

STATE OF MICHIGAN
IN THE SUPREME COURT

MELISSA BOODT, as Personal
Representative of the Estate of
DAVID WALTZ, deceased

Plaintiff-Appellee,

-vs-

SCt No: 132688
COA No.: 266217
LC Case No: C03-000318-NH
Hon. Philip D. Schaefer

BORGESS MEDICAL CENTER;
MICHAEL ANDREW LAUER, M.D.;
HEART CENTER FOR EXCELLENCE, P.C.
Jointly and severally,

Defendants-Appellants.

BRIEF AMICUS CURIAE OF CITIZENS FOR BETTER CARE

132688

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER MCL 600.2912b REQUIRES ONLY THAT A CLAIMANT PROVIDE A HEALTH PROFESSIONAL WITH "A STATEMENT" OF THE SIX FACTORS IDENTIFIED IN MCL 600.2912b, WHERE THE PLAIN LANGUAGE OF THE STATUTE DOES NOT REQUIRE A HIGHER DEGREE OF SPECIFICITY?

Amicus Citizens for Better Care answers, "Yes"

- II. WHETHER DISMISSAL WITH PREJUDICE IS AN INAPPROPRIATE SANCTION FOR A CLAIMANT'S FAILURE TO COMPLY WITH MCL 600.2912b, WHERE NEITHER *KIRKALDY V. RIM* NOR THE LEGISLATIVE INTENT BEHIND THE DRAFTING OF MCL 600.2912b SUPPORT SUCH A HOLDING ?

Amicus Citizens for Better Care answers, "Yes"

- III. WHETHER A CLAIMANT SHOULD BE PERMITTED TO AMEND HER NOTICE OF INTENT WHERE IT IS SUBSEQUENTLY FOUND TO BE DEFECTIVE IN ORDER TO FURTHER JUSTICE?

Amicus Citizens for Better Care answers, "Yes"

STATEMENT OF INTEREST OF AMICUS CURIAE

Citizens for Better Care came into existence in 1969. Its function as a consumer advocacy and information agency exists for the sole and exclusive purpose of improving the overall quality of care for all of Michigan's nursing home residents. Citizens for Better Care is actively concerned with court decisions which impact the rights of nursing home residents in Michigan. The present case is especially important where the ability of victims of nursing home abuse and neglect to rely on the plain language of Michigan statutes, present their substantive claims in our judicial system, and have such claims timely resolved, are all at stake.

STATEMENT OF FACTS

Amicus Michigan Citizens for Better Care adopts the facts set out in the Supplemental Brief of Plaintiff-Appellee/Cross-Appellant.

ARGUMENT I

MCL 600.2912b REQUIRES ONLY THAT A CLAIMANT PROVIDE A HEALTH PROFESSIONAL WITH “A STATEMENT” OF THE SIX FACTORS IDENTIFIED IN MCL 600.2912b, WHERE THE PLAIN LANGUAGE OF THE STATUTE DOES NOT REQUIRE A HIGHER DEGREE OF SPECIFICITY

MCL 600.2912b requires that an individual provide a health professional or health facility with not less than 182 days notice before commencing an action.

The statute also specifically addresses the substance of such notice as follows:

- (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.**

In determining whether a Notice of Intent (NOI) satisfies the requirements of the above statute, this Court's clearly enunciated **rules of statutory**

construction control. This Court's paramount rule of statutory interpretation is to **"effect the intent of the Legislature."** *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60, 631 NW2d 686 (2001) (citing *Tryc v Michigan Veteran's Facility*, 451 Mich 129, 135, 545 NW2d 642 (1996)). As a result, it must be determined whether the language of MCL 600.2912b – that the NOI contain **"a statement"** of the six identified factors – is **clear and unambiguous**. If so, it is **assumed that the Legislature intended the meaning clearly and plainly expressed**; no further judicial construction is required or permitted and the statute must be **enforced as written**. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597, 664 NW2d 705 (2003) (citing *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402, 605 NW2d 300 (2000)), *Wickens* (citing *People v Stone*, 463 Mich 558, 562, 621 NW2d 702 (2001)). Every word in the statute should be given meaning, and Court's are to avoid a construction that would render any part of the statute surplusage or nugatory. *Wickens* (citing *Altman v Meridian Twp*, 439 Mich 623, 635, 487 NW2d 155 (1992)).

MCL 600.2912b requires only that a plaintiff or plaintiff's counsel prepare a NOI which contains **"a statement"** of the six factors designated in §2912b(4). MCL 600.2912b is devoid of language indicating that the drafter of an NOI must include anything other than a statement of the enumerated factors. Numerous other Michigan statutes, however, do in fact qualify the word "statement" (or an equivalent) when setting forth the requirements for the contents of a document, which increases the burden placed on the drafter of the document. Below are

examples of instances where the Michigan Legislature has clearly decided to qualify the requisite “statement”:

- MCL 333.17015(10) requires that a person state certain facts “**with specificity.**”
- MCL 333.22231(4) requires that a person state certain facts “**with specificity.**”
- MCL 769.1a(8) requires that a person state certain facts “**with specificity.**”
- MCL 38.416 uses the term “**stating specifically**”
- MCL 500.8133 (3) uses the term “**stating specifically**”
- MCL 38.14 requires presentation of a “**detailed statement**” of certain facts.
- MCL 125.1510(1) requires presentation of a “**detailed statement**” of certain facts.
- MCL 408.1027 (2)(b) requires presentation of a “**detailed statement**” of certain facts.
- MCL 462.319(1)(a) requires presentation of a “**detailed statement**” of certain facts.
- MCL 600.557b(2) requires presentation of a “**detailed statement**” of certain facts.
- MCL 600.6461(2) requires presentation of a “**detailed statement**” of certain facts.
- MCL 224.25 mandates that parties prepare a “**full statement.**”
- MCL 491.920(3) mandates that parties prepare a “**full statement.**”
- MCL 500.424(2) mandates that parties prepare a “**full statement.**”
- MCL 14.283 requires a “**complete statement**” of certain facts.
- MCL 462.2(2) requires a “**complete statement**” of certain facts.
- MCL 247.172 demands a “**full and complete statement**” of certain facts.

- MCL 324.51904 demands a “**full and complete statement**” of certain facts.
- MCL 390.758 demands a “**full and complete statement**” of certain facts.
- MCL 224.25 mandates a “**complete statement in detail.**”
- MCL 324.20114(8) requires a “**complete and specific statement**” of certain facts.

Obviously, the Michigan Legislature could have demanded that an individual state the facts within the NOI “with specificity,” or that the statement be “detailed,” “full,” “complete,” “full and complete,” “complete ... in detail,” or “complete and specific.” But the Legislature instead chose simply to require **only “a statement”** of the factors listed therein. An appropriate **textual interpretation** of §2912b therefore mitigates **against** the conclusion that each and every factor enumerated in §2912b requires something more than “**a statement.**” Had the Michigan Legislature incorporated any of the above qualifying language into §2912b, it could be argued that the requirements for a NOI were as onerous as defendants-appellants are claiming herein. Since, however, §2912b requires only “**a statement**” of the factors listed therein, there is no textual support for any argument that something more is required.

This conclusion is further supported by the **pre-suit stage** at which the plaintiff is required to provide a health care professional with such notice. In *Roberts v Atkins (After Remand)*, 470 Mich 679, 684 NW2d 711 (2004) (“*Roberts II*”), this Court acknowledged that it is “reasonably anticipatable that plaintiff’s averments as to the applicable standard may prove to be ‘inaccurate’ or erroneous following formal discovery” due to the fact that at the pre-suit notice stage, it is likely that the claimant has not yet had access to all of the pertinent

records of the health professional or facility. As a result, *Roberts* held that a **“claimant is not required to craft her notice with omniscience.”** *Id.* at 691-92. Moreover, a claimant is not required to ultimately prove that her statements are “correct” in the legal sense. *Id.* at 692 n. 7. Additionally, this Court has recognized that in some cases, where the breach in the standard of care would be obvious to a casual observer, the burden of explication under MCL 600.2912b will be minimal. *Id.* Finally, the *Roberts* Court recognized that nothing in MCL 600.2912b requires that the NOI be in any particular format. *Id.*

Both the plain language of MCL 600.2912b and the holding of *Roberts II* must be applied by this Court in discerning whether Plaintiff-Appellee’s NOI is sufficient. In this case, because Plaintiff-Appellee provided Defendant-Appellant with a pre-suit notice containing **“a statement”** of each of the six factors identified in MCL 600.2912b, this Court should either deny leave, thus allowing the Court of Appeals’ ruling to stand, or issue an opinion upholding the correctness of such decision.

ARGUMENT II

DISMISSAL WITH PREJUDICE IS AN INAPPROPRIATE SANCTION FOR A CLAIMANT'S FAILURE TO COMPLY WITH MCL 600.2912b, WHERE NEITHER *KIRKALDY V. RIM* NOR THE LEGISLATIVE INTENT BEHIND THE DRAFTING OF MCL 600.2912b SUPPORT SUCH A HOLDING

In the event that this Court determines that a plaintiff's NOI is insufficient or defective in this case, the appropriate sanction is a dismissal **without prejudice**. This Court recently held that when an Affidavit of Merit (AOM) is successfully challenged as deficient, "the proper remedy is dismissal without prejudice," giving plaintiff "whatever time remains in the period of limitations within which to file a complaint accompanied by a conforming affidavit of merit." *Kirkaldy v Rim*, 478 Mich 581, 586, 734 NW2d 201 (2007). Moreover, this Court noted that "under MCL 600.5856 (a) and MCL 600.2912d, the period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendants." *Id* at 585. (citing *Scarsella v Pollack*, 461 Mich 547, 549, 607 NW2d 711 (2000)).

There is absolutely no justification for imposing a harsher penalty on a claimant for alleged defects in a pre-suit document intended merely to facilitate settlement discussions. In fact, the purpose of the NOI requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. *Neal v. Oakwood Hosp. Corp.*, 226 Mich App 701, 705, 575

NW2d 68 (1997) (citing Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993).

Therefore, *Kirkaldy's* holding and reasoning as applied to defective AOMs should apply equally to an allegedly defective NOI.

In addition, in the present case, it is undisputed in this case that a complaint and AOM were **timely** filed and served before the two year statute of limitations had passed. There is no challenge to the complaint or the AOM in this case. Therefore, a plaintiff who timely files a complaint and AOM, and whose NOI is later found to be insufficient or defective, is entitled to tolling pursuant to *Kirkaldy*.

Also of great significance is the fact that the Legislature never intended for cases to be **dismissed** for alleged defects in a NOI.

As part of its commitment to a textual approach to the interpretation of statutes, this Court has made it clear in recent years that, in the course of interpreting the statute, a court is prohibited from adding language to that statute which 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) (a court is to apply the statute “as enacted without addition, subtraction or modification”). This Court has also recognized that **“where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the**

Legislature explicitly rejected.” *In re MCI Telecommunications Complaint*, 460 Mich 396, 415, 596 NW2d 164 (1999).

In this case, the Legislature specifically rejected and removed the following proposed language in the final version of MCL 600.2912b:

[I]n an action alleging medical malpractice, the court shall **dismiss** a claim not included in the notice required under section 2912f.

Senate Legislative Analysis, SB 270, August 11, 1993.

Dismissal of a **claim** for failure to include the **claim** in the NOI was **not** incorporated into the final version of MCL 600.2912b. By affirmatively removing this proposed language from the final version of MCL 600.2912b, the Legislature’s intent could not be more clear. As this Court expressly held in *In re Certified Question*, 468 Mich 109, 115, n. 5, 659 NW2d 597 (2003), “**by comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted.**”

Simply stated, it is error for a court to provide a penalty that the Legislature explicitly rejected. If the instant NOI is somehow found to be defective, any dismissal should be **without** prejudice.

ARGUMENT III

A CLAIMANT SHOULD BE PERMITTED TO AMEND HER NOTICE OF INTENT WHERE IT IS SUBSEQUENTLY FOUND TO BE DEFECTIVE IN ORDER TO FURTHER JUSTICE

Pursuant to MCL 600.2301, a Court has the power to amend “**any process, pleading, or proceeding.**” MCL 600.2301, however, is unlike MCR 2.118, which applies only to the amendments of “pleadings,” rather than “any process, pleading, or proceeding.” Therefore, the language of §2301 is sufficiently expansive to cover a NOI.

Moreover, the court “at every stage of the action or proceeding **shall disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.**” MCL 600.2301. Use of the word “shall” in this statute “indicates a mandatory and imperative directive.” *Burton v Reed City Hosp Corp*, 471 Mich 745, 752, 691 NW2d 424 (2005), *Oakland County v State of Michigan*, 456 Mich 144, 154, 566 NW2d 616 (1997). A court **must**, therefore, allow an amendment to avoid an error or defect which does not affect the substantial rights of a party.

MCL 600.2301 also expressly states that a court may allow an amendment “in form or substance, **for the furtherance of justice.**” In this instance, justice dictates that, in the event that this court finds Plaintiff’s NOI to be defective (a conclusion it should not reach for the reasons set out in Section I, *supra*) Plaintiff should be allowed to submit an amended NOI.

In medical malpractice cases, a defendant would be hard pressed to show how his “substantial rights” were affected by an alleged defect in a NOI. First, the function of the NOI is simply to **inform a health professional or facility of the *claims* that the claimant intends to file against the health professional or facility** at a later date. *Roberts v Atkins (After Remand)*, 470 Mich 679, 684 NW2d 711 (2004) (“*Roberts II*”). In addition, the purpose of the NOI requirement is to **promote settlement** without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. *Neal, supra*.

As the Court of Appeals in this case appropriately recognized, **“the defendants have in their possession most of the pertinent facts from their own records**. It strains credulity to conclude that they would not understand the nature of the suit against them after reading the notice of intent here.” *Boodt v Borgess Medical Center*, 272 Mich App 621, 632-33, 728 NW2d 471 (2006). Thus, neither the function nor the purpose of MCL 600.2912b would be frustrated if a claimant is permitted to amend her NOI where it is later found to be deficient.

CONCLUSION

For all of the reasons stated above, *Amicus* Citizens for Better Care respectfully requests that this Honorable Court refrain from holding claimants, including victims of nursing home abuse and neglect, to a higher burden at the pre-suit notice stage of a medical malpractice claim than that intended by the Michigan Legislature. As a result, *Amicus* respectfully requests that this Honorable Court AFFIRM the decision of the Court of Appeals, or that this Court issue its own opinion reaffirming *Roberts II* and upholding the fact that the only burdens to be placed on a claimant at the NOI stage are those set forth in the plain language of MCL 600.2912b. If, for any reason, this Court finds the instant NOI to present a technical defect, it should allow the Plaintiff to amend, rather than impose the sanction of dismissal with prejudice, as required by *Kirkaldy*.

Respectfully Submitted,

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BORGESS MEDICAL CENTER;
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Jointly and severally,

Defendants-Appellants.

PROOF OF SERVICE

The undersigned certifies that on December 21, 2007, a copy of Motion for Leave to File *Amicus Curiae* Brief on Behalf of Citizens for Better Care, Brief *Amicus Curiae* for Citizens for Better Care, and this Proof of Service were served upon all parties to the above cause by placing such documents in the United States Mail, postage prepaid, to each of the attorneys of record herein at the following addresses:

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