STATE OF MICHIGAN

IN THE SUPREME COURT

DRAGO KOSTADINOVSKI and BLAGA KOSTADINOVSKI,

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 Circuit Court Case No 14-2247-NH

Hon. Kathryn A. Viviano

AMICUS CURIAE BRIEF FILED BY MICHIGAN DEFENSE TRIAL COUNSEL, INC. SUPPORTING DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case Law

Statutes

Michigan Court Rules

STATEMENT OF QUESTIONS PRESENTED

1. Did the failure of Plaintiffs-Appellees to raise the question of whether the Macomb Circuit Court was required to apply section 2301 of the Revised Judicature Act, MCL 600.2301, when considering their motion to amend pleadings, waive their right to raise that issue on appeal?

Plaintiffs-Appellees have not addressed this issue.
Defendants-Appellants say “Yes”.
The Court of Appeals did not address this issue.
Amicus Curiae MDTC says “Yes”.

2. How, consistent with MCL 600.2912b, may a plaintiff in a medical malpractice case amend the complaint to include newly discovered claims against an existing defendant?

Plaintiffs-Appellees state that MCL 600.2912b does not affect amendment.
Defendants-Appellants state that a plaintiff must serve a new notice of intent.
The Court of Appeals found that a plaintiff may amend their existing notice of intent instead of serving a new notice of intent.
Amicus Curiae MDTC states that a plaintiff must serve a new notice of intent.

3. Should this Court adopt the bright line test that the Court of Appeals has created through *Gulley-Reaves v Baciewicz*, 260 Mich App 478; 679 NW2d 98 (2004) and *Decker v Rochowiak*, 287 Mich App 666; 791 NW2d 507 (2010) for determining when a plaintiff must file a new notice of intent before being permitted to amend a medical malpractice complaint?

Plaintiffs-Appellees say “No”.
Defendants-Appellants say “Yes"
The Trial Court essentially followed this test.
The Court of Appeals did not apply this test in this case.
Amicus Curiae MDTC says “Yes”.

STATEMENT OF INTEREST OF AMICUS CURIAE

In its September 27, 2018 order setting this case for oral argument, this Court invited the Michigan Defense Trial Counsel, Inc. ("MDTC")[1] to submit an amicus curiae brief. MDTC is a statewide association of attorneys whose primary focus is representing defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, the MDTC accomplishes this by facilitating discourse among, and advancing the knowledge and skills of, defense lawyers to improve the adversary system of justice in Michigan. The MDTC appears as a representative of civil defense attorneys and their clients throughout Michigan, a significant number of whom will be potentially affected by the Court's resolution of the issues presented in this appeal.

INTRODUCTION

One fundamental aspect of due process is providing adequate notice to the adverse party of the claims and defenses being raised in the litigation. In the specific area of medical malpractice, the Michigan Legislature has created a comprehensive set of procedures that a medical malpractice plaintiff must follow before filing suit. This set of procedures is intended to (1) promote settlement of medical malpractice claims without litigation, (2) reduce litigation costs and (3) provide compensation for medical malpractice claims that might not be provided because of the cost of litigation. The Court of Appeals decision in this case subverts this intent and violates the substantive rights of Defendants-Appellants by permitting a medical malpractice plaintiff to add

[1] After reasonable investigation, MDTC believes that (a) no MDTC member who voted either in favor or against preparation of this brief, and no attorney in the law firm or corporation of such a MDTC member, represents a party to this litigation; (b) no MDTC member who is a representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than MDTC, or its members who authored this brief and their law firms or employers, made a direct or indirect financial contribution to the preparation or submission of this brief.

new claims years into a lawsuit without following the clear statutory requirements for commencing a new medical malpractice claim. Therefore, this Court should grant leave to Defendants-Appellants to appeal so this Court can issue a decision that not only protects their substantive and procedural rights, but also provides clear guidance for future litigants pursuing and defending medical malpractice claims.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This medical malpractice lawsuit arises out of a mitral value repair surgery that was performed on December 14, 2011. (Complaint, ¶¶ 35-46, App 53-55). Plaintiffs-Appellees waited until December 9, 2013, just five days before the statute of limitations would have expired, to serve a Notice of Intent ("NOI") upon one health professional, Steven D. Harrington M.D. and two health facilities, Henry Ford Macomb Hospital and Advanced Cardiothoracic Surgeons. (Proof of Mailing for NOI, App 43). Plaintiffs-Appellees then commenced this lawsuit 182 days later, on June 5, 2014. (Macomb Circuit Court Docket Sheet, App 2). This lawsuit was supported by the Affidavit of Merit of Edgar Chedrawy, M.D. (App 68-74).

A medical malpractice plaintiff may petition for leave to delay the filing of an affidavit of merit if the plaintiff does not have all of the medical records needed to prepare such an affidavit. See MCL 600.2912d(3). Plaintiffs-Appellees did not request such an extension. (See Macomb Circuit Court Docket, App 2). At no time have Plaintiffs-Appellees contended that they did not possess all applicable medical records. Plaintiffs-Appellees certainly have never claimed that they did not have the laboratory values, the basic factual predicate on which Plaintiffs-Appellees base their proposed amended pleading, which is the focus of the Application before this Court.

The NOI, Complaint and Affidavit of Merit all contended that the alleged medical malpractice was related to the use of an EndoClamp during the mitral valve repair. (NOI, pp 9-

12; Complaint, ¶¶ 69-79; and Chedrawy Affidavit of Merit, ¶¶ 10-17; App 37-40, 59-64, and 69-73). More specifically, Dr. Chedrawy testified as to the alleged failures by Defendants-Appellants to perform testing, such as a CT angiogram, before the surgery. (Chedrawy Affidavit, ¶¶ 10(b), 11(b), App 68-72). After the lawsuit was filed, Defendants-Appellants defended this medical malpractice claim for more than 21 months. (Macomb Circuit Court Docket, App 2-14). Toward the conclusion of discovery, Defendants-Appellants deposed the experts retained by Plaintiffs-Appellees, including Dr. Chedrawy, who had signed the Affidavit of Merit that Plaintiffs-Appellees were required to file with their Complaint. See MCL 600.2912d(1). During his deposition, Dr. Chedrawy testified that the failure of Defendants-Appellants to perform a CT angiogram before the surgery did not breach the standard of care when the surgery was performed in 2011. (Chedrawy Deposition, pp 27-29, App 103-105).

Therefore, on March 21, 2016, Defendants-Appellants filed a motion for summary disposition because Plaintiffs-Appellees did not have any expert witness testimony to support any of the claims described by the NOI, alleged in their Complaint and supported by Dr. Chedrawy's Affidavit of Merit. (Macomb Circuit Court Docket, App 14-15). At the April 25, 2016 hearing, Plaintiffs-Appellees agreed that the malpractice claims alleged in their original complaint should be dismissed for lack of the required expert witness support for these claims even though Plaintiffs-Appellees had litigated these for nearly two years before conceding this. (April 25, 2016 Transcript, pp 8-9, App 338-339). The trial entered an order dismissing the complaint on April 25, 2016. (App 343).

The same day that Defendants-Appellants filed their dispositive motion, Plaintiffs-Appellees filed a motion to amend their pleadings to add a new claim related to the management of hypotension during the surgery. (Macomb Circuit Court Docket, App 15). In their motion,

Plaintiffs-Appellees argued that they were entitled to amend their pleadings under MCR 2.118(A)(2) and (C)(2). (App 280, 282-284). After hearing oral argument on March 28, 2016, the trial court took the motion to amend under advisement. (March 28, 2016 Transcript, App 307-328). On April 29, 2016, the trial court issued a written opinion and order denying the motion to amend. (App 368-376).

Nowhere in their motion to amend or supporting brief had Plaintiffs-Appellees mentioned MCL 600.2301 ("section 2301"). (App 278-285). In their Court of Appeals Brief, however, Plaintiffs-Appellees argued that the trial court decision was erroneous because Plaintiffs-Appellees could amend their NOI under section 2301 pursuant to *Bush v Shabahang*.[2] (Plaintiffs-Appellees Court of Appeals Brief, pp 19-23). Plaintiffs-Appellees then explained how *Bush* had applied section 2301 and argued that the trial court should have followed the same procedure. (*Id.*). Plaintiffs-Appellees did not tell the Court of Appeals that they had not mentioned either *Bush* or section 2301 in their motion to amend. (*Id.*). They also did not explain why they should be permitted to raise this new issue for the first time on appeal. (*Id.*).

Despite this argument's not being raised in the trial court, the Court of Appeals decision is concerned primarily with how *Bush* and section 2301 apply to this case. The Court of Appeals framed the issue before it as follows:

> Our analysis today entails the question whether the *Bush* Court's application of MCL 600.2301 in a case involving a defective NOI governs the approach to be applied in the context of the procedural circumstances present in the instant case, or whether two published opinions[3] from this Court that arguably lend some support for defendants' position are controlling.

(Court of Appeals Opinion, p 6) (App 383) (footnote added to identify referenced cases).

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[2] 484 Mich 156; 772 NW2d 272 (2009).

[3] *Gulley-Reaves v Baciewicz*, 260 Mich App 478; 679 NW2d 98 (2004) and *Decker v Rochowiak*, 287 Mich App 666; 791 NW2d 507 (2010).

Similarly, when it announced its holding, the Court of Appeals stated that:

> On the strength of *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), we hold that the trial court, as opposed to automatically not allowing plaintiffs to amend their complaint because of the NOI conundrum that would be created, was required to assess whether the NOI defect could be disregarded or cured by an amendment of the NOI under MCL 600.2301 in the context of futility analysis. Accordingly, we reverse and remand for further proceedings under MCL 600.2301.

(Court of Appeals Opinion, p 2) (App 379).

Finally, when it explained what the trial court should do upon remand, the Court of Appeals once again focused upon this new issue:

> For purposes of guidance on remand, we provide the following direction. The trial court is to engage in an analysis under MCL 600.2301 to determine whether amendment of the NOI or disregard of the prospective NOI defect would be appropriate. If the trial court concludes that amendment or disregard of the defect would not be proper under MCL 600.2301, the court's prior futility analysis relative to plaintiff's motion to amend the complaint shall stand and the motion to amend the complaint shall be denied, ending the case, subject of course to appeal on the § 2301 analysis. If the trial court determines that MCL 600.2301 supports amendment of the NOI or disregard of the NOI defect, thereby negating the court's prior futility analysis, amendment of the complaint shall be allowed, with one caveat. [consideration of other grounds for denying amendment that Defendants-Appellants had raised in the trial court].

(Court of Appeals Opinion, p 10) (App 387) (footnote omitted).

Defendants-Appellants sought leave from this Court to appeal the Court of Appeals decision. Plaintiff-Appellees filed a cross-application for leave to appeal. On September 27, 2018, this Court entered an order that granted a mini-oral argument on this application for leave to appeal. In its Order, this Court stated that:

> The parties shall file supplemental briefs within 42 days of the date of this order 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.

Amicus Curiae MDTC now files its brief addressing this issue and proposing a test that this Court should adopt to guide future litigants and courts regarding how to resolve this issue in the future.

ARGUMENT

There are three important issues that this Court can resolve by granting the Application for Leave to Appeal. First, the Court of Appeals decision is based upon an issue that Plaintiffs-Appellees did not raise in the trial court. Moreover, the Court of Appeals decision effectively replaces this Court's requirement that parties "raise or waive" issues with a very broad duty for the trial courts to perform independent research to decide issues that the parties had not raised. Second, the Court of Appeals decision departs both from the language of section 2912b[4] and the Legislative intent that this Court has determined underlies section 2912b. Third, this Court should adopt the simple test developed by prior Court of Appeals decisions for determining when medical malpractice plaintiffs must file a new NOI before being permitted to file an amended complaint.

I. THE COURT OF APPEALS ERRED BY IMPOSING A MANDATORY DUTY UPON MICHIGAN TRIAL COURTS TO RESOLVE ISSUES THAT WERE NEVER RAISED BEFORE IT.

The initial question that every appellate court must answer is whether it can review the issues presented by the parties. One aspect of this question is whether the appellate court has jurisdiction to hear the issue presented. See, e.g., MCR 7.203(A)-(D) and MCR 7.303. A related issue is whether "a litigant [has] preserve[d] an issue for appellate review by raising it in the trial court." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (footnotes omitted). "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014).

[4] MCL 600.2912b.

This rule is based upon extremely important legal principles. As this Court explains:

> **The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency.** By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, **appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually.** This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. **Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute**.

Walters, 481 Mich at 387-388 (footnotes omitted) (emphasis added). One important aspect of judicial economy is the private and public expense of new trial court proceedings that could have been avoided had the issue been timely raised in the trial court. *Napier v Jacobs*, 429 Mich 222, 229; 414 NW2d 862 (1987). Another is the public and private cost of appellate proceedings that would have been unnecessary if the trial court had the chance to resolve the issue during the original trial court proceedings. *Id.*

There are a few, very narrow, exceptions from the "raise or waive" rule. One is "plain error", which the Court of Appeals has described as follows:

> [If an] issue is unpreserved, . . . this Court's review is limited to plain error affecting substantial rights. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."

Bennett v Russell, 322 Mich App 638, 642–43; 913 NW2d 364 (2018) (footnotes with citations omitted). Another exception is this Court's inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice. *Walters*, 481 Mich at 387 (footnotes omitted). This Court's "'inherent power [to review an issue not raised in the trial court] is to be exercised only under what appear to be compelling circumstances to avoid a miscarriage of justice or to accord a

[criminal] defendant a fair trial.'" *Id.* at 387 n 21 (citing *Napier*, *supra*, 429 Mich at 233). "More than the loss of . . . money . . . in [a] civil case is needed to show a miscarriage of justice or manifest injustice." *Napier*, 429 Mich at 234.

In this case, the Court of Appeals reversed the trial court's denial of the motion to amend because "the trial court . . . was **required** to assess whether the NOI defect could be disregarded or cured by an amendment of the NOI under MCL 600.2301 in the context of a futility analysis." (Court of Appeals Opinion, p 2, App 379) (emphasis added). Plaintiffs-Appellees did not mention section 2301 in the trial court, let alone argue that the trial court should apply this provision. (See Motion to Amend) (App 278-285, 298-305). Therefore, this issue was not preserved for appellate review. *Walters*, *supra*, 481 Mich at 387. Plaintiffs-Appellees did not disclose that they were raising this new issue on appeal, let alone explain why an exception from the "raise or waive" rule allowed them to raise this new issue for the first time on appeal. (Plaintiffs-Appellees' Court of Appeals Brief, pp 20-23). Defendants-Appellants did advise the Court of Appeals that Plaintiffs-Appellees were raising a new issue. Despite this, the Court of Appeals did not explain either why Plaintiffs-Appellees could raise this issue for the first time on appeal or why the trial court was **required** to consider an issue that Plaintiffs-Appellees had not raised below. (See Court of Appeals Opinion, App 378-388).

Because Plaintiffs-Appellees did not explain why they should be permitted to raise their new issue for the first time on appeal, Plaintiffs-Appellees waived this issue as well. This failure justifies peremptory reversal of the Court of Appeals decision and reinstatement of the Macomb Circuit Court decision. Moreover, Plaintiffs-Appellees could not justify an exception from the "raise or waive" requirement. No Michigan case has previously held that section 2301 must be applied under these circumstances. Therefore, the "plain error" exception could not apply.

Bennett, *supra*, 322 Mich App at 642-643. The fact that Plaintiffs-Appellees will lose their case if they could not raise a new argument on appeal does not rise to the level of "manifest injustice" or a "miscarriage of justice." *Napier*, *supra*, 429 Mich at 234.

It was fundamentally unfair for the Court of Appeal to reverse a final decision by a trial court because it did not raise and decide an issue that neither party raised until the case was on appeal. This new rule -- that trial courts must apply section 2301 even if the parties do not mention this provision -- transforms the trial courts into "research assistants of the litigants" despite this Court's clear admonishments to the contrary. Moreover, the language of section 2301 is very broad, and it expressly applies "to every stage of the action or proceeding". See MCL 600.2301. As a result, if this trial court erred by not *sua sponte* applying section 2301, then the trial courts should be performing independent research to raise, research and decide all unraised issues that might further justice.

Plaintiffs-Appellees and the Court of Appeals cavalierly ignored this Court's decisions holding that issues are waived on appeal if they are not raised in the trial court. The procedural history of this case confirms why the "raise or waive" rule is so important to judicial efficiency. The surgery at issue occurred more than seven years ago, in December 2011. This lawsuit was filed in June 2014. Plaintiffs-Appellees moved to amend their pleadings in March 2016, but did not argue that section 2301 controls the amendment process until they filed their Court of Appeals brief. If this Court were to affirm the Court of Appeals decision, then the trial court would be reviewing this doubly waived issue in mid-2019, more than three years after Plaintiffs-Appellees should have raised or waived this issue. If the motion were granted, new discovery and perhaps even new experts would be required. Therefore, the trial court would not be trying the new claims until sometime in 2020, more than eight years after the surgery. Absent a settlement, the Court of

Appeals would be reviewing the second appeal no earlier than 2021, a decade after the surgery.

Failing to enforce the "raise or waive" rule, then, has a significant impact on upon the time, money and effort expedited by the parties and the public on this case. If section 2301 now supersedes the "raise or waive" rule, then its potential future application will slow the resolution of many cases while the trial courts perform their required review under section 2301 to "further justice" by raising and resolving the issues that the parties did not raise. Therefore, this Court of Appeals decision will have a significant impact on the judicial system as a whole. Accordingly, this Court should resolve this case by issuing an opinion or order that reverses the Court of Appeals decision and clearly restates the importance of the "raise or waive" rule so that litigants and the Court of Appeals do not ignore it in the future.[5]

II. SECTION 2912B REQUIRES THAT A MEDICAL MALPRACTICE PLAINTIFF SERVE A NOI AND WAIT THE APPLICABLE TIME PERIOD BEFORE FILING AN AMENDED COMPLAINT THAT CONTAINS A NEW MEDICAL MALPRACTICE CLAIM.

This Court requested briefing regarding "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."

Section 2912b does not expressly describe how a plaintiff should add a new medical malpractice claim. The clear and unambiguous language of section 2912b requires the service of a NOI at least 182 days before a new medical malpractice claim may be filed against a health professional or facility. Section 2912b has three express exceptions from this 182 waiting period, but none apply to adding a new claim to an existing lawsuit. The absence of an exception from

[5] The Michigan Court Rules require parties to include a statement of jurisdiction in their briefs filed in this Court and the Court of Appeals. MCR 7.212(C)(4) and MCR 7.312(A) (incorporating requirements of MCR 7.212(C)). This Court may wish to consider whether to impose a similar requirement that parties either document how an issue raised on appeal was preserved below or explain why they should be permitted to raise a new issue for the first time on appeal.

this waiting period should lead to the conclusion that any plaintiffs wanting to add a new claim to an existing lawsuit has the same statutory obligation to serve a NOI describing the new claim as they would have if no litigation were pending.

In addition, while section 2301 may allow amendment of a NOI to correct technical errors, this provision does not allow "amending" a NOI to add a completely new claim because doing so would prejudice the substantial rights of the defendants. Requiring compliance with the NOI waiting periods is also consistent with this Court's decisions applying sections 2912b and 2301 and also with the Legislative intent underlying section 2912b. Therefore, this Court should find that a plaintiff must serve a new NOI before a trial court may permit the filing of an amended pleading adding a medical malpractice claim that was not described in the original NOI.

A. The text of section 2912b requires that a NOI must be served before a medical malpractice claim is filed even if another medical malpractice claim is pending against the professional or facility allegedly liable on the claim.

As this Court has recently confirmed:

> When interpreting a statute, "our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language." "In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." "When a statute's language is unambiguous, ... the statute must be enforced as written. No further judicial construction is required or permitted."

People v Pinkney, 501 Mich 259, 268; 912 NW2d 535 (2018) (footnotes omitted). When interpreting statutes, this Court has held that the "use of the term 'shall' rather than 'may' indicates mandatory rather than discretionary action." *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994)

In *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 484-488; 679 NW2d 98 (2004), the Court of Appeals applied these basic legal principles to find that the language of section 2912b

required that a medical malpractice claim must be described by a NOI before being alleged in a complaint filed in court. After reviewing the language of section 2912b, this Court should reach the same conclusion and hold that a plaintiff must serve a new NOI describing the new claim before being permitted to file an amended pleading containing a new medical malpractice claim.

1. Section 2912b requires a claimant to wait at least 182 days after serving a NOI to file a lawsuit that contains a medical malpractice claim that has been described by the NOI.

Section 2912b provides a number of detailed requirements before a medical malpractice claim can be filed. This statute begins by providing that:

> (1) a **person shall not commence an action alleging medical malpractice** against a health professional or health facility **unless the person has given** the health professional or health facility **written notice under this section** not less than 182 days before the action is commenced.

MCL 600.2912b(1) (emphasis added). In the next paragraph, section 2912b provides that:

> (2) **The notice of intent to file a *claim*** required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the ***claim***. . . .

MCL 600.2912b(2) (emphasis added). Therefore, paragraph 1 prohibits the "commencement of an action" unless the notice provisions within section 2912b have been followed while paragraph 2 requires "notice of intent to file a claim" to be sent to those potentially liable on a claim.

Paragraph 4 requires that the following content that must be included in a NOI:

> (4) The notice given to a health professional or health facility under this section shall 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). Therefore, the NOI must provide the information that will be required to prove the medical malpractice claim described by the NOI against the health professional or facility served with the NOI. *Craig ex rel Craig v Oakwood Hospital*, 471 Mich 67, 86; 684 NW2d 296 (2004) (finding that Legislature codified the four elements of a common law medical malpractice claim ((1) the applicable standard of care, (2) that defendant breached the standard, (3) the plaintiff's being injured, and (4) plaintiff's injuries being the proximate result of the defendant's breaching the standard of care) in MCL 600.2912a). This Court should read this paragraph with paragraphs 1 and 2 to place all of their "words and phrases in the context of the entire legislative scheme." *Pinkney*, *supra*, 501 Mich at 268. Doing so leads to the conclusion that a medical malpractice action must be based upon the medical malpractice claims that have already been described in a NOI. In other words, a plaintiff must serve a NOI that has described a medical malpractice claim before the plaintiff can include the claim in a complaint that is filed in the trial court.

Section 2912b neither expressly authorizes nor expressly prohibits the service of additional NOIs. Paragraph 6, however, implicitly recognizes that claimants may serve multiple NOIs because it explains the effect of serving multiple notices:

> (6) After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, **irrespective of how**

> **many additional notices are subsequently filed for that claim** and irrespective of the number of health professionals or health facilities notified.

MCL 600.2912b(6) (emphasis added). This Court has applied this provision to resolve questions arising because a plaintiff served multiple NOIs before filing suit. See *Mayberry v General Orthopedics, PC*, 474 Mich 1, 2-3, 7-10; 704 NW2d 69 (2005) (explaining that second NOI tolled statute of limitations because first NOI served more than 182 days before the statute of limitations expired).[6]

2. None of the exceptions from the 182-day waiting period after service of a NOI apply to a new claim against a defendant in a pending lawsuit.

The Legislature has created three express exceptions from the requirement that a claimant must wait 182 days after serving a NOI before filing suit on the medical malpractice claim described by the NOI. First, paragraph 3 provides a shortened 91-day waiting period after serving a NOI under the following limited circumstances:

> (a) The claimant has previously filed the 182-day notice required in subsection (1) against other health professionals or health facilities involved in the claim.
>
> (b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).
>
> (c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).
>
> (d) The claimant did not identify, and could not reasonably have identified a health professional or health facility to which notice

[6] Serving a NOI tolls the statute of limitations if the statute of limitations would expire during the applicable waiting period. MCL 600.5856(c). Therefore, in *Mayberry*, serving the original NOI more than 182 days before the running of the statute of limitations did not toll the running of the statute, but serving the second NOI as to the same potential defendants less than 182 days before the statute of limitations expires did toll the statute. On the other hand, if the first NOI is served less than 182 days before the running of the statute of limitations, then filing a second NOI does not expand the tolling period. MCL 600.2912b(6).

> must be sent under subsection (1) as a potential party to the action before filing the complaint.

MCL 600.2912b(3). Therefore, this paragraph applies only if the plaintiff is trying to add a new health professional or provider as a defendant on a claim that (1) was already described by a NOI, (2) is now in litigation and (3) the claimant could not have named the new health professional or provider before filing the lawsuit.

There are two other exceptions from the 182-day waiting period after service of a NOI. First, if a health professional or facility does not serve a written response within 154 days of service of the NOI, then the claimant may file suit. MCL 600.2912b(7), (8). See also *Bush v Shabahang*, 484 Mich 156, 181; 772 NW2d 272 (2009). Second, if a health professional or facility served with a NOI informs the claimant that it does not intend to settle within the 182-day period, then the claimant may file suit immediately. MCL 600.2912b(9).

The Michigan Legislature could have chosen to enact a fourth exception from the 182-day waiting period for adding a new claim against a health professional or facility that was already a defendant in the pending lawsuit. Doing so would be reasonable because adding a new medical malpractice claim against a defendant defending another malpractice claim is somewhat similar to adding a new defendant to a claim that is already being litigated. But, not creating a fourth exception is also reasonable because adding a new claim is different from adding a new party to a claim already being litigated. For example, if requested, medical records must be provided after service of the NOI. MCL 600.2912b(5). As a result, this part of the NOI process is already complete if a new party is added to a pending lawsuit, but may not have started if the plaintiff wants to add a new claim.

Therefore, while creating a fourth shortened notice period for new claims against an existing defendant would be reasonable, so is not creating such a fourth exception for new claims.

Accordingly, this Court should find that the absence of a fourth exception from the 182-day waiting period for new claims against an existing defendant means that a new NOI must be served for the new claim and that the 182-day notice period normally applies.

3. This Court should conclude that section 2912b requires a plaintiff to serve a new NOI if the plaintiff wants to pursue a new claim against a defendant in an ongoing medical malpractice lawsuit.

Reading all of the subparagraphs of section 2912b together leads to the following conclusions:

- A plaintiff cannot file a medical malpractice action unless the plaintiff has complied with the NOI provisions;
- A plaintiff must wait 182 days after serving a NOI before filing a medical malpractice claim against the health professional or provider served with the NOI;
- The NOI must provide the health professional or facility with a description of the facts supporting each element of a medical malpractice claim under Michigan substantive law;
- None of the express exceptions from the 182-day waiting period apply to a plaintiff seeking to add a new medical malpractice claim against a defendant in an existing medical malpractice claim.

In other words, as this Court has already recognized, a NOI must be served before a medical malpractice claim may be filed. *Bush*, 484 Mich at 176-77 (finding that "Since an NOI must be given before a medical malpractice claim can be filed, the service of an NOI is part of a medical malpractice 'proceeding.' "). Therefore, this Court should conclude that *Gulley-Reaves* correctly determined that a plaintiff cannot file a pleading alleging a medical malpractice claim that was not previously described by a NOI.

B. Finding that a plaintiff must serve a new NOI to pursue a new medical malpractice claim fulfills the Legislative intent underlying section 2912b.

The goal of Michigan courts resolving disputes over the meaning of a statute is to "give

effect to the Legislature's intent." *Pinkney*, *supra*, 501 Mich at 268. Michigan courts try to determine this intent from the express language of the statute if that language is unambiguous. *Id.* If Michigan courts cannot determine the intent from the language alone, then they may review additional materials such as the legislative analyses prepared by the Michigan House and Senate. This Court has used these sources to hold that the Legislature intent implemented by section 2912b is to (1) promote settlement without litigation, (2) reduce the cost of medical malpractice litigation and (3) provide compensation for meritorious medical malpractice that might be precluded by the cost of litigation. See, e.g., *Bush*, 484 Mich at 175. Finding that section 2912b requires that a new NOI be served before a new claim can be filed achieves these stated objectives. The construction of section 2912b offered by Plaintiffs-Appellees does not for the following reasons.

The first goal is promoting settlement of medical malpractice claims without litigation. Plaintiffs-Appellees claim that this goal cannot be achieved if litigation on other claims has already commenced. But, the inability of the parties to settle one claim does not mean that the party cannot resolve a different claim. In this case, Defendants-Appellants were unwilling to settle the claims ultimately dismissed with prejudice after Plaintiffs-Appellees finally conceded that they did not have the evidence required to support them. Their decision, then, was quite rational. Defendants-Appellants should not lose their substantive right under section 2912b to try to resolve the new claims related to the management of hypotension during surgery before litigation commences *on those claims* just because the Plaintiffs-Appellees chose to begin by pursuing a meritless set of claims for more than two years.[7] Neither should all other medical malpractice defendants that are

[7] Plaintiffs-Appellees argue that requiring a new NOI would not promote this goal because litigation was already pending. (Plaintiffs-Appellees Brief, p 12). Because Plaintiffs-Appellees conceded that all of their pending claims were groundless, no claims alleged in a filed pleading were pending when the trial court was deciding the motion to amend.

belatedly confronted with new claims after they have been defending other claims.

The second goal is reducing the cost of medical malpractice litigation. Allowing plaintiffs to amend their pleadings to add new claims after discovery and without service of a NOI will increase the cost of litigation. Again using the example of this case, if the proposed amendment is allowed, discovery may have to be reopened after the defendants have litigated the case for almost two years and taken the time, money and effort needed to defeat all claims described by the NOI and alleged in the original complaint. Allowing Plaintiffs-Appellees to have a "do-over" under these circumstances will increase the cost of litigating all of their claims against Defendants-Appellants.

Plaintiffs-Appellees claim that requiring a new NOI will increase the cost of litigation because of the delay that will result from serving the new NOI. But, the record shows that counsel for Plaintiffs-Appellees knew about the potential new claims eight months before moving for leave to amend. Had Plaintiffs-Appellees served a new NOI describing the new claim immediately after learning of the new claim, then the motion to amend could still have been filed on, or even before, March 21, 2016, the date when it was filed. In other words, in this case, trial counsel for Plaintiffs-Appellees chose to continue to pursue a medical malpractice claim that their experts would soon disavow for two months longer than they would have had to wait had they followed the NOI process mandated by section 2912b.

Moreover, court decisions affect the future conduct by litigants. This case may present an unusual situation today. If this Court allows Plaintiffs-Appellees to move to amend on the new claims without first serving a NOI describing them, then this practice will become much more common because there will be no consequence for not including all of the potential claims within the NOI. On the other hand, litigating by ambush has perceived advantages. As a result, the

amount of time and money spent to litigate medical malpractice claims will increase. Therefore, setting aside the question of how it affects the outcome of this case, affirming the Court of Appeals will increase the cost of litigation in the future.

Third, the procedure that Plaintiffs-Appellees are attempting to follow eliminates the chance to settle new claims before incurring the costs to litigate those claims. This is a clear and unambiguous statutory right that Defendants-Appellants and all potential medical malpractice defendants have. Affirming the Court of Appeals decision will substantially curtail that right.

C. Although section 2301 allows a medical malpractice plaintiff to seek leave to amend a NOI to correct technical errors in the statement of a claim within the NOI, it does not allow medical malpractice plaintiff to amend a NOI to add a completely new claim.

The Court of Appeals reversed the trial court decision because the trial court did not *sua sponte* determine if section 2301 allows Plaintiffs-Appellees to amend their NOI to add the new claims instead of serving a new NOI before being able to file an amended complaint. This Court's decisions permit medical malpractice plaintiffs to use section 2301 to amend a NOI to cure minor defects in how the NOI described a claim, but prohibit them from making more significant amendments because that would harm the substantial rights of medical malpractice defendants. These decisions are consistent with this Court's historic use of section 2301 to cure minor, technical, defects in pleadings and other court papers that did not mislead or otherwise prejudice the opposing parties. But, this Court has never authorized the use of section 2301 (or its predecessors) to amend a pleading to state a new claim when doing so would cause prejudice to the defendant. Therefore, this Court should find that section 2301 does not permit medical malpractice plaintiff to amend their NOI to add new claims because doing so would subvert justice by harming the substantial rights of the defendants.

1. This Court has found that section 2301 allows a medical malpractice plaintiff to amend a NOI to correct technical deficiencies but only when the amendment does not affect the substantial rights of the defendants.

In *Bush*, this Court held that section 2301 permits a party to amend a NOI to correct minor defects in the statement of a claim in a NOI. 484 Mich at 177-178. The *Bush* plaintiff served a NOI, "the vast majority [of which] . . . was in compliance with § 2912b(4)." *Id.* at 178. The Court of Appeals determined, however, that the NOI was defective as to the claims for direct liability against two defendants and reversed the trial court decision to deny summary disposition to these two defendants on these claims.[8] *Id.* at 179-180.

This Court agreed with the Court of Appeals that the NOI defectively described these two claims for direct liability, but disagreed that dismissal with prejudice was the appropriate remedy for the failure of the NOI to describe a claim adequately. *Bush*, 484 Mich at 180. In determining the correct remedy, this Court reviewed others parts of the Revised Judicature Act, including section 2301, which provides that:

> 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* determined that this language creates "a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed "on such terms as are just." 484 Mich at 177-178. *Bush* held that section 2301 may allow a plaintiff to amend a NOI that defectively

[8] The *Bush* NOI complied with all requirements for the claims of vicarious liability against these two defendants and for all the claims against all the other defendants. 484 Mich at 178 and n 41.

states a medical malpractice claim pending against a defendant when doing so did not implicate the substantive rights of the medical malpractice defendants. *Id.* at 178. Because the original NOI contained only minor errors and there was no showing of bad faith by the plaintiffs, *Bush* held that the correct remedy was amendment of the NOI pursuant to section 2301, not dismissal of the defectively stated claims with prejudice. *Id.* at 180-181.

2. This Court has not extended the use of section 2301 in medical malpractice claims beyond supplementing NOIs to correct minor defects within them.

Since *Bush*, this Court has twice considered whether section 2301 may be used to "amend" a NOI. In both cases, this Court held that section 2301 did not authorize the relief requested because *inter alia* the proposed amendment of the NOI would affect the substantial rights of the defendants.

In *Driver v Niani*, 490 Mich 239, 242-243; 802 NW2d 311 (2011), this Court considered whether a plaintiff could use section 2301 to add a non-party defendant,[9] Cardiovascular Clinical Associates, PC ("CCA"), to a pending medical malpractice claim so that the amended NOI would relate back to the filing of the original complaint and thereby toll the statute of limitations. *Driver* found that section 2301 did not apply for several reasons. *Driver* initially held that *Bush* did not apply because CCA never received a timely, though defective, NOI. *Id.* at 253. It also determined that there was no "proceeding" pending against CCA when the plaintiff sent the NOI to this entity because plaintiff's claim had already been time barred. *Id.* at 254.

Finally, section 2301 only permits a Michigan court to "disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." MCL 600.2301. *Driver* held that the "amendment of the NOI to allow plaintiff to add CCA would not be "'for the furtherance

[9] CCA had been identified as a non-party at fault under MCR 2.112(K). 490 Mich at 244.

of justice'" and would affect CCA's "'substantial rights'"." 490 Mich at 254. *Driver* explained that:

> Applying MCL 600.2301 in the present case would deprive CCA of its statutory right to a timely NOI followed by the appropriate waiting period, and CCA would also be denied its right to consider settlement. CCA would also be denied its right to a statute-of-limitations defense.

Id. at 255. Therefore, *Driver* found that section 2301 could not be used to avoid the statutory obligation of serving a NOI to CCA.

In *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68, 74-77; 869 NW2d 213 (2015), the plaintiffs[10] did not wait the entire required statutory waiting period after serving their NOI before filing their medical malpractice claims. Defendants in both cases moved for summary disposition, arguing that the prematurely filed lawsuits did not toll the statutory of limitations. *Id.* Plaintiffs argued that section 2301 could be used to correct their compliance errors during the NOI process and avoid the running of the statute of limitations. *Id.* at 90-92.

Tyra determined that section 2301 did not apply because the medical malpractice "proceedings were no longer pending when the trial court ruled on defendants' motions for summary disposition because the limitations periods had expired by that time." 498 Mich at 92. In addition, *Tyra* held that "ignoring the defects in these cases would not be 'for the furtherance of justice' and would harm defendants' 'substantial rights.'" *Id.* Just as in *Driver*, this Court found that the proposed use of section 2301 to amend a NOI would "deprive [defendants] of [their] statutory right to a timely NOI followed by the appropriate waiting period,' and they 'would also be denied [their] right to a statute of limitations defense.'" *Id.* As a result, this Court held that the prerequisites of section 2301 had not been satisfied. *Id.* at 92-93.

[10] This Court consolidated two separate cases in *Tyra*. 498 Mich at 74.

Therefore, under *Bush*, *Driver* and *Tyra*, a medical malpractice plaintiff is only permitted to seek leave to amend a NOI pursuant to section 2301 (1) if the proceedings are still pending, (2) to provide additional factual detail about a medical malpractice claim substantially described by the prior NOI and (3) if allowing the amendment does not affect the substantial rights of the defendants.

3. Section 2301 was historically used to cure minor technical errors, not to allow a plaintiff to pursue a completely new claim.

The *Bush* majority discussed, and essentially adopted, the dissent authored by Justice Michael Cavanagh in *Boodt v Borgess Medical Center*, 481 Mich 558; 751 NW2d 44 (2008).[11] In this dissent, Justice Cavanagh had explained that:

> The aim of MCL 600.2301 is "'to abolish technical errors in proceedings and to have cases disposed of as nearly as possible in accordance with the substantial rights of the parties.'" *Gratiot Lumber & Coal Co v Lubinski*, 309 Mich 662, 668-669; 16 NW2d 112 (1944) (citation omitted).

Boodt, 481 Mich at 569. Justice Cavanagh's dissent in *Boodt* and the *Bush* majority opinion both referred to this Court's historical use of section 2301 and its predecessors to support their conclusion that section 2301 may be used to amend NOIs. See *Bush*, 484 Mich at 177. A review of the older decisions that applied this statutory provision and that were cited by Justice Cavanagh or *Bush* shows section 2301 (and its predecessors) have very limited application.

In *MM Grantz v Alexander*, 258 Mich 695, 696-697; 242 NW 813 (1932),[12] for example, a bank was permitted to amend its disclosure to a garnishment because the trial court found after a motion hearing that the bank had made a factual error in its original disclosure. In *Tudryck v*

[11] *Bush* explained that the 2004 amendments to section 5856, MCL 600.5856, superseded the majority holding in *Boodt* because they eliminated the provision on which the majority decision was based. 484 Mich at 170 and n 26.

[12] *Grantz* was a "citation omitted" in Justice Kavanagh's quotation of *Gratiot* in *Boodt*.

Mutch, 320 Mich 99, 103-104; 30 NW2d 518 (1948), a permanent receiver had been appointed, but had not formally substituted in place of the temporary receiver before entering into a settlement that resolved the case. This Court held that this claimed defect did not affect the substantive rights of the parties under the predecessor of section 2301 because they were dealing with the permanent receiver. *Id.* at 107. Therefore, it applied the predecessor of section 2301 to substitute the permanent receiver *nunc pro tunc* for the temporary receiver so that the settlement was properly authorized.

In *Fildew v Stockard*, 256 Mich 494, 495; 239 NW 868 (1932), the plaintiff had described a defendant as a Michigan corporation when it was really a Delaware corporation. Plaintiff then sought leave to amend the praecipe, summons and affidavits to correct this error. *Id.* at 495. This Court held that:

> While due diligence is required in pleadings of the plaintiff in the description of the parties, and pleadings still serve a necessary purpose, nevertheless, where no one has been misled in any manner by a misnomer, the amendment should be permitted. . . . Under the facts of the present case, we believe that the circuit judge was correct in permitting the amendment.

Id. at 498–99 (referring to the statute of amendments, section 14144, CL 1929).[13]

Similarly, in *Bole v Sands & Maxwell Lumber Co*, 77 Mich 239, 240, 242; 43 NW 873 (1889), a default judgment was entered against a corporation, which had been properly served and whose name was properly stated in the summons and judgment. Defendant objected because the defendant's name was not properly recorded in the declaration. *Id.* at 240-241. This Court found no error because the name was correct in the summons and judgment and the correct defendant

[13] Like section 2301, this earlier statutory provision provided the court with "the power to amend any process, pleading, or proceeding in an action or proceeding, either in form or in substance, for the furtherance of justice, and may disregard any error or defect in the proceedings which does not affect the substantial rights of the parties." *Fildew*, 256 Mich at 498.

was served. *Id.* at 241. Alternatively, this Court noted in dicta this error could have been corrected by amendment. *Id.* at 241-242.

Gratiot is the only case cited by *Bush* or *Boodt* that found that section 2301 authorized the filing of a new claim. But, the *Gratiot* plaintiff was permitted to amend its claim to add a new claim because the defendant testified much differently at trial from the defense that he had raised in his pleadings. 309 Mich at 669-670.[14] Importantly, *Gratiot* found that the plaintiff could not have learned about the new position until trial.[15] Therefore, *Gratiot* presented an unusual case where allowing a party to use section 2301 to raise a new claim would be "in the furtherance of justice". In addition, the amendment did not unfairly affect the substantial rights of the *Gratiot* defendant because the amendment cured the problem created by this defendant.

In summary, almost all of this Court's prior cases applying section 2301 to allow an amendment permitted the correction of minor, essentially clerical, errors that had not misled the party opposing the amendment.[16] The only case in which this Court approved an amendment to raise a new claim was a case in which defendants had misled the plaintiff regarding defendants' position in the case. Therefore, none of these cases authorized amendments that affected the substantial rights of the parties opposing the amendment. As a result, by allowing a plaintiff to amend a NOI to provide more detail about an existing claim, but prohibiting amendments that

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[14] In their pleadings, the *Gratiot* defendants denied liability because they claimed they owed money to an individual, not the plaintiff. 369 Mich at 669-670. At trial, defendants changed their position and claimed they did not know to whom the money was owed. *Id.*

[15] When *Gratiot* was litigated, now common methods of discovery, such as document requests and depositions were recent innovations permitted only at the virtually unreviewable discretion of the trial court judge. See, e.g., *Magel v Kulczynski*, 276 Mich 424, 427; 267 NW2d 872 (1936) (noting that Court Rule (1933) 41 was "in an experimental stage" and that review of decisions allowing or denying discovery was by mandamus before denying request to enlarge order allowing limited deposition)

[16] The discussion of the predecessor to section 2301 in *Hopkins & Son v Green*, 93 Mich 394; 53 NW 537 (1892) is dicta regarding an error that could have been corrected.

affect the substantial rights of medical malpractice defendants, this Court's decisions in *Bush*, *Driver* and *Tyra* are consistent with the historical use of section 2301 and its predecessors.

4. This Court should find that the Court of Appeals erred by allowing Plaintiffs-Appellees to use section 2301 to amend under both this Court's decisions applying section 2301 to the NOI statute and its historic application of section 2301 or its predecessors.

Applying the two-prong test established by *Bush*, the proposed amendment of the NOI would deprive the Defendants-Appellants of their statutory right to a NOI describing the new claim and the statutory right to try to settle that new claim before litigation commenced on it. As explained above, *Driver* held that section 2301 does not authorize a court to approve an amendment to the NOI that deprives a medical professional of their right to the appropriate NOI notice period and the chance to settle the claim before the medical malpractice claim is filed. 490 Mich at 254-255.

Moreover, *Driver* rejected plaintiff's proposed use of section 2301 because it "would create a situation permitting endless joinder of non-party defendants. *Driver* explained that:

> Plaintiff would have us allow a claimant in a malpractice action to preserve claims against an infinite number of potential non-party defendants by simply submitted an NOI to a single defendant. This would absolve a plaintiff of his or her statutory burden to preserve tolling in accord with the prerequisites explained in *Burton*.[17] Absent the statutory mechanism governing tolling, a claimant could continually add non-party defendant to an existing action for an undefined amount of time. This result is contrary to the plain language of MCL 600.2912b and MCL 600.5856(c).

490 Mich at 258-259 (footnote added). The rule advocated by Plaintiffs-Appellees shares the similar flaw of creating the potential for adding an "infinite series" of new medical malpractice claims against a medical malpractice defendant as long the plaintiff has served an NOI describing a single medical malpractice claim against that defendant.

[17] *Burton v Reed City Hospital Corporation*, 471 Mich 745; 691 NW2d 424 (2005).

Therefore, this Court should find that neither its case law applying section 2301 to the NOI process nor its historical use of section 2301 and its predecessor allows Plaintiffs-Appellees to amend their NOI to raise new claims. As a result, the Court should find that the Court of Appeals decision erred by finding that the trial court was required to apply section 2301 to determine if Plaintiffs-Appellees could retroactively amend the NOI to add their new claims.

D. The objections that Plaintiffs-Appellees raise to following the NOI process do not justify creating a new exception from the waiting periods that are an express part of the NOI statute.

Plaintiffs-Appellees offer a parade of horribles that will supposedly arise if medical malpractice plaintiffs are required to follow the general requirement of waiting 182 days after service of a NOI before being permitted to file an amended complaint. For example, Plaintiffs-Appellees suggest that after the motion to amend is granted, "*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.*" (Plaintiffs-Cross-Appellants' Cross Application for Leave) (emphasis in original).

In this case, however, what actually happened was that trial counsel for Plaintiffs-Appellees learned about the new claim, but continued to pursue their groundless original claims for more than six months while doing absolutely nothing to follow the statutory NOI requirements for pursuing this new claim. Therefore, in this case, at least Plaintiffs-Appellees could have served a new NOI, waited the entire 182-day period and still moved for leave to amend their pleadings to add the new claim on the same day as they actually did: March 21, 2016. As a result, in this case, serving a new NOI would not have delayed consideration of the motion to amend in this case. It should not cause a substantial delay in other cases.

Moreover, there are two express exceptions from the 182-day waiting period that could apply if a plaintiff served a new NOI for a new claim while a medical malpractice lawsuit is

pending. First, if a written response is not served within 154 days of the new NOI is served, the plaintiff can move forward. MCL 600.2912b(7), (8). Second, counsel for the existing defendants might chose to end the NOI waiting period and allow plaintiff to seek leave to amend their pleadings by advising plaintiff's counsel that they were not going to enter into settlement negotiations on the new claim. MCL 600.2912b(9).

Finally, the parties could actually negotiate a settlement of both the pending claims and the potential new claims during the NOI waiting period. The service of a NOI with new claims might provide the parties with the incentive and the opportunity to settle all of their claims, thereby achieving one of the Legislative goals in enacting the NOI statute.

Accordingly, this Court should find that none of Plaintiffs-Appellees' objections to being compelled to follow the statutory NOI process justify creating a judicial exception from the statutory requirements of serving a NOI and waiting the required time period before being permitted to file an amended complaint with the new claims.

III. THIS COURT SHOULD ADOPT AND APPLY THE SIMPLE TEST DEVELOPED BY THE COURT OF APPEALS FOR DETERMINING WHEN A PARTY MAY SEEK LEAVE TO AMEND A PRIOR NOI AND WHEN IT MUST SERVE A NEW NOI.

The Court of Appeals has issued two cases that establish a simple and clear test to determine whether a plaintiff may seek leave to amend their pleadings without first serving a new NOI as required by section 2912b. Under this test, a plaintiff may amend their pleadings without first serving a new NOI if the NOI already describes the claim and the amended pleading is providing more detailed allegations regarding that claim. If a plaintiff wants to add a new claim, however, then the plaintiff must first serve a NOI that describes the new claim.

In the first of these two decisions, *Gulley-Reaves*, the Court of Appeals determined that a medical malpractice "complaint must be limited to the issues raised in the notice of intent." 260

Mich App at 484. The *Gulley-Reaves* NOI described a medical malpractice claim based upon how a surgical procedure was performed. *Id.* at 479-480. The medical malpractice complaint, however, also included a claim that the anesthesia had been improperly administered during that procedure. *Id.* at 483. It also named the anesthesiologist and the nurse anesthetist as defendants; neither had been served with the NOI. *Id.* After carefully reviewing the language of section 2912b, the Court of Appeals determined that the plaintiff could not pursue the claim based upon the alleged improper administration of anesthesia and reversed the lower court denied of the motion for summary disposition on claims that had not been stated in the NOI. *Id.* at 490.

By contrast, in *Decker v Rochowiak*, 287 Mich App 666, 677; 791 NW2d 507 (2010), the NOI had described a medical malpractice claim that was based upon several critical errors and omissions including "the failure to properly care for, evaluate, treat and monitor [the patient's] hypoglycemic condition, including by the proper and timely administration of the necessary glucose solutions through a properly placed central venous line." While the medical malpractice claim was pending, the plaintiff sought leave to amend their pleadings. The Court of Appeals performed a detailed comparison of the new allegations with the medical malpractice claim described by the NOI. *Id.* at 677-680. It then summarized its findings as follows:

> 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. Thus, plaintiff was only required under MCL 600.2912b(1) to provide the statutory notice before he commenced his lawsuit against these same defendants and it is undisputed that the requisite notice was provided.

Id. at 681. Therefore, *Decker* held that the plaintiff could be granted leave to amend the complaint without filing a new NOI because the "allegations in the amended complaint merely clarified with more specificity the manner in which the standards of care were breached. . . ." *Id.* at 680.

This distinction between these two very different situations is reflected in the language of

sections 2301 and 2912b. This test is also consistent with this Court's decisions applying section 2301, both recently in medical malpractice case and historically in a broad array of litigation. Moreover, this bright line rule will promote the Legislative goals in enacting section 2912b and the principles of justice. Medical malpractice plaintiffs will be required to state each potential claim in a NOI before including that claim in a pleading as required by section 2912b and *Bush*. Medical malpractice defendants will then have the chance to settle each claim before having to defend that claim in litigation. Plaintiffs will be further encouraged to file all of their claims in the original complaint, which will reduce the cost of litigation. Moreover, defendants will not suffer the tremendous prejudice of defending a set of claims for more than two years before the plaintiff gets around to telling the defendant what the real claim is.

This Court has often cautioned plaintiffs whose claims could sound in ordinary or professional negligence to comply with the procedure requirement for professional negligence claims. See, e.g, *Trowell v Providence Hospital and Medical Centers, Inc,* 502 Mich 509, 524; 918 NW2d 645 (2018) (citing *Bryant v Oakpointe Villa Nursing Center, Inc*, 471 Mich 411, 432-433; 684 NW2d 864 2004)). A plaintiff that is uncertain as to whether new information states a new claim should take the similar precaution of serving a new NOI before filing the motion to amend the pleadings. Given how similar a NOI and a complaint can be, this would not require significant additional work for plaintiff's counsel.[18]

Therefore, this Court should adopt the bright-line test that the Court of Appeals has established through the *Gulley-Reaves* and *Decker* decisions.

[18] MCL 600.2912b does not dictate the form of a NOI. Therefore, a plaintiff could use the proposed new pleading as the new NOI. The form of the original Complaint and the original NOI are substantially the same in this case. Cf Complaint (App 46-66) with NOI (App 29-42).

CONCLUSION AND RELIEF REQUESTED

A bright-line test that requires medical malpractice plaintiffs to follow the NOI process before being permitted to file an amended complaint stating a new medical malpractice claim follows the language of sections 2912b and 2301, is consistent with this Court's decisions applying these two statutes, would promote the legislative goals underlying sections 2912b and would provide clarity for future litigants and the lower courts. Therefore, the Court should adopt this test, reverse the decision by the Court of Appeals and reinstate the lower court decision granting summary disposition in favor of Defendants-Appellants.

Respectfully submitted,

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