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/APPELLEES/CROSS-APPELLANTS' SUPPLEMENTAL BRIEF FILED PURSUANT TO THE COURT'S SEPTEMBER 27, 2018 ORDER

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)
Attorneys for Plaintiffs/Appellees/Cross-Appellants
3200 Greenfield, Suite 260
Dearborn, MI 48120
(313) 961-0130

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STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT CONCLUDE THAT THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' REQUEST TO AMEND THEIR COMPLAINT FOR FAILING TO COMPLY WITH MCL 600.2912b BECAUSE (1) THAT STATUTE HAS NO APPLICATION TO A MOTION TO AMEND TO ADD A NEW THEORY OF RECOVERY AGAINST AN ALREADY-NAMED DEFENDANT AND (2) ASSUMING THAT THIS STATUTE DOES APPLY TO SUCH AN AMENDED THEORY, THE CIRCUIT COURT SHOULD HAVE ORDERED PLAINTIFFS TO FILE A NEW NOTICE OF INTENT AND OBSERVE THE MANDATORY WAITING PERIOD BEFORE FILING THEIR AMENDED COMPLAINT?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

II. TO THE EXTENT THAT IT IS NECESSARY TO REACH THIS QUESTION, DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT PLAINTIFFS' PROPOSED AMENDMENTS WERE NOT FUTILE ON THE BASIS OF MCL 600.2301 AS INTERPRETED BY THIS COURT IN *BUSH V SHABAHANG*, 484 Mich 156; 772 NW2d 272 (2009)?

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. App. 53. In the course of that surgery, Mr. Kostadinovski suffered a stroke. *Id*., ¶¶55-56; App. 56-57.

Mr. Kostadinovski retained an attorney to investigate a potential medical malpractice claim against Dr. Harrington. On December 9, 2013, counsel for Mr. Kostadinovski mailed a Notice of Intent to File Claim in compliance with MCL 600.2912b. App. 29-44. 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, at 10-11; App. 38- 39.

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. Complaint, App. 46-66. 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, ¶69a-g; App. 59-60.

In January and February 2016, plaintiffs' standard of care and causation experts were deposed. In their depositions, plaintiffs' experts offered no support for the theories of malpractice that were asserted in plaintiffs' original complaint. Plaintiffs' experts did, however, testify that Dr. Harrington committed malpractice in failing to recognize that Mr. Kostadinovski was in a hypotensive state during his mitral valve surgery and in failing to adequately perfuse Mr. Kostadinovski during that procedure, two theories that had not been included in the presuit notice or plaintiffs' original complaint.

On March 21, 2016, the defendants filed a motion for summary disposition. App. 265-269.

In that motion, they argued that, based on the deposition testimony provided by plaintiffs' experts, all of the claims of malpractice alleged in the original complaint were subject to dismissal. In that same motion, defendants also sought to strike any allegations of malpractice that plaintiffs 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 depositions. On March 21, 2016, plaintiffs moved to amend their complaint to include claims that Dr. Harrington was responsible for malpractice in 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. Motion to Amend, App. 278-285.

In their response to plaintiffs' motion to amend, defendants proffered several reasons why, in their view, the motion to amend should be denied. App. 287-296. Defendants contended that the motion should be denied as untimely and prejudicial to the defense. App. 289-292. They 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); App. 288-289.

Second, defendants asserted that the amendment that plaintiffs proposed would be futile because the additional theories that they sought to add by amendment were not included in the

December 2013 notice of intent. App. 292-296. 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 plaintiffs' notice of intent, defendants argued in response to the motion to amend that the amendment would be futile because, "there is no mention, reference or inference to an alleged failure by Dr. Harrington to transfuse the patient secondary to a decreased hemoglobin and hematoint during the December 14, 2011 surgery." Response, at 9; App. 295.

A hearing was held on plaintiffs' motion to amend on March 28, 2016. App. 307-329. At that hearing, the circuit court took plaintiffs' motion under advisement. Tr. 3/28/16, at 19; App. 325.

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 asserted in plaintiffs' original complaint. App. 331-341. At that hearing, the circuit court acknowledged that plaintiffs were offering no objection to the dismissal of the claims asserted in their original complaint. App. 338-339. The circuit court signed an order dated April 25, 2016 dismissing the claims of professional negligence stated in the original complaint. App. 343. The April 25, 2016 order noted that it was not a final order since the circuit court still had the plaintiffs' motion to amend under advisement.

The circuit court issued a written opinion addressing plaintiffs' motion to amend on April 29, 2016. App. 368-376. In that opinion, the circuit court first addressed the defendants' claim that the amendment that plaintiffs proposed was futile because it would not relate back under MCR 2.118(D). The circuit court rejected defendants' argument and concluded that, if allowed, plaintiffs' amendment would relate back to the filing of their original complaint since it arose out of the same

"conduct, transaction, or occurrence" as the claims made in the original complaint. Opinion, at 3-6; App. 370-373.

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

> 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.
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> Opinion, at 8-9; App. 375-376.

Thus, the circuit court concluded that the two new theories that plaintiffs sought to add to the

case by amendment - that Dr. Harrington did not properly monitor Mr. Kostadinovski's hypotension levels during the December 14, 2011 surgery and he failed to properly transfuse Mr. Kostadinovski - could not be added to the case because these theories had not been included in the December 2013 notice of intent. Based on its conclusion that plaintiffs had failed to comply with MCL 600.2912b's notice requirement, the circuit court determined that plaintiffs' motion to amend the complaint would be denied as futile.

Plaintiffs appealed the circuit court's April 29, 2016 decision to the Court of Appeals. A panel of that Court issued a published decision reversing the circuit court on October 24, 2017. *Kostadinovski v Harrington*, 321 Mich App 736; 909 NW2d 907 (2017); App. 378-387. In that opinion, the panel ruled that on the basis of a Michigan statute, MCL 600.2301, and this Court's decision in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), the case had to be remanded to the circuit court for a determination of whether plaintiffs should be given the opportunity to amend their notice of intent. 321 Mich App at 751-754.

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

On September 27, 2018, this Court issued an order directing the Clerk to schedule oral argument on both applications. *Kostadinovski v Harrington*, ___ Mich ___; 917 NW2d 403 (2018); App. 389-390. The Court's September 27, 2018 order further provided that the parties were to file supplemental briefs "addressing the issues raised in the primary appeal and the cross-appeal, including 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."

ARGUMENT

I. PLAINTIFFS' REQUEST TO AMEND THEIR MALPRACTICE COMPLAINT CANNOT BE DENIED AS FUTILE ON THE BASIS OF MCL 600.2912b WHERE THAT AMENDMENT SEEKS TO ADD ADDITIONAL THEORIES OF RECOVERY AGAINST AN ALREADY-NAMED DEFENDANT.

The plaintiffs in this medical malpractice action sought to amend their complaint to add additional theories of recovery against a defendant who was already named in their original complaint. The circuit court ruled that plaintiffs could not amend their complaint to allege new theories against the defendants because these new theories had not been included in the presuit notice that plaintiff's had mailed in compliance with MCL 600.2912b. The Court of Appeals reversed, ruling that the plaintiffs' right to amend their complaint was dependent on whether they could meet the requirements of MCL 600.2301 and this Court's decision in *Bush v Shabahang*.

There are two reasons why this Court need not address the rationale that the Court of Appeals offered for reversing the circuit court's decision denying plaintiffs' motion to amend. For two rather fundamental reasons, the circuit court erred in concluding that plaintiffs' request to amend was futile for the purported failure to comply with the notice of intent statute.

A. MCL 600.2912b Has No Application To A Request To Amend To Assert A New Theory Of Recovery Against An Existing Defendant.

In denying plaintiffs' motion to amend, the circuit court concluded that allowing the amendment 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 actually

applies to additional theories of recovery pleaded against existing defendants that are added to a malpractice case by amendment. This basic assumption that lies behind the circuit court's ruling is 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 the notice that a plaintiff must provide to the defendant "*before the action is commenced.*" Thus, §2912b's notice requirement applies at a time before suit is filed; it does not apply to an amended complaint filed later in the proceeding against an already-named defendant.

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

Thus, while §2912b decrees the nature of the notice that a prospective medical malpractice

plaintiff must provide *before* commencing a suit as well as the notice that a plaintiff must provide if he/she seeks to amend an existing complaint to add a *new* defendant, §2912b contains no provision dictating that a party who amends a complaint to raise new theories of recovery against an already-named defendant must provide advance notice of such claims and also comply with §2912b's mandatory waiting period. By its express language, §2912b has no application to the situation presented in this case in which the plaintiffs fully complied with §2912b before suit was commenced[1] and later sought to add new theories by amendment against a defendant previously named in the case. The circuit court's conclusion that the amendment plaintiffs requested would be futile under §2912b fails for the simple reason that this statute, by its unambiguous wording, has no application to the amendment that plaintiffs proposed.

The 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

[1]In the papers that they filed in the circuit court, defendants conceded (as they had to) that plaintiffs' notice of intent mailed in December 2013 fully complied with §2912b. In addition, the assertions of professional negligence claimed in that notice of intent perfectly matched the allegations of malpractice alleged in plaintiffs' original complaint. *See* Notice of Intent at 10-11; App. 38-39; Complaint, ¶69a-g; App. 59-60. 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 one point in time that this statute matters, *i.e.*, at the time *before* the commencement of the cause of action.

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 NW2d 44 (2008) ("a plaintiff cannot *commence* an action before he or she files a notice of intent that contains all of the information required under §2912b(4))" (emphasis added); *Morrison v Dickinson,* 217 Mich App 308, 317; 551 NW2d 449 (1996), (noting that §2912b, "simply mandates notice *before a complaint is filed*.") (emphasis added); *Neal v Oakwood Hospital Corp*., 226 Mich App 701, 718; 575 NW2d 68 (1997), ("§2912b(1) . . . merely provides a brief temporal restriction *before suit may be commenced*.") (emphasis added).[2]

These cases serve to confirm that §2912b's notice requirement must be satisfied at one particular point in time in the litigation process - *before any suit is filed.* The notice of intent statute says nothing about what a plaintiff must do in amending a complaint to add a new theory against an existing defendant. Nothing in the text of §2912b supports the 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.[3]

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[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).

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

> Thus, *plaintiff was only required under MCL 600.2912b(1) to provide the statutory notice before she commenced her lawsuit* against these same defendants and it is undisputed that the requisite notice was provided. *Plaintiff was not required to file a second notice of intent with regard to these defendants after she*

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.*, 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 to add a new theory against an existing defendant must comply with the requirements of §2912b is not only at odds with the text of that statute, it is also inconsistent with the basic rationale behind this statutory notice provision. As the Court recognized in *Bush*, the purpose of the notice of intent

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> *was granted leave to file her amended complaint*, a complaint which merely clarified plaintiff's claims against the Spectrum defendants. *The purpose of the notice requirement - to promote settlement without the need for formal litigation - cannot be realized under these circumstances.*
>
> *Id*. at 681 (emphasis added).

statute is to "promote[] settlement without the need for formal litigation." 484 Mich at 174; *see also Gulley-Reaves v Baciewicz*, 260 Mich App 478, 488; 679 NW2d 98 (2004) ("The purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation. . .") The fundamental purpose of §2912b, as its text declares, 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' request to amend. In its April 29, 2016 opinion, the circuit court appeared to conclude that its determination that plaintiffs' request to amend was futile 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 that 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 perfectly 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 panel 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 to assert those new theories.[4]

The *Gulley-Reeves* decision in no way supports the circuit court's conclusion that §2912b extends to bar any new theories of recovery against a defendant already named in the case that may later be added 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.

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[4]For this reason, the holding in *Gulley-Reeves* is not directly at issue in this case that involves the amendment of a complaint. But, at some point in time this Court will perhaps have to address whether the *Gulley-Reeves* case was decided correctly. In addressing that issue, the Court will have to decide whether the holding in *Gulley-Reeves* survived this Court's decision in *Bush v Shabahang,* 484 Mich 156; 772 NW2d 272 (2009). One of the central premises of this Court's interpretation of §2912b in *Bush* concerned Senate Bill 270, an early version of the notice of intent statute. As the *Bush* Court noted, one of the provisions of that proposed Senate Bill specified:

> Except as otherwise provided in this subsection, in an action alleging medical malpractice, *the court shall dismiss a claim not included in the notice required under section 2912f.*
>
> Senate Bill 270, quoted in *Bush*, 484 Mich at 173.

What is significant about this language in Senate Bill 270 is that it directly corresponds to the conclusion that was reached some years later in *Gulley-Reeves* - the Court of Appeals ordered in that case that any claim in a complaint that was not included in the plaintiff's presuit notice of intent was subject to dismissal. But, as this Court pointed out in *Bush*, what is significant about the above-quoted language from Senate Bill 270 is that it did not have enough votes to pass and it was removed from the notice of intent statute in its final form. 484 Mich at 173-174. The fate of Senate Bill 270 casts considerable doubt on the conclusion that was reached by the panel in *Gulley-Reeves.*

The unambiguous text of §2912b must control this case. But, in addition to the text of that statute, this Court should consider the practical implications of the circuit court's ruling if that ruling were adopted here.

If the circuit court were correct, the result would be that anytime that a plaintiff seeks to add a new theory to a medical malpractice action by amendment, that amendment would be allowed only if the plaintiff could demonstrate that the new theory that he/she wishes to add was included in a 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 would be allowed to 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 all of the claims that the plaintiff could pursue. Additional claims of professional negligence that surface during the course of discovery that might otherwise be added to the case under Michigan's liberal amendment rules, *see* MCR 2.118(A)(2), would be foreclosed because these newly-discovered theories were not included in the presuit notice prepared months before the case was even filed.

Such a view of §2912b's requirements runs afoul of an important observation made by this Court in *Roberts*. In that case, the 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 presuit notice requirement applies to new theories of recovery developed during the course of discovery, it would demand of plaintiff's counsel what the *Roberts* Court 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 have been secured and before any discovery has been conducted, the plaintiff must draft a notice of intent that anticipates *every* theory that might possibly emerge in the case, 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.

It is interesting to note the defendants' response to this particular ramification of the circuit court's ruling in this case. The defendants' position on this particular point has undergone a significant evolution during the course of this proceeding. In the brief that they filed in the circuit court in opposition to the plaintiffs' request to amend their complaint, the defendants specifically argued that this amendment was futile because the allegations that plaintiffs sought to add to the case *were not included in the December 2013 notice of intent.*

Thus, defendants argued in response to plaintiffs' motion to amend that this case was analogous to the Court of Appeals decision in *Gulley-Reaves* and they specifically asked the circuit court to compare the claims of malpractice contained in the December 2013 notice of intent with the theories that plaintiffs wished to add to the case by amendment. In their response to plaintiffs' motion to amend, the defendants argued:

> Here, *a review of Plaintiffs' Notice of Intent attached hereto as Exhibit 2 reveals that all of the allegations in the NOI relate to the preoperative assessment of the arterial tree,* and the breaking off of clot or thrombus with the use of an EndoClamp resulting in stroke. *There is simply no mention, reference or inference to an alleged failure by Dr. Harrington to transfuse the patient secondary to a decreased hemoglobin and hematocrit during the December 14, 2011 surgery. Similarly, in the NOI, Plaintiffs make no assertion that the cause of the stroke was related to decreased oxygenation to the brain secondary to hemodilution (or hypotension)* during the surgery and the failure to transfuse the patient. Rather, the NOI clearly identifies the cause of the stroke as being related to the alleged dislodging of thrombus, clot or calcification during the use of the EndoClamp. See Exhibit 2, pp. 12-13.
>
> This case is not like those facts found in *Decker, supra*, but rather, it is akin to the facts in *Gulley-Reaves, supra*, where there is a "totally new" and "different potential cause of injury" in the proposed Amended Complaint than those set forth in the NOI. As a result, the failure to adhere to the statutory mandates makes any proposed amendment futile, as these new allegations of negligence must fail as a matter of law.
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> Response, at 9; App. 295 (emphasis added).

It is this argument demanding a direct correlation between the contents of the presuit notice and the claims that plaintiffs sought to add by amendment that the circuit court found convincing. Like the defendants in their response to plaintiffs' motion to amend, the circuit court in its April 29, 2016 opinion denying that motion compared the theories that plaintiffs sought to add by amendment with the contents of the December 2013 notice of intent. Based on that comparison, the circuit court found that the pleading of these new theories would be futile because they were not included in the presuit notice:

> 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 hypension 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.
>
> Opinion, at 9; App. 376 (emphasis added).

On appeal, however, after apparently grasping the full implications of the position they took in the circuit court, the defendants have had to alter their position considerably. In their appellate briefing, defendants have announced that they are *not* seeking to bind a plaintiff to the contents of the original notice of intent. The defendants have, therefore, executed a strategic retreat from the argument that they got the circuit court to accept. In responding to the application for leave that plaintiffs filed in this Court, the defendants described their *present* position in this case in the following three sentences:

> Omniscience isn't required. Defendants have never suggested that plaintiffs are forever limited to the claims in their original notice of intent to sue. They only need to comply with the statutory procedure - send a new notice for the new claim and wait the appropriate notice period.
>
> Response to Application, at 1-2.

One of these three sentences - the second - is completely inaccurate. In point of fact, the central basis for one of defendants' futility arguments in the circuit court - the one that the circuit court ultimately adopted - was that any theories that plaintiffs sought to add by amendment *had to be contained in their December 2013 notice of intent*.[5] The fact that the defendants are now compelled to distance themselves from the very argument that formed the basis for the circuit court's decision in their favor should provide this Court with everything it needs to know about the propriety

[5]As will be discussed in the next section of this brief, the third of these three sentences from defendants' response to plaintiffs' application is also of significance at this stage since that sentence acknowledges that there was nothing that prevented plaintiffs from complying with §2912b, assuming that a court were to find that this statute applies to amendments.

of that decision.

For all of these reasons, the Court should conclude that the circuit court erred in finding that plaintiffs' request to amend was barred by §2912b's notice requirement since the unambiguous text of that statute reveals that it has no application to the amendment proposed in this case.

B. To The Extent Plaintiffs Had To Comply With MCL 600.2912b, The Circuit Court Should Have Ordered Plaintiffs To Mail A New Notice Of Intent.

In its September 27, 2018 order granting oral argument on the parties' applications, the Court indicated that the parties were to address in their supplemental briefs "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." App 390. For the reasons discussed in the previous section of this brief, there is no amending of a complaint that is "consistent with §600.2912b," since that statute, by its own language, is inapplicable to the amendment process outside of the limited circumstances described in §2912b(3).

But, if this Court's goal is an amendment of a medical malpractice complaint that is "consistent with §2912b" irrespective of what that statute's language actually provides, the course that the circuit court should have followed in this case is obvious. Rather than rejecting plaintiffs' request to amend as futile based on §2912b, what the circuit court should have done is to grant plaintiffs the right to amend and to order the plaintiffs to prepare a new notice of intent that included the new theories of recovery they sought to add by amendment. Once that new notice of intent was mailed, the circuit court should have further ordered that everybody involved in the case would sit

on their hands for an unspecified[6] mandatory waiting period and, when that waiting period expired, the plaintiffs should then have been allowed the right to file their amended complaint.

In most other circumstances, where a plaintiff is required during the course of a case to file a new notice of intent and observe §2912b's mandatory waiting period, the delay involved would be fatal to the plaintiffs' claims because of the operation of the statute of limitations[7]. But, the statute of limitations is of no concern in this case because, as the circuit court recognized in its April 29, 2016 decision addressing plaintiffs' motion to amend, the amendment that plaintiffs sought to add to their complaint would under MCR 2.118(D) relate back to June 5, 2014, the date of their original complaint. App. 370-373.

Thus, as long as the theories that a plaintiff seeks to add by amendment are against a defendant who was named in the original complaint and they arise out of the "conduct, transaction or occurrence" that was the subject of that original complaint, these claims will relate back. MCR 2.118(D); *see Doyle v Hutzel Hospital*, 241 Mich App 206, 211-220; 615 NW2d 759 (2000). In this case, what that means is that, to the extent that plaintiffs were compelled to comply with §2912b's notice requirement as to the theories that they sought to add by amendment, *plaintiffs could have*

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[6]MCL 600.2912b specifies a *presuit* waiting period of 182 days from the date of mailing a notice. MCL 600.2912b(3) calls for a 91 day waiting period where the plaintiff seeks to amend the complaint to add a new defendant. For reasons discussed earlier, neither of these provisions apply in these circumstances. Thus, to the extent that "compliance with §2912b" were the goal, the Court would be compelled to engage in a bit of judicial draftsmanship to determine whether the 182 day or the 91 day mandatory waiting period is to be applied in a case such as this one.

[7]For example, if rather than amending the complaint to allege additional theories against an already named defendant, plaintiffs wished to amend the complaint to name a new defendant in March 2016, that amendment would have been futile because the two-year statute of limitations applicable to the date of malpractice would have expired in December 2013. See *Driver v. Naini*, 490 Mich 239, 250-251; 802 NW2d 311 (2011).

done so simply by mailing a new notice of intent.

This is, therefore, a second reason why this Court does not need to reach the legal issue that was decided by the Court of Appeals in this case. To the extent that §2912b does, in fact, apply to the amendment that plaintiffs proposed, compliance with that statute was easy to achieve. Plaintiffs' motion to amend should have been granted, conditioned on (1) the mailing of a new notice of intent containing those added theories; and (2) waiting the 91 or 182 day period specified in §2912b. Once plaintiffs did these two things, they would then be entitled to file their amended complaint.

If §2912b were rewritten so as to require compliance with its dictates in a case such as this one 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 the right to amend 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 three or six months presumably doing nothing while §2912b's mandatory waiting period expires*.

It would appear that the defendants now concur in this argument that the plaintiffs could achieve compliance with §2912b in these circumstances simply by filing a new notice of intent. On page 17 of this brief, plaintiffs quoted three sentences that were contained in defendants' response to plaintiffs' application for leave. In these three sentences, defendants attempted to disavow what they had argued in the circuit court in support of their claim that the amendment would be futile.

In place of that argument, defendants have asserted (at least at the appellate level) that plaintiffs in amending their Complaint "only need to comply with [§2912b's] statutory procedure - send a new notice for the new claim and wait the appropriate notice period." Defendants' Response to Application, at 1-2. It appears, therefore, that even the defendants believe that this Court does not

need to reach the decision rendered by the Court of Appeals panel in this case.

For these reasons, even if §2912b were to be found applicable to the amendment that plaintiffs proposed in this case, that amendment would not have been futile as the circuit court found. Where, as here, plaintiffs' amended theories lodged against defendants who were named in the original complaint relate back under MCR 2.118(D), the circuit court should not have denied plaintiffs' motion to amend as futile for failing to comply with §2912b; it should have ordered plaintiffs to comply with the notice and mandatory waiting period provided in §2912b by mailing a new notice of intent incorporating the new theories that plaintiffs sought to add by amendment and then waiting some period of time before filing their amended complaint.

C. Even If §2912b Applied To Claims Asserted In An Amended Complaint, The Circuit Court Still Erred In Concluding That Amendment Of The Complaint Would Be Futile.

For the two reasons discussed in the prior sections of this brief, the circuit court erred in concluding that plaintiffs' proposed amendment was futile on the basis of §2912b's notice requirement. But, there is another slightly less direct means by which a plaintiff could achieve compliance with §2912b's notice requirement that is consistent with this Court's precedents. That final approach was the subject of the Court of Appeals October 24, 2017 opinion.

The Court of Appeals ruled that this Court's decision in *Bush* controlled its analysis. 321 Mich App at 750. In *Bush*, this Court considered the question of how a medical malpractice action is to be treated where the presuit notice called for by §2912b was defective in some respect. It was entirely appropriate for the Court of Appeals in this case to employ this Court's reasoning in *Bush* since the essence of the circuit court's ruling was that - at least with respect to the two theories that plaintiffs sought to add by amendment - plaintiffs' December 2013 notice of intent was "defective"

in that it did not include these two new theories.

In *Bush*, this Court considered the question of what a court is to do when a notice of intent is found to be defective in some respect. *Bush*, 484 Mich at 170-181. The *Bush* Court examined the legislative history behind the notice of intent statute and determined that "the Legislature did not intend for a defect in an NOI to be grounds for dismissal with prejudice based on §2912b." 484 Mich at 173. The *Bush* Court ruled, instead, that the Revised Judicature Act provided a mechanism for curing any defects in a notice of intent through the amendment of that notice. The basis for the right to amend identified by the Court in *Bush* was a Michigan statute, MCL 600.2301. That statute provides:

> 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.

MCL 600.2301 gives a court the authority to amend any "process, pleading or proceeding" in the furtherance of justice. The Court ruled in *Bush* that the mailing of a notice of intent is part of the "process" or "proceeding" of a malpractice case. 484 Mich at 176. The *Bush* Court further found in the text of §2301 a two-pronged test governing circumstances in which a court should permit the amendment of a notice of intent to correct a defect in that notice: (1) whether a substantial right of a party is implicated, and (2) whether amendment is in the furtherance of justice. 484 Mich at 177-178. The Court in *Bush* found that the first of these two requirements is met in

medical malpractice cases based on the sophistication of the doctors and institutions served with notices of intent:

> Given that NOIs are served at such an early stage in the proceedings, so-called "defects" are to be expected. The statute contemplates that medical records may not have been turned over before the NOI is mailed to the defendant. Defendants who receive these notices are sophisticated health professionals with extensive medical background and training. Indeed, these same defendants are allowed to act as their own reviewing experts. A defendant who has enough medical expertise to opine in his or her own defense certainly has the ability to understand the nature of claims being asserted against him or her even in the presence of defects in the NOI. Accordingly, we conclude that no substantial right of a health care provider is implicated.

484 Mich at 178.

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

Applying this two part test to the facts presented in *Bush,* this Court went on to rule that, despite the fact that plaintiff's notice of intent in that case was found to be defective under §2912b, plaintiff had made a good faith attempt to comply with §2912b(4). 484 Mich at 179-181. As a result, the Court held in *Bush* that any defect in a plaintiff's notice of intent could be corrected through amendment. The *Bush* Court further held that the amendment of a notice of intent under §2301 would relate back to the date of the filing of the original notice of intent. *Id*., at 181, n. 44. As a result, the Court ruled that the plaintiff's cause of action was not to be dismissed because of a

defect in a presuit notice. Instead, the Court remanded the case to the circuit court with instructions to allow plaintiff to prepare an amended notice of intent under the procedures it had set out. 484 Mich at 180-181.

All that the Court of Appeals did in this case was to follow the process set out by this Court in *Bush*. The Court of Appeals first correctly grasped that the defect in the plaintiff's notice of intent in *Bush* was directly analogous to the "defect" that the circuit court identified in the Kostadinovskis' December 2013 notice - it failed to include the two theories of liability that plaintiffs wished to add by amendment. The panel ruled in its October 24, 2017 opinion:

> 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.
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> 321 Mich App at 750-751.

The panel then applied the approach to defective notices of intent that this Court adopted in *Bush*. As in *Bush,* the panel remanded the case to the circuit court to make the following determinations:

> The trial court is to engage in an analysis under MCL 600.2301 to determine whether amendment of the NOI or disregard of the prospective NOI defect would be appropriate. If the trial court concludes that amendment or disregard of the defect would not be proper under MCL 600.2301, the court's prior futility analysis relative to plaintiff's motion to amend the complaint shall stand and the motion to amend the complaint shall be denied, . . . 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 . . .
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> 321 Mich App at 753-754.

There is nothing wrong with the Court of Appeals resort to the analysis employed by this Court in *Bush* other than the fact that, for the two reasons previously discussed in this brief, the Court of Appeals was not required to reach this issue.

RELIEF REQUESTED

Based on the foregoing, plaintiffs/appellees/cross-appellants, Drago Kostadinovski and Blaga Kostadinovski, request that this Court reverse the circuit court's April 29, 2016 order denying plaintiffs' motion to amend 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/Appellees/Cross-Appellants
2684 Eleven Mile Road, Suite 100
Berkley, MI 48072
(248) 546-4649

MORGAN & MEYERS PLC

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

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