STATE OF MICHIGAN

IN THE SUPREME COURT

DRAGO KOSTADINOVSKI and BLAGA KOSTADINOVSKI, as Husband and Wife,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Supreme Court No. 156850
Court of Appeals No. 333034

Macomb County Circuit Court
No. 14-2247-NH
Hon. Kathryn A. Viviano

DEFENDANTS-APPELLANTS STEVEN D. HARRINGTON, M.D. AND ADVANCED CARDIOTHORACIC SURGEONS, P.L.L.C.'S SUPPLEMENTAL BRIEF

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On May 19, 2016, plaintiffs-appellees/cross-appellants Drago and Blaga Kostadinovski's filed a timely claim of appeal from the trial court's April 29, 2016 final Opinion and Order denying their motion to amend their complaint. See MCR 7.205(A).[1] On October 24, 2017, the Court of Appeals (Judges Murphy, Borrello, and Ronayne Krause) issued a published opinion reversing the trial court and remanding for further proceedings consistent with its opinion.[2]

Under MCL 600.215, MCR 7.303(B)(1), and MCR 7.305(H)(1), this Court may grant leave to appeal or order other relief after a decision of the Court of Appeals. An application for leave to appeal is timely when it is filed within forty-two days of the Court of Appeals' opinion. MCR 7.305(C)(2). Defendants-appellants/cross-appellees timely filed their application for leave to appeal on December 5, 2017.

A cross-application for leave to appeal is timely when it is filed within 28 days of the application. MCR 7.307(A). The Kostadinovskis timely filed their cross-application on December 27, 2017.

On September 27, 2018, this Court directed the clerk to schedule oral argument on the application and the cross-application.[3] This Court directed the parties to file supplemental briefs addressing the issues raised in the applications and, in particular, "how, consistent with MCL 600.2912b, a plaintiff in a medical malpractice case may amend the complaint to include newly discovered claims against an existing defendant."[4]

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[1] **Appendix 368-376**, Opinion and Order, dated Apr. 29, 2016.

[2] **Appendix 378-387**, Court of Appeals Opinion.

[3] **Appendix 389**, Supreme Court Order, dated September 27, 2018.

[4] *Id.*

Statement of Question Presented

After the claims in Kostadinovski's[5] NOI and complaint proved meritless, he wanted to raise an entirely new theory. But he didn't send a new NOI. He argued that a new claim can be added without serving an NOI for it. The Court of Appeals disagreed, but held that the NOI could be amended under MCL 600.2301—an issue Kostadinovski didn't preserve. Was Kostadinovski required send a new notice, wait the notice period, and then move to amend his complaint?

Plaintiffs-appellants answer, "no," arguing that Kostadinovski was free to amend new claims into the complaint without including them in a notice of intent to sue.

Defendants-appellees answer, "yes."

The trial court answered, "yes."

The Court of Appeals answered, "no," stating that MCL 600.2301 was "implicated and potentially applicable" when "discovery has shed new light on the case and given rise to a new liability theory."

[5] 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."

Introduction

Medical-malpractice plaintiffs must give potential defendants notice of the claim they intend to sue on. The purpose is to give the parties an opportunity to resolve the claim without the burden and expense of formal litigation involving complex malpractice claims. This case involves the procedure when a plaintiff gives notice of one claim, but later wants to add an entirely new claim against an existing defendant. The parties and the Court of Appeals have come up with three options:

(1) Plaintiffs must serve a notice for the new theory, wait the notice period, and then move to amend their complaint.

(2) Plaintiffs are free to amend new claims into their complaint even if they weren't in a notice.

(3) Plaintiffs may amend their original notice under MCL 600.2301 to include the new claims and then address whether they can amend their complaint.

The first option is simple enough. It treats newly discovered claims like all other claims. Plaintiffs must put the new theory in a notice. The parties have the opportunity to resolve it before it's put into litigation. And, if they don't, the plaintiffs can sue on it, assuming there isn't a statute-of-limitations problem.

The second option is a novel way to subvert the legislated notice requirement. Notice of one claim is notice of all claims. Under this option, plaintiffs have a perverse incentive to sandbag. It would be easier for plaintiffs to add claims that they never tried to describe in their original notice than it is for them to include claims that they insufficiently described in the original notice.

The third option has similar problems. It's a fiction. The defendant never receives the legislated notice. But, equally important, the third option isn't actually an option in this case. The Kostadinovskis didn't ask to amend their original notice under MCL 600.2301 in the trial court. So the trial court didn't abuse its discretion when it didn't grant that relief. As a result, there are only two ways for this Court to endorse the third option in this case—(1) in dicta, or (2) by ignoring established preservation rules and the abuse-of-discretion standard, like the Court of Appeals did. If this Court believes that the third option is the right answer, the correct course is to simply vacate the Court of Appeals opinion and reinstate the trial court's judgment.

This Court should choose option one and reverse the Court of Appeals. Kostadinovski only needed to do what the notice statute required—send a notice for his new theory. For unknown reasons, he didn't do that. He shouldn't be excused from the statutory requirement simply because he gave notice of other, meritless claims.

There's no criticism of the first option that doesn't apply to the notice procedure in general. Those criticisms should be directed to the Legislature. Until the Legislature is persuaded to change it, this Court must enforce defendants' statutory right to notice followed by the appropriate notice waiting period. Treating newly discovered claims the same as those discovered pre-suit protects that right. The Court of Appeals erred in holding that Kostadinovski may be able to circumvent that right. This Court should reverse.

Statement of Facts

Dr. Harrington and Advanced Cardiothoracic adopt the discussion of the factual and procedural background of this case that is in their application for leave to appeal.

Standard of Review

This appeal concerns the trial court's denial of Kostadinovski's motion to amend his complaint. This Court reviews a circuit court's ruling on a motion to amend a complaint for an abuse of discretion. *Weymers v Khera,* 454 Mich 639, 654; 563 NW2d 647 (1997). Trial courts don't abuse their discretion unless their "decision falls outside this range of principled outcomes." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

The Michigan Court Rules provide that "[l]eave to amend shall be freely given when justice so requires." MCR 2.118(A)(2). But, despite that general rule, leave to amend is properly denied for: "[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility." *Weymers*, 454 Mich at 658. "'An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face.'" *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998), quoting *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

Kostadinovski stipulated to dismiss the theory stated in his notice of intent to sue (NOI), complaint, and affidavit of merit. His proposed amended complaint would have

added an entirely new theory that wasn't in his NOI.[6] The trial court held that the amendment was futile because, if it allowed the amendment, the court would have had to grant a summary-disposition motion on the new claim since it wasn't in an NOI.

Argument

Again, the three potential procedural options for plaintiffs who discover a new theory against an existing defendant after filing suit are:

(1) Defendants' position: Plaintiffs must serve an NOI for the new theory, wait the NOI period, and then move to amend their complaint.

(2) Plaintiff's position: Plaintiffs are free to amend new claims into their complaint even if they weren't in an NOI.

(3) The Court of Appeals' position: Plaintiffs may amend their NOIs under MCL 600.2301 to include the new claims and then address whether they can amend their complaint.

The first option treats newly discovered claims like all others. It's business as usual. The second option is a free for all. Once the plaintiff gives adequate notice of one claim, they can amend whatever new claims they like into their complaint. The third option embraces fiction. Defendants never receive notice of the new claims before they're put into litigation, but the third option pretends that they did. This Court should hold that the first option is the correct procedure.

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[6] The original causation theory was that an EndoClamp caused a clot to break loose and move to Drago Kostadinovski's brain. See Appendix 62-64, Complaint, ¶¶75-77. The new theory is that low blood pressure caused an "in adequate supply of oxygen and nutrients" to his brain, which resulted in his stroke. Appendix 233-234, 237, Naidich Dep., p. 30-31, 34; Appendix 363-364, Proposed Amended Complaint, ¶80.

A. Option 1—Business as usual

1. The NOI statute's structure and purpose.

The NOI statute, MCL 600.2912b, gives medical-malpractice defendants a "statutory right to a timely NOI 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. The NOI 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 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 NOI 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 NOI 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). But defendants can't consider and settle a claim pre-litigation if they aren't given notice of it. So, to effectuate the NOI 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).").

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 an NOI on a hospital alleging 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 NOI deficiently described the anesthesia claims. The trial court denied the motion. But the Court of Appeals agreed that the NOI was deficient and reversed. The NOI statute specifically "contemplates that additional notices of intent may be filed." *Gulley-Reaves*, 260 Mich

App at 486, citing MCL 600.2912b(6). But the plaintiff didn't serve an NOI 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 an NOI. 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.

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:

- "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 an NOI for his new claim. So the trial court correctly denied his motion to amend the complaint to add it.

Gulley-Reaves and *Decker* are rooted in the text and purpose of the NOI statute. MCL 600.2912b. Again, the statute is mandatory; the notice "shall contain" the "factual basis for the claim**,**" including "the applicable standard," how that was breached, and how that breach caused the injury. MCL 600.2912b(4)(a)-(e). Kostadinovski didn't do any of that for his hypotension-and-transfusion claim. There's no dispute about that.

There was a simple way for Kostadinovski to comply with the NOI statute: he could have sent a new NOI. The NOI statute specifically "contemplates that additional notices of intent may be filed." *Gulley-Reaves*, 260 Mich App at 486, citing MCL 600.2912b(6).[7] But Kostadinovski didn't serve one. It follows that Kostadinovski can't

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

maintain a malpractice action based on the hypotension-and-transfusion claim. The trial court correctly concluded that, even if he amended his complaint, the new claim was doomed to be dismissed and was therefore futile.

B. Option 2—A free for all

Despite *Gulley-Reaves*, *Decker*, and the claim-specific language in the NOI statute, Kostadinovski's argument is that sufficiently describing one claim is enough. Other claims, he contends, can be added later by amending the complaint even if they weren't in an NOI. His argument doesn't reconcile with the statutory text, the purpose of the NOI requirement, or case law.

1. The text of the NOI statute doesn't support Kostadinovski's argument.

Kostadinovski's interpretation would only require notice of "a" claim. But plaintiffs must give "written notice under [MCL 600.2912b]," which 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's argument would only work if the statute required notice of "a" claim; it doesn't.

Kostadinovski emphasizes that the NOI statute imposes requirements before an action may be commenced. But he also acknowledges that "a plaintiff cannot commence an action before he or she files a notice of intent that contains all the information required under § 2912b(4)." *Boodt*, 481 Mich at 562-563.

Kostadinovski never commenced an action on the hypotension-and-transfusion claim. He couldn't. He never served "a notice of intent that contains all the information required under § 2912b(4)" for that claim. *Boodt*, 481 Mich at 562-563. He never gave notice of "The factual basis for the claim." MCL 600.2912b(4)(a). He never described "The applicable standard of practice or care" for the claim. MCL 600.2912b(4)(b). He didn't explain how Dr. Harrington breached the standard of practice and how that breach was "the proximate cause of the injury claimed in the notice." MCL 600.2912b(4)(c)-(e). Kostadinovski didn't do any of that for his hypotension-and-transfusion claim. So he couldn't commence an action on that claim.

2. Kostadinovski's argument also 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."[8] 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; *Bush*, 484 Mich at 174.

This case illustrates the point. Kostadinovski gave notice of meritless claims. 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-and-transfusion claim "without resort to formal litigation." *Neal*, 226 Mich App at 705.

[8] Appendix 386, Court of Appeals Opinion, p. 9 n.6.

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.

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

Kostadinovski's argument would also upend established case law. Kostadinovski has argued that *Decker* allowed him to add a new theory in an amended complaint. But that argument was based on selective quotation. *Decker* stated, "Plaintiff was not required to file a second NOI with regard to these defendants after he was granted leave to file his amended complaint, **a complaint that merely clarified plaintiff's claims against the Spectrum defendants**." 287 Mich App at 681 (emphasis added). Kostadinovski's argument ignored the emphasized text.

It also ignored the rest of *Decker*'s analysis. The Court of Appeals correctly observed that "[i]f [Kostadinovski's argument] were the law, the entire analysis in *Decker* would have been completely unnecessary …."[9] *Decker* diligently compared the original and amended complaint to determine whether the plaintiff was adding a new claim. It made that detailed comparison because it was necessary to distinguish *Gulley-*

[9] Appendix 386, Court of Appeals Opinion, p. 9 n.6.

Reaves. But that was pointless if, as Kostadinovski contends, the plaintiff was free to add new claims regardless whether they were in his NOI.

Gulley-Reaves 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.

Kostadinovski's argument would gut both *Gulley-Reaves* and *Decker*. But it wouldn't stop there. His argument would also make this Court's analysis in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009) moot.

In *Bush*, the plaintiff's NOI sufficiently described several claims, but defectively described others. This Court held that plaintiffs could cure NOI deficiencies under MCL 600.2301 if they satisfied a two-pronged test. *Id.* at 177. But if Kostadinovski's argument is right, MCL 600.2301 and its two-prong test was irrelevant. According to Kostadinovski, the plaintiff in *Bush* was free to add the defectively described claims in an amended complaint because the NOI "statute has no application to theories added to a case by amendment."[10] So, though he doesn't acknowledge it, Kostadinovski's argument effectively asks this Court to overrule *Bush*.

4. Kostadinovski offers two policy-based rationales that don't withstand scrutiny.

Kostadinovski offers two policy-based rationales in support of his novel position. First, he argues that if the "notice requirement applies to theories developed during the

[10] Cross-Application, p. 6.

course of discovery that must be added to a malpractice case by amendment, it would demand … that a presuit notice of intent be prepared with complete omniscience."[11] It's a strawman argument.[12]

Neither defendants' position nor, for that matter, the Court of Appeals' analysis requires omniscience. Dr. Harrington and Advanced Cardiothoracic have explained that Kostadinovski only needed to send a new NOI. The Court of Appeals held that plaintiffs like Kostadinovski should move to amend their NOI under MCL 600.2301. Neither approach requires omniscience or forever bars any claim that wasn't in the initial NOI. Kostadinovski's first rationale fights an imagined enemy.

Kostadinovski's second rationale fights the entire premise of a notice period. He argues that if plaintiffs who discover new claims during litigation must send a new NOI, "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."[13] That's improperly dismissive of the legislated notice procedure. It's also hyperbolic.

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 has shown that it doesn't share

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[11] Cross-Application, p. 13.

[12] *State v Bowen*, 281 P3d 599 (Kan App, 2012) ("A strawman argument is where 'the arguer knocks down a misstated argument and concludes that the original argument was bad.'"), quoting Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking*, p. 171 (3d ed, 1997).

[13] Cross-Application, p. 15.

Kostadinovski's dim view of the notice period. In fact, this Court's opinions have 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 because plaintiffs could send a new NOI while they continue to litigate their other claims. For example, Kostadinovski's attorney admitted that he knew about the new claim by July 2015.[14] That was 6 months before his experts were deposed. And it was about 8 months before he moved to amend his complaint to add the new theory. So Kostadinovski could have given notice of his new claim, continued litigating his original claims, and amended his complaint around the time his experts were deposed. Instead, he waited 8 months and until after he abandoned his original claims. Any time spent "doing nothing" would have been the product of Kostadinovski's lack of diligence.[15] That's not a reason to excuse Kostadinovski (or future plaintiffs) from the notice requirement.

5. Conclusion: Kostadinovski's proposed solution 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 NOI requirement, undermine its purpose (would-be defendants can't assess and settle pre-suit what isn't in a notice), and deny defendants their statutory right to notice. This Court should reject option two.

[14] Appendix 314, Mar. 28, 2016 Hrg. Tr., p. 8.

[15] Of course, sending a new NOI doesn't guarantee that the trial court will grant leave to amend the complaint. Kostadinovski's undue delay also warranted denying his motion—a point that Dr. Harrington and Advanced Cardiothoracic preserved below, but the Court of Appeals left for the trial court to address on remand.

C. Option 3—Time travel

Not to be flippant, but the Court of Appeals' position—amending the NOI under MCL 600.2301—essentially advocates the fiction of time travel. It does this in two ways. Kostadinovski didn't preserve the issue and defendants never received an NOI for their new claim. The Court of Appeals engaged the fiction that both preservation and notice actually occurred.

1. The Court of Appeals erred because it reversed based on an issue that Kostadinovski didn't preserve.

The first fiction concerns the specific facts of this case. Kostadinovski didn't move to amend his NOI or cite MCL 600.2301 in the trial court. That can't be undone. Defendants rely on their application[16] and won't belabor the point here. It's simple: the trial court wasn't required to raise amending the NOI or MCL 600.2301 for the Kostadinovskis and it certainly didn't abuse its discretion by not doing so. *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008) ("Trial courts are not the research assistants of the litigants …."); *Napier v Jacobs*, 429 Mich 222, 228-229; 414 NW2d 862 (1987) ("'[T]here is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right.'"), quoting 3 LaFave & Israel, Criminal Procedure, § 26.5(c), pp. 251-252; *Duray Dev LLC v Perrin*, 288 Mich App 143, 161; 792 NW2d 749 (2010) ("Perrin did not raise the issue in the trial court, and the trial court did not err by not raising it for him.").

[16] Application, pp. 12-18.

The Court of Appels erred because it analyzed the issue as though it had been preserved. It hadn't. So, simply put, the third option isn't at issue and isn't actually an option in this case.

2. MCL 600.2301 cannot allow plaintiffs to "amend" an NOI to include an entirely new theory.

Leaving preservation and the standard of review aside, the Court of Appeals' analysis promotes another fiction—defendants received the legislatively required notice when a NOI is amended to add a new claim. It's one thing to amend an NOI to fix a deficiently described claim. The premise behind doing so is that the defendant could figure it out; they were, or at least should have been, aware of the deficiently described claim when the received the NOI. *Bush*, 484 Mich at 178. But it's pure fiction to suggest that adding an entirely new claim through an amendment provided the legislated notice. The amendment is a charade.

a. A newly discovered claim can't meet *Bush*'s two-pronged test for applying MCL 600.2301.

The Court of Appeals held that, "by analogy" to this Court's decision in *Bush*, "MCL 600.2301 is implicated and potentially applicable to save [Kostadinovski's] medical malpractice action …."[17] It's wrong. Under *Bush*, MCL 600.2301 only applies when (1) the amendment wouldn't affect a party's substantial rights, and (2) the plaintiff made a good-faith attempt to comply with the NOI requirements. 484 Mich at 177. Neither prong can be met for a claim that wasn't even alluded to in an NOI.

[17] Appendix 385, Court of Appeals Opinion, p. 8.

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 NOI also defectively described some claims:

> 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 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 NOI referred to several claims, but it didn't fully describe them as required by the NOI statute. *Bush*, 484 Mich at 179-180, citing MCL 600.2912b.

Bush considered whether MCL 600.2301 allowed the trial court to "amend" the NOI or "disregard" the defects in it. The statute allows courts to do so "in the furtherance of justice" and when it wouldn't "affect the substantial rights" of a party:

> 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. [MCL 600.2301.]

Bush held 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. The furtherance-of-justice prong is met "when a party makes a good-faith attempt to comply with the content requirements of §2912b." *Id.* at 178.

In *Bush*, the defendants' substantial rights were not 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. Amendment was also 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.

The NOI in *Bush* referred to the claims, but didn't put any meat on the bones. Here, there are no bones for Kostadinovski's new claim. His NOI asserted that Dr. Harrington caused a clot to break loose, which led to his stroke. The NOI doesn't refer to hypotension or transfusion during surgery at all. So, unlike the defendants in *Bush*, Dr. Harrington and Advanced Cardiothoracic couldn't have possibly understood "the nature of the claims being asserted against him … even in the presence of defects in the NOI." *Id.* at 178. If amendment were allowed, they would have no opportunity to address the new claim outside the context of litigation. Kostadinovski also made no attempt, much less a good-faith attempt, to comply with the content requirements for his new claim. He could have sent a new NOI. See *Gulley-Reaves*, 260 Mich App at 486,

citing MCL 600.2912b(6). But he didn't. Accordingly, Kostadinovski can't amend his NOI under *Bush* and MCL 600.2301.

b. Applying MCL 600.2301 would deprive defendants of their statutory right to notice.

Since *Bush*, this Court has confirmed that the NOI requirement isn't a mere formality that can be lightly cast aside. It's a statutory right. In *Driver* (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. 490 Mich at 255. In *Tyra* (2015), this Court held that MCL 600.2301 can't cure a plaintiff's failure to wait the NOI period before filing the complaint. 498 Mich at 92. Both opinions emphasized that allowing the amendment "'would deprive defendants of their statutory right to a timely NOI followed by the appropriate notice waiting period." *Tyra*, 498 Mich at 92, quoting *Driver*, 490 Mich at 255 (cleaned up).

As in *Driver* and *Tyra*, applying MCL 600.2301 in any case like this one would mean that defendants don't get the statutorily required notice before a claim is put into litigation. So, as *Tyra* stated, "ignoring the defects in these cases would not be 'for the furtherance of justice' and would affect defendants' 'substantial rights.'" *Tyra*, 498 Mich at 92, quoting MCL 600.2301.

That isn't necessarily the case when the plaintiff's NOI suggested or referred to a theory. E.g., *Bush*, 484 Mich at 179-180. In those cases, the defendant arguably had some opportunity to consider the claim unencumbered by litigation. See *id.* at 178. Not here though. And not in any case in which the plaintiff raises an entirely new theory during

litigation. In those cases, allowing amendment under MCL 600.2301 can do only one thing—deprive defendants of their statutory right.

c. Conclusion: The Court of Appeals's holding that MCL 600.2301 could be used to amend an NOI to include an entirely new claim is wrong.

This isn't a fact-specific issue. The result should be the same any time a plaintiff tries to raise a new theory that wasn't in his NOI. MCL 600.2301 cannot be "potentially applicable"[18] when a claim isn't even alluded to in an NOI. If it were, Dr. Harrington and Advanced Cardiothoracic and all defendants like them will **never** get their statutory right to review and address the new claim outside the context of litigation.

This case illustrates the point. The Kostadinovskis made no attempt to comply with the NOI requirement for their new theory. Allowing amendment would deprive defendants of their "statutory right" to receive an NOI describing the claim before it's put into litigation. *Tyra*, 498 Mich at 92; MCL 600.2912b(4). So the analysis in Court of Appeals' published opinion is wrong. If this Court reaches this issue despite Kostadinovski's waiver, it should reject the Court of Appeals analysis.

Conclusion and Relief Requested

The cure for the Kostadinovski's problem was simple—serve an NOI that described the new claim and wait the notice period. Nothing prevented Kostadinovski from doing so. His need to be excused from that simple requirement is the product of his refusal to play by the rules.

[18] Appendix 385, Court of Appeals Opinion, p. 8.

To cure his unexplained omission, Kostadinovski advocates a tectonic shift that would gut case law and the legislated notice procedure. That certainly is not what the Legislature intended. And the Court of Appeals' solution is no better. It reversed the trial court under abuse-of-discretion review based on an issue that Kostadinovski waived. That's error. MCL 600.2301 also cannot ever apply when a plaintiff seeks to raise a new theory that wasn't referenced in his NOI. The Court of Appeals erred in suggesting otherwise.

This Court should deny Kostadinovski's cross-application, reverse the Court of Appeals, and reinstate the trial court's order. Since Kostadinovski didn't send an NOI for his new theory and wait the NOI period, he couldn't amend his complaint to add the new theory. The trial court didn't abuse its discretion in denying Kostadinovski's motion to amend his complaint.

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