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STATE OF MICHIGAN

IN THE SUPREME COURT

DRAGO KOSTADINOVSKI and BLAGA KOSTADINOVSKI, as Husband and Wife,

Plaintiffs-Appellees/Cross-Appellants,

v.

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
Hon. Kathryn A. Viviano

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

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

Kostadinovski argues that plaintiffs who send a sufficient notice of intent to sue for one claim against a defendant have complied with MCL 600.2912b and are free to amend any additional claims against that defendant into the complaint—option 2 discussed in defendants' supplemental brief. He argues that the notice requirement only applies before a suit is filed because MCL 600.2912b(1) refers to sending a notice "before the action is commenced:"

> 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**. [*Id.* (emphasis added).]

His argument skips over an important part of the statute—the plaintiff must give "written notice under this section" before commencing the action.

As defendants' supplemental brief discussed, the content of the written notice required under the NOI statute is claim specific. 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).

So, yes, the statute applies "before the action is commenced." But no action is commenced until plaintiffs give the required written notice of "the claim," including "the applicable standard of care" and how its breach was "the proximate cause" of

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injury, that they intend to sue on. *Tyra v Organ Procurement*, 498 Mich 68, 91-92, 94; 869 NW2d 213 (2015); *Driver v Naini*, 490 Mich 239, 255-256; 802 NW2d 311 (2011).

Here, the action on the new claim was never and couldn't be commenced because Kostadinovski didn't give the "written notice under [MCL 600.2912b]" for it. Since Kostadinovski didn't give "written notice under this section," he couldn't commence his action on the new claim by filing an amended complaint. The trial court denied leave to amend the complaint for the right reason.

B. The trial court didn't have an obligation to order relief that Kostadinovski didn't ask for.

Kostadinovski argues that he should win, even if this Court agrees with defendants. The trial court erred, he says, because it didn't "order[] plaintiffs to comply with the notice and mandatory waiting periods 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."[1] He skips an important point: He never asked the trial court to order that and it had no obligation to do so on its own.

Kostadinovski moved to amend his complaint. The trial court had discretion to grant or deny that request. *Weymers v Khera,* 454 Mich 639, 654; 563 NW2d 647 (1997). It had no obligation to raise alternative forms of relief for Kostadinovski. *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008); *Napier v Jacobs*, 429 Mich 222, 228-229; 414 NW2d 862 (1987). It didn't abuse its discretion by not raising the prospect of amending

[1] Kostadinovski's Supplemental Brief, p. 18.

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the NOI or MCL 600.2301.[2] And, likewise, it didn't abuse its discretion by not directing Kostadinovski to do what MCL 600.2912b required. See *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."). Simply put, trial courts aren't required to be so paternalistic.

Kostadinovski's argument is likely less about what the trial court should have done more about what he'd like this Court to do—order what he should have asked for (or simply done) below. That isn't the role of an appellate court. *Kincaid v Cardwell*, 300 Mich App 513, 539; 834 NW2d 122 (2013). And it certainly isn't this Court's role. See MCR 7.305(B). In fact, it would be a dangerous precedent for this Court to hold that trial courts abuse their discretion when they don't grant relief that no one asked them for—effectively wiping out preservation law in one fell swoop.

C. Kostadinovski's argument that defendants changed their position is factually incorrect and substantively irrelevant.

In various ways, Kostadinovski accuses that defendants changed their position after the trial court's ruling.[3] He claims that defendants argued that he was forever limited to his original notice and, later, argued that he could have sent a new notice. There's no change in there. Kostadinovski sent only one notice of intent. So **he** is forever

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[2] Defendants' Supplemental Brief, pp. 15-16.

[3] See Kostadinovski's Supplemental Brief, p. 15 ("The defendants' position on this particular point has undergone a significant evolution during the course of this proceeding."); *id.*, p. 17 ("[T]he defendants have had to alter their position considerably."); *id.* ("The defendants have, therefore, executed a strategic retreat from the argument that they go the circuit court to accept.").

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limited to the claims in **his** original notice of intent because that's the **only** notice that he sent. Other plaintiffs who send additional notices aren't so limited.

Kostadinovski points out that defendants' response to his motion to amend argued futility because the new claim was "not included in the December 2013 notice of intent."[4] That's absolutely true. It's true because the December 2013 notice of intent was the only one that Kostadinovski sent; there was no other notice to discuss. So defendants and the trial court compared the new claim to the claim in the notice of intent and, finding no hint of the new claim in the notice, they concluded that the proposed amendment was futile.

The fact that defendants' appellate briefing explained how Kostadinovski **could have** properly raised his new claim wasn't a change in their position. Tellingly, while Kostadinovski tries to fault defendants for not explaining what he should have done in their trial court briefing, he omits that he didn't articulate his argument that MCL 600.2912b doesn't apply or his omniscience argument until the appeal. He didn't address *Gulley-Reaves*,[5] *Decker*,[6] or *Bush*[7] in the trial court at all. So when he finally explained his position on appeal, defendants explained its flaws.

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[4] Kostadinovski's Supplemental Brief, p. 15.

[5] *Gulley-Reaves v Baciewicz*, 260 Mich App 478; 679 NW2d 98 (2004). *Gulley-Reaves* affirmed summary disposition on claims that were in the complaint but not the NOI. Though Kostadinovski didn't address *Gulley-Reaves* in the trial court, his appellate briefs have questioned whether it "survived this Court's decision in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009)." Kostadinovski's Supplemental Brief, p. 13 n.4. It did. Even *Bush* agreed that dismissal is an appropriate remedy for a deficient NOI. See *Bush*, 484 Mich at 180 (stating that dismissal is "warranted" if the plaintiff can't amend under MCL 600.2301).

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Kostadinovski's argument that defendants changed their position is mere gamesmanship.[8] It has no substantive impact. Even if defendants changed their position on whether there was a way for Kostadinovski to add his new claim (they didn't), that would neither make Kostadinovski right that MCL 600.2912b doesn't apply to the new claim nor entitle him to relief that he didn't ask for.

Conclusion

Here's an important concession from Kostadinovski's supplemental brief: "To the extent that §2912b does, in fact, apply to the amendment that plaintiffs proposed, compliance with that statute was easy to achieve."[9] Agreed. This isn't difficult.

Kostadinovski knew about his new theory in July 2015—six months before his experts' depositions. As he acknowledges, it would have been easy for him to send a new notice for the claim at that point. Why he didn't is unknown. *Gulley-Reaves* rejected an attempt to raise new claims that weren't in a notice of intent. And *Decker* only allowed an amended complaint because it did not raise a new claim. It's a wonder why

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[6] *Decker v Rochowiak*, 287 Mich App 666; 791 NW2d 507 (2010).

[7] *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009).

[8] For example, defendants' briefs consistently refer to the Kostadinovskis as "Kostadinovski" or "the Kostadinovskis," not "plaintiffs." Yet Kostadinovski argues that this sentence from defendants' answer to his cross-application is "completely inaccurate:" "Defendants have never suggested that plaintiffs are forever limited to the claims in their original notice of intent to sue." Kostadinovski Supplemental Brief, p. 17. There shouldn't be any real confusion that defendants were referring to plaintiffs in general. But, to be sure, defendants never argued that plaintiffs, in general, are forever limited to the claims in their original notice of intent to sue, but Kostadinovski, in particular, is forever limited to the claims in his original NOI because that's the only one that he sent.

[9] Kostadinovskis Supplemental Brief, p. 20.

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Kostadinovski thought he could add a new claim without doing something easy like sending a new notice.

Compare the ease of sending a new notice with the impact that Kostadinovski's position would have on Michigan law. Accepting his position would effectively overrule at least three currently binding decisions:

- *Bush*'s analysis under MCL 600.2301 would be moot because, while the plaintiff's notice in that case deficiently described some claims, it sufficiently described others. So if Kostadinovski is right, all he had to do was amend his complaint as of right, MCR 2.118(A)(1), to add the deficiently described claims.
- Likewise, *Gulley-Reaves* would be moot—all the plaintiff had to do was amend his complaint.
- *Decker*'s diligent comparison of the pleaded claim and the amended claim was pointless if the plaintiff was free to add new claims against the existing defendant.

In addition, if this Court agrees with Kostadinovski, plaintiffs would be able to add new claims discovered pre-suit through an amendment as of right, MCR 2.118(A)(1), without giving notice of those claims. And, if the claim involves an entity like a hospital, the plaintiff could amend their complaint to add entirely new theories against the hospital that involve other medical providers who weren't even mentioned in the notice. See, e.g., *Gulley-Reaves*.

The detail that the Legislature required for notices under MCL 600.2912b(4) doesn't reconcile with an interpretation in which notice of one claim is notice of all claims. Yet that's where Kostadinovski's argument leads. This Court should reject his

argument, deny his cross-application, reverse the Court of Appeals, and reinstate the trial court's order.

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