves v Baciewicz, 260 Mich App 478; 679 NW2d 98 (2004). 12

Lesner v Liquid Disposal, Inc., 466 Mich 95; 643 NW2d 553 (2002) 10

Ligouri v Wyandotte Hospital, 253 Mich App 372; 655 NW2d 592 (2002) 10

Mayberry v General Orthopedics, P.C., 474 Mich 1; 704 NW2d 69 (2005) 10

Morrison v Dickinson, 217 Mich App 308; 551 NW2d 449 (1996). 10

Neal v Oakwood Hospital Corp., 226 Mich App 701; 575 NW2d 68 (1997) 10, 11

Omelenchuck v City of Warren, 466 Mich 524; 647 NW2d 493 (2002) 11

Omne Financial, Inc. v Shacks, Inc., 460 Mich 305; 596 NW2d 591 (1999). 10

Rheaume v Vandenberg, 232 Mich App 417; 591 NW2d 331 (1998) 10

Roberts v Mecosta County General Hospital, (After Remand), 470 Mich 679; 684 NW2d 711 (2004) 9

Wickens v Oakwood Healthcare System, 465 Mich 53; 631 NW2d 686 (2001) 11

Statutes

MCL 600.2912b 11

MCL 600.2912b(1) 9

MCL 600.2912b(3) 11

Court Rules

MCR 2.118(D) 4

ORDER BEING APPEALED FROM AND RELIEF REQUESTED

Plaintiffs-Appellants, Drago Kostadinovski and Blaga Kostadinovski, seek leave to appeal from one aspect of the Court of Appeals decision dated October 24, 2017. A copy of that Opinion is Exhibit E to this application. That opinion reversed a circuit court ruling granting summary disposition to the defendant on plaintiffs' medical malpractice claim on the basis of MCL 600.2912b, the notice of intent statute. In reaching this result, the Court of Appeals panel rejected plaintiffs' principal argument that MCL 600.2912b has no application to additional theories added by amendment asserted against an already-named defendant.

Plaintiffs-appellants, request that this Court grant leave to appeal to consider the important legal question presented in this case as to whether the notice of intent statute has any role to play in the treatment of theories added to a pending case by amendment.

STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT REVIEW THE QUESTION OF WHETHER THE NOTICE OF INTENT STATUTE, MCL 600.2912b, HAS ANY APPLICATION TO AN ADDITIONAL THEORY OF RECOVERY ASSERTED IN AN AMENDED COMPLAINT AGAINST AN ALREADY-NAMED DEFENDANT?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

STATEMENT OF MATERIAL PROCEEDINGS AND 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. In 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. 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 of intent 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;

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 his professional corporation, Advanced Cardiothoracic Surgeons, PLLC. A copy of plaintiffs' 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.

During the course of the discovery that followed, evidence came to light that Dr. Harrington had breached the standard of care in several ways other than those claimed in the notice of intent and the original complaint. Specifically, plaintiffs learned during discovery that Mr. Kostadinvoski was in a hypotensive state during the December 2011 surgery and that he was not adequately perfused during that surgery.

In January and February 2016, plaintiffs' standard of care and causation experts were deposed. During the depositions of plaintiffs' two standard of care experts, they testified that Dr. Harrington breached the standard of care in failing to recognize that Mr. Kostadinovski was in a

hypotensive state during the mitral valve repair surgery and in failing to adequately perfuse Mr. Kostadinovski during that procedure.

On March 21, 2016, the defendants filed a motion for summary disposition. In that motion, the defendants argued that, based on the deposition testimony provided by plaintiffs' experts, all of the claims of malpractice alleged in plaintiffs' original complaint were subject to dismissal. In that same motion, defendants also sought to strike any allegations of malpractice that plaintiff might pursue that were not contained in the December 2013 notice of intent or complaint.

Plaintiffs responded by filing a motion to amend their complaint to include the additional theories of malpractice that had been developed during discovery and discussed by their experts during their 2016 depositions. Thus, on March 21, 2016, plaintiffs moved to amend their complaint to include claims that Dr. Harrington was liable for failing to realize that Mr. Kostadinovski was in a hypotensive state during the mitral valve repair surgery and in failing to adequately perfuse him during that surgery.

The defendants filed a response to plaintiffs' motion to amend. In that response, defendants proffered several reasons why, in their view, the motion to amend should be denied. Defendants first contended that the motion was untimely. The defendants further argued that the amendment should be denied because adding the two new theories of liability 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 filing of the original complaint under MCR 2.118(D).

Second, defendants asserted that the amendment that plaintiffs proposed would be futile because the additional theories that plaintiffs sought to add by amendment were not included in the December 2013 notice of intent. According to defendants, plaintiffs could not add these new theories to the case unless they had been asserted in their December 2013 notice of intent. Thus, citing to MCL 600.2912b, the notice of intent statute, defendants argued in response to plaintiffs' motion to amend that "Plaintiffs' proposed amendment would be futile because plaintiffs' proposed new claim bypassed the statutory requirements for filing a medical malpractice action." Response, at 6.

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. 3/228/16, at 19.

On April 25, 2016, prior to issuing its 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 raised in plaintiffs' 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 C to this application. The April 25, 2016 order further noted that 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 this opinion is Exhibit D to this application. In that opinion, the circuit court first addressed the defendants' claim that the amendment that plaintiffs proposed would not relate back under MCR 2.118(D). Based largely on the Court of Appeals decision in *Doyle v Hutzel Hospital*, 241 Mich App 206; 615 NW2d 759 (2000), the circuit court rejected defendants' argument and concluded that, if allowed, plaintiffs' amendment would relate back to the filing of their original

complaint. Opinion (Exhibit D), 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 would be inconsistent with the requirements set out in MCL 600.2912b:

> Although the allegations in plaintiffs' complaint mirrored the allegations made in the NOI, now plaintiffs seek to amend their complaint to include allegations that Dr. Harrington negligently failed to monitor Mr. Kostadinovski's hypotension during the operation and failed to transfuse him. 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 failed to transfuse him. 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. Even if plaintiffs had included these new allegations in their original complaint, defendants lacked the requisite notice mandated by MCL 600.2912b because they were not raised in the NOI.
>
> Plaintiffs' failure to adhere to the statutory mandates renders the new allegations contained in the proposed amended complaint futile, as these new allegations of medical malpractice must fall as a matter of law. *See Boodt*, 481 Mich at 562-563; *Gulley-Reaves*, 260 Mich App 490. Therefore, plaintiffs' motion to amend is properly denied.

Opinion (Exhibit D), at 8-9.

Plaintiffs timely appealed to this Court from the circuit court's April 29, 2016 decision. In the Court of Appeals, plaintiff made two general arguments as to why the circuit court erred in refusing to allow them to amend their complaint to assert the theories of recovery developed during

discovery. First, plaintiffs argued that the additional theories that they sought to add by amendment could not be dismissed on the basis of MCL 600.2912b because that statute has no application to theories added to a case by amendment.

As a secondary argument, plaintiff contended that MCL 600.2912b could not be the basis for the denial of plaintiffs' request to amend based on this Court's holding in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009).

A panel of the Michigan Supreme Court issued a published decision reversing the circuit court on October 24, 2017. A copy of the Court of Appeals opinion is Exhibit E to this application. In that opinion, the panel held that the circuit court's refusal to allow plaintiffs to amend their complaint was contrary to this Court's decision in *Bush*. The panel, however, rejected plaintiffs' primary argument that the notice of intent statute had no application to a claim added to a pending case by amendment. Opinion (Exhibit E), at 9, fn. 6.

On December 5, 2017, the defendants filed an application for leave to appeal seeking review of the Court of Appeals October 24, 2017 opinion.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE QUESTION OF WHETHER MCL 600.2912b HAS ANY APPLICATION TO THEORIES OF RECOVERY ADDED TO A PENDING MEDICAL MALPRACTICE ACTION BY AMENDMENT.

The circuit court ruled in this case that plaintiffs could not amend their complaint to allege new theories against the defendants because these new theories were barred by MCL 600.2912b, the notice of intent statute. The Court of Appeals reversed, ruling that the plaintiffs' right to amend their complaint was dependent on whether the plaintiffs could meet the requirements of *Bush v Shabahang*.

The Court of Appeals did not need to reach the question of whether plaintiffs could meet the dictates of the notice of intent statute under the guidance provided in *Bush*. There was a much simpler reason why plaintiffs should have been allowed to amend their complaint under the explicit language of §2912b - the notice of intent statute has no application to additional theories asserted against existing defendants added to a medical malpractice case through amendment. This is an important issue of Michigan law that at some point will have to be addressed by this Court.

In denying plaintiffs' motion to amend, the circuit court concluded that allowing the amendment that plaintiffs proposed would be futile because the new theories that plaintiffs were attempting to add to the case would have to be dismissed in any event because those theories had not been included in the presuit notice of intent that plaintiffs' counsel mailed in December 2013.

The central assumption underlying the circuit court's reasoning is that §2912b, the notice of intent statute, actually applies to additional theories of recovery pleaded against existing defendants that are added to a malpractice case by amendment. This basic assumption behind the circuit court's

ruling is fundamentally incorrect.

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 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 a 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 proceeding against an already-named defendant.

This conclusion is fully 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 a new defendant is added to an already-pending case by amendment, that new defendant must first be mailed a notice of intent and the plaintiff must wait a prescribed period of time 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 comply with §2912b's mandatory waiting period. By its express language, §2912b has no application to the situation presented in this case in which the plaintiffs fully complied with §2912b before suit was commenced[1] and later sought to add new theories by amendment against a defendant who was 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 case law with respect to §2912b confirms 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). As this portion of the Court's decision in *Roberts* makes clear, §2912b's notice requirement attaches *before* a case is instituted against a defendant; that statute does not apply where the plaintiff files an amended complaint against an already-named defendant. *See also Boodt v Borgess Medical Center*, 481 Mich 558, 562-563; 751

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

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).

Similarly, in *Morrison v Dickinson,* 217 Mich App 308, 317; 551 NW2d 449 (1996), the Court of Appeals noted that §2912b, "simply mandates notice *before a complaint is filed*." (emphasis added). Moreover, in *Neal v Oakwood Hospital Corp*., 226 Mich App 701; 575 NW2d 68 (1997), the Court of Appeals ruled that"§2912b(1) . . . merely provides a brief temporal restriction *before suit may be commenced*." 226 Mich App at 718 (emphasis added).[2]

As *Roberts, Boodt, Morrison* and *Neal* confirm, §2912b's notice requirement must be satisfied at one particular point in time in the litigation process - *before any suit is filed.* MCL 600.2912b describes what a plaintiff must do *before* filing suit. It says nothing about what a plaintiff must do in amending a complaint to add a new theory against an existing defendant. There is nothing in the text of §2912b to support the circuit court's 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.

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. *Omne Financial, Inc. v Shacks, Inc.*, 460 Mich 305, 311; 596 NW2d 591 (1999) ("nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself."); *Lesner v Liquid Disposal, Inc.*,

---

[2]In addition to these decisions, there are numerous other cases describing §2912b's provisions as requiring a *presuit* notice. *See e.g. Mayberry v General Orthopedics, P.C.*, 474 Mich 1, 8; 704 NW2d 69 (2005); *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).

466 Mich 95, 101; 643 NW2d 553 (2002) (the Court is to apply the statute "as enacted without addition, subtraction or modification."); *American Federation of State County and Municipal Employees v City of Detroit,* 468 Mich 388, 400; 662 NW2d 695 (2003). 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); *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). 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 circuit court to apply that statute beyond its literal text to apply to the amended complaint that plaintiffs sought to file in this case.

The circuit court's conclusion that an amendment to a medical malpractice complaint must comply with the requirements of §2912b also does nothing to address the basic rationale behind this statutory notice provision. The entire purpose behind the presuit notice and mandatory waiting period embodied in §2912b is to alert a prospective defendant that a malpractice case is being contemplated so that party has an opportunity to resolve that case "without resort to formal litigation." *Neal*, 226 Mich App at 720; *see also Bush,* 484 Mich at 174 (the purpose of the notice of intent statute is to "promote[] settlement without the need for formal litigation."); *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 488; 679 NW2d 98 (2004). MCL 600.2912b's fundamental purpose is, therefore, to assist in the resolution of cases *before* the institution of formal litigation. That purpose is, of course, not served in the amendment context since any case in which a request to amend is made is already in suit.

Applying §2912b according to its literal text effectively disposes of the principal Court of

Appeals case on which the circuit court relied in rejecting plaintiffs' motion to amend. In its April 29, 2016 opinion, the circuit court appeared to conclude that its determination was dictated by the Court of Appeals 2004 decision in *Gulley-Reaves.* In that case, a panel of the Court of Appeals held that where a medical malpractice plaintiff's *original complaint* contained theories of liability that were not included in plaintiff's presuit notice of intent, the additional theories of liability alleged in the complaint were subject to dismissal.

Thus, *Gulley-Reaves* involved a case in which the only issue before the Court of Appeals was whether the plaintiff's *original* complaint could contain a theory that was not also contained in the presuit notice required by §2912b. The panel held in *Gulley-Reeves* that the allegations of malpractice contained in the plaintiff's original complaint had to correspond to the assertions of negligence set out in plaintiff's presuit notice of intent. But while *Gulley-Reeves* addressed the relationship between the contents of a notice of intent and the contents of plaintiffs' *original* complaint, the Court in *Gulley-Reaves* was not called upon to discuss or decide what would occur in a case in which the discovery process revealed new theories of liability, necessitating an amendment of the original complaint.

The *Gulley-Reeves* decision in no way supports the circuit court's conclusion that §2912b extends to bar any new theories of recovery that may later be added to a case after that case is properly commenced. Indeed, it would appear that the *Gulley-Reaves* panel was in agreement with the foregoing argument as to the inapplicability of §2912b to amendments. In *Gulley-Reaves*, the panel accurately described how the notice of intent statute operated: "MCL 600.2912b provides that *before suit is brought* . . . written notice of intent to file suit . . . must be given." 260 Mich App at 485 (emphasis added). Thus, even the *Gulley-Reaves* panel identified §2912(b) as being applicable

to the *presuit* period, not to the amendment of a case already in suit.

The implications of the conclusion reached by the circuit court in this case, *i.e.* that §2912b applies to theories of recovery against an existing defendant added to malpractice action by amendment, are of great significance. There are two possible results that would flow from the circuit court's reasoning, neither of which is particularly palatable.

First, courts might conclude, much as the circuit court did in this case, that a new theory of recovery that the plaintiff seeks to add to a malpractice action by amendment would not be allowed unless that new theory was included in the plaintiff's presuit notice of intent. Such a result would mean that, in one of the more complex areas of personal injury law, the claims on which a plaintiff may proceed would be controlled exclusively by the contents of a document prepared six months before suit was even filed.

If the circuit court's view of §2912b were correct, a notice of intent drafted at the very outset of the proceedings, before any discovery of any kind has been conducted, would govern the nature of the claims that the plaintiff may pursue. Additional claims of professional negligence that surface during the course of discovery that might otherwise be added by Michigan's liberal amendment rules, *see* MCR 2.118(A)(2), would be foreclosed if these newly-discovered theories were not included in the presuit notice.

Such a view of the law runs afoul of an observation that this Court made in *Roberts*. In that case, this Court made note of the fact that a "notice of intent is provided at the earliest stage of a medical malpractice proceeding" at a time when "discovery as contemplated in our court rules . . . has not been commenced, and it is likely that the claimant has not yet been provided access to the records of the professional or facility named in the notice." 470 Mich at 691. Taking these

limitations into account, this Court recognized in *Roberts* that it cannot be expected that a notice of intent could be "craft[ed] . . . with omniscience." *Id*.

But, if the circuit court in this case were correct and §2912b's notice requirement applies to theories developed during the course of discovery that must be added to a malpractice case by amendment, it would demand what the *Roberts* decision recognized was impossible - that a presuit notice of intent be prepared with complete omniscience. Adoption of the circuit court's reasoning in this case would mean that months before a lawsuit is filed, before all pertinent medical records are secured and before any discovery is conducted, the plaintiff must draft a notice of intent that anticipates *every* theory that might possibly emerge, including those theories that only the discovery process might reveal. If the circuit court's interpretation of §2912b were correct, it would impose on plaintiffs and their counsel a level of omniscience that the *Roberts* Court recognized was not feasible.

There is a second potential ramification of the application of §2912b's notice requirement to the circumstances of this case that is unappealing in a different way. Assume that the circuit court were correct and §2912b's notice of intent requirement applies to any new theory of recovery added to a medical malpractice case by amendment.

A plaintiff, forced to comply with §2912b with respect to any new theories of liability to be added by amendment, could prepare a new notice of intent incorporating these new theories.[3] To

[3]In other circumstances in which a plaintiff might be compelled to prepare a new notice of intent and delay the filing of any complaint by the mandatory waiting period called for by §2912b, there would undoubtedly be statute of limitations concerns that would arise. Thus, in most cases in which a plaintiff might be required to mail a second notice of intent and also observe the 182-day mandatory waiting period, that plaintiff (without the benefit of the tolling provision provided in MCL 600.5856(c)) would probably be facing insuperable statute of limitations difficulties. There is, however, no such concern with respect to the amendment of a

fully comply with §2912b, the plaintiff would have to do one more thing after preparing and mailing this new notice of intent; the plaintiff would have to wait the 182 days prescribed in §2912b before filing an amended complaint which included the additional theories developed during discovery.

Thus, if §2912b were rewritten so as to require compliance with its dictates in every case in which a medical malpractice plaintiff seeks to amend to add a new theory of recovery against an already-named defendant, the plaintiff could move to amend and, once that amendment is granted, a new notice of intent would have to be served on the already-named defendant and then *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*.

Thus, the other potential ramification of a ruling that §2912b applies to the amendment of malpractice complaints is that circuit courts will be forced to routinely declare a six month hiatus in the proceedings every time they allow an amendment while the mandatory waiting period of that statute runs out. There is no reason why every amendment of a medical malpractice complaint to add a new theory of recovery against an already-named defendant should result in a six month suspension of the circuit court proceedings while the statutory waiting period runs.

To be sure, the Michigan Legislature *could* have written such a statute; it could have drafted §2912b in such a way that a new notice of intent would have to be served and a new mandatory

---

complaint to add a new theory against an already-named defendant because of MCR 2.118(D). That court rule provides that any new theory of recovery added by amendment that arises out of the "conduct, transaction or occurrence" that was the subject of the original complaint will, for purposes of the statute of limitations, relate back to the filing of the original complaint. Since the theories that the plaintiffs sought to add in this case arose out of the same "conduct, transaction or occurrence" that was the subject of the original complaint, *Doyle v Hutzel Hospital*, 241 Mich App 206; 615 NW2d 759 (2000), plaintiffs would have no statute of limitations concerns if they were allowed to amend even if they were forced to comply with §2912b by preparing a new notice of intent and observing the statute's mandatory waiting period.

waiting period would have to be observed where the plaintiff seeks to amend a malpractice complaint to assert a new theory against a previously named defendant. The Legislature, however, never wrote such a statute.

The Court of Appeals decision in this case looked to this Court's decision in *Bush* as to how plaintiffs could achieve compliance with §2912b with respect to the new theories they seek to add to this case by amendment. The defendants have filed an application for leave to appeal, requesting that this Court review that determination. But, before deciding whether compliance with 2912b's notice requirement can be met on the basis of *Bush*, the more basic question presented by the literal text of §2912b is whether that statute even applies to the amended complaint that plaintiffs sought to file in this case.

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 issue presented in this cross-application. In the alternative, plaintiffs request that this Court summarily reverse the circuit court's April 29, 2016 decision on the ground that MCL 600.2912b does not apply to new theories asserted against an existing defendant and added to a complaint by amendment and remand this case to the Macomb County Circuit Court for further proceedings.

MARK GRANZOTTO, P.C.
/s/ Mark Granzotto
MARK GRANZOTTO (P31492)
Counsel for Plaintiffs/Cross-Appellants
2684 Eleven Mile Road, Suite 100
Berkley, MI 48072
(248) 546-4649

/s/ Jeffrey T. Meyers
JEFFREY T. MEYERS (P34348)
TIMOTHY M. TAKALA (P72138)
Counsel for Plaintiffs/Cross-Appellants
3200 Greenfield, Suite 260
Dearborn, MI 48120
(313) 961-0130

Dated: December 27, 2017