

STATE OF MICHIGAN
IN THE SUPREME COURT

LISA TYRA

Appellee
Plaintiff- Respondent,

Publ Open 8-15-13
Supreme Court No. *Rec 10-11-13*
Court of Appeals No: 298444
Lower Court Case No. 09-103111-NH

v.

ORGAN PROCUREMENT AGENCY OF
MICHIGAN, a ~~Michigan corporation~~ d/b/a
GIFT OF LIFE MICHIGAN,

Appellant
Defendant-Applicant,

Oakland
N. Grant

and

STEVEN COHN, M.D., DILLIP SAMARA
PUNGAVAN, M.D., WILLIAM BEAUMONT
HOSPITAL, a ~~Michigan corporation~~;

Defendants. - *Appellees*

OK

and ← *and John Doe, Defendants*

**APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-APPLICANT
ORGAN PROCUREMENT AGENCY OF MICHIGAN/GIFT OF LIFE**

148079

— AND —

APK

MEMORANDUM OF LAW SUPPORTING APPLICATION

1417

B42640

C. THOMAS LUDDEN (P45481)
KAREN A. SMYTH (P43009)
Lipson, Neilson, Cole, Seltzer & Garin, P.C.
Attorneys for Defendant-Applicant Gift of Life
3910 Telegraph Road, Suite 200
FILED Bloomfield Hills, Michigan 48302
(248) 593-5000

NOV 21 2013

LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

STATEMENT OF JURISDICTION

On August 15, 2013, the Court of Appeals issued its opinion reversing the decision by the Oakland Circuit Court to grant summary judgment to the Defendants. (Exhibit J: Court of Appeals Opinion). On September 5, 2013, Defendants filed motions for reconsideration of this decision. (Court of Appeals Docket, Items 44 and 45). Therefore, these motions were timely. MCR 7.215(I)(1).

On October 11, 2013, the Court of Appeals entered its order denying the motions for reconsideration. (Court of Appeals Docket, Item 48). This Application is being filed on or before November 22, 2013. Therefore, it has been filed in a timely manner, and this Court has jurisdiction to hear this Application. MCR 7.301(A)(2) and 7.302(C)(2)(b).

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STATEMENT OF QUESTIONS PRESENTED

Plaintiff filed her medical malpractice lawsuit at least six weeks before she was permitted to do so under MCL 600.2912b. Under this Court's decision in *Burton v Reed City Hospital*, 471 Mich 745; 691 NW2d 424 (2005), her premature filing of her lawsuit did not toll the statute of limitations. Despite this, the Court of Appeals reversed the decision of the trial court to grant summary disposition to Defendants and remanding the case to the trial court by relying upon *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009) and its interpretation of MCL 600.2301. Should the Court of Appeals have recognized that *Zwiers* does not apply on the record that exists and that Plaintiff's medical malpractice claim is time barred under *Burton* and *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011)?

Defendant-Applicant Organ Procurement Agency of Michigan says "Yes"

Plaintiff-Respondent will say "No".

The majority of the Court of Appeals panel said "No".

In dissent from the Court of Appeals decision, Judge Wilder said "Yes"

APPLICATION FOR LEAVE TO APPEAL

Defendant-Applicant Defendant Organ Procurement Agency of Michigan d/b/a Gift of Life ("Gift of Life"), through its counsel, Lipson, Neilson, Cole, Seltzer & Garin, P.C., pursuant to MCR 7.302, applies for leave to appeal to this Court the August 15, 2013 decision by the Michigan Court of Appeals to reverse the decision by the Oakland Circuit Court granting summary disposition to all Defendants because the statute of limitations barred the claims by Plaintiff-Respondent Lisa Tyra, stating as follows:

1. Plaintiff filed this medical malpractice lawsuit only 112 days after serving the notice of intent even though she was required to wait at least six weeks longer before filing this lawsuit. Under *Burton v Reed City Hospital Corp*, 471 Mich 747; 691 NW2d 424 (2005), the filing of this lawsuit did not toll the statute of limitations, which accordingly barred her claim.

2. Despite this clear precedent, the Court of Appeals reversed the trial court and remanded for further proceedings under its application of *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009). (Exhibit J: Court of Appeals Opinion). In a detailed dissent, Court of Appeals Judge Kurtis Wilder explained why the Court of Appeals had erred in relying upon *Zwiers* instead of following this Court's decisions in *Burton* and *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011). (Exhibit K: Court of Appeals Dissent).

3. In *Furr v McLeod*, ___ Mich App ___, ___ NW2d ___, Court of Appeals Docket No. 310652, 2013 WL 5762981 (Oct. 24, 2013), the Court of Appeals has recently held that it must follow this case under MCR 7.215(C)(2) even though it disagrees with the holding. Although the Court of Appeals has convened a special panel to resolve the conflict between this case and *Furr*, this case presents additional issues that are not present in *Furr* and that might not be resolved by the special panel. More importantly for Gift of Life, the special panel cannot reverse the Court of Appeals decision in this case.

The Court of Appeals issued a published decision, which affirmed that the trial court had properly followed *Burton* and related cases to find that Defendants' affirmative defenses were sufficient to raise their statute of limitations defense. (Exhibit J: COA Decision, pp 6-7). Despite this, the Court of Appeal reversed the decision to grant summary decision and remanded the case so that the trial court could determine whether the Plaintiff could avoid the statute of limitations under an interpretation of MCL 600.2301 that the Court of Appeals had offered in *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009). Judge Wilder issued a dissent, in which he explained, among other things, that this Court's decision in *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011) effectively overruled the *Zwiers*' application of MCL 600.2301.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is a medical malpractice action. The Plaintiff underwent a kidney transplant on June 9, 2007. She alleges that Defendant Organ Procurement Agency of Michigan d/b/a Gift of Life ("Gift of Life") was negligent because it failed to perform a cross-match laboratory test on a donor kidney, which was offered to Defendant William Beaumont Hospital for Plaintiff's transplant surgery. The failure to perform this cross-match has allegedly impacted Plaintiff's post-surgery quality of life. All of the alleged professional negligence by the Defendants occurred on or before the date of her transplant surgery. Although Plaintiff served her NOI in a timely manner, she filed her medical malpractice complaint at least six weeks before she was permitted to do so. The trial court granted the motions for summary disposition filed by Defendants, but the Court of Appeals remanded this case based upon an issue that Plaintiff did not raise or support in the trial court.

Defendants' motions for summary disposition.² (Exhibit G). Concluding that Plaintiff's case was controlled by *Burton*, the trial court dismissed the Complaint with prejudice, rejecting Plaintiff's argument that Defendants' waived their right to enforce the statute of limitations by allegedly failing to comply with MCR 2.111(F)(3). In its decision, the trial court noted that:

Plaintiff does not dispute that she filed her complaint too early and, therefore, did not comply with the notice provisions of the medical malpractice act. Nor does Plaintiff dispute that such a defect, if properly raised, precludes the complaint from "commencing" the action for purposes of the statute of limitations pursuant to *Burton v Reed City Hosp Corp*, 471 Mich 475 (2005).

(*Id.*, p 2.)

The trial court reasoned that while *Burton* did not involve application of MCR 2.111(F)(3), it did consider an "analogous waiver argument" regarding the manner in which defendants alleged their affirmative defenses. (*Id.*, p 2). The trial court further found that:

[*Burton*] considered these allegations [(1) that "plaintiff's claim is barred by the applicable Statute of Limitations;" and (2) that "Plaintiff has failed to comply with the provisions of MCL 600.2912b and MCL 600.2912d, et seq., and plaintiff's complaint, must, therefore, be dismissed"] in light of the requirement in MCR 2.116(D)(2) that a defendant "raise any statute of limitations defense in his or her first responsive pleading. The Court then rejected the plaintiff's waiver argument, finding that the defendants "specifically raised the statute of limitation and plaintiff's compliance with MCL 600.2912b in their answer and affirmative defenses" and, therefore, "clear[ly] affirm[ed] and invoke[ed]' the defense in a manner "sufficient to comply with the requirements of MCR 2.116(D)(2)." *Id.* at 755.

(Exhibit G, pp 2-3).

Finding that the affirmative defenses in *Burton* were "virtually identical" to the defenses raised in this case, the trial court concluded that Defendants' affirmative defenses raised a statute

² The other Defendants also moved for summary disposition under MCR 2.116(C)(7).

4. This Court should grant this Application because:
- a. The Court of Appeals committed significant errors of law by issuing a published decision that did not properly apply at least three decisions of this Court for the reasons stated by Judge Wilder in his dissent and in the Memorandum of Law supporting this Application.
 - b. Although this Court has twice narrowly decided not to review the issues raised by *Zwiers*,¹ the decisions by the Court of Appeals in this case and in *Furr* show that this Court should clarify and re-affirm its holdings.
 - c. The Court of Appeals rendered a clearly erroneous decision by reversing the trial court to allow the Plaintiff to create a record on an issue that she chose not to address and had therefore abandoned in the trial court.

WHEREFORE Defendant-Applicant Organ Procurement Agency of Michigan d/b/a Gift of Life requests that this Honorable Court grant this Application reverse the decision by the Court of Appeals and reinstate the decision by the Oakland Circuit Court to grant summary disposition to Defendants.

Respectfully submitted,

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

By:



C. THOMAS LUDDEN (P45481)

KAREN A. SMYTH (P43009)

Attorneys for Defendant-Applicant Gift of Life

3910 Telegraph Road, Suite 200

Bloomfield Hills, Michigan 48302

(248) 593-5000

tludden@lipsonneilson.com

ksmyth@lipsonneilson.com

Dated: November 21, 2013

¹ *Zwiers*, 486 Mich 1058; 783 NW2d 514 (2010); and *Ellout v Detroit Medical Center*, 486 Mich 1058; 783 NW2d 388 (2010).

MEMORANDUM OF LAW
STATEMENT OF THE CASE

There is a two year statute of limitations for medical malpractice claims. MCL 600.5805(6). For medical malpractice actions, this statute is tolled if a notice of intent (“NOI”) complying with MCL 600.2912b is served. MCL 600.5856(c). Filing a complaint ordinarily tolls the statute of limitations, MCL 600.5856(a), but a medical malpractice action cannot be commenced until the applicable notice period after the NOI is served has expired. See MCL 600.2912b(1), (3) and (8). Therefore, under the clear and unambiguous language of these statutory provisions, filing a medical malpractice complaint before the notice period expires does not toll the statute of limitations. *Burton v Reed City Hospital Corp*, 471 Mich 747, 753-754; 691 NW2d 424 (2005).

On April 23, 2009, the Plaintiff served her NOI. The parties agree that Plaintiff served this NOI in a timely manner and that it extended the statute of limitations for a period of 182 days, from June 9, 2009 to December 8, 2009. It is also undisputed that Plaintiff did not wait the required period under MCL 600.2912b before filing her complaint in the circuit court, but that she instead filed that complaint at least 42 days, and possible as many as 70 days, before the notice period expired.

In the trial court, Plaintiff contended only that Defendants had waived the statute of limitations defense because she claimed that their affirmative defenses did not adequately advise her that she had not waited for the statutorily required period before filing her complaint. Following *Burton*, the trial court found that Defendants had raised the statute of limitations defense adequately. (Exhibit G: Trial Court Opinion, pp 2-3). The trial court, then, properly granted summary disposition to Defendants under MCR 2.116(C)(7).

A. Plaintiff filed her medical malpractice complaint only 112 days after serving her Notice of Intent.

On April 23, 2009, Plaintiff served a NOI, which identified Gift of Life as a health care facility "involved in the treatment of the person of Lisa Tyra." (Exhibit A, NOI, pp 1, 4). In her NOI, Plaintiff described her contentions regarding the applicable standard of care required of Gift of Life, the manner in which she claimed that Gift of Life breached the standard of care, the steps that Gift of Life allegedly should have taken to comply with the standard of care and how Plaintiff was allegedly injured as the proximate result of the alleged breach of the standard of care. (*Id.*, pp 2-4). The NOI claims that Plaintiff was injured as a result of alleged actions or omissions of Gift of Life, all of which occurred on or before June 9, 2007, the date on which Plaintiff had the kidney transplant surgery. (*Id.*).

Plaintiff's service of her NOI triggered a waiting period before she could file a lawsuit based upon the alleged medical malpractice described in her NOI. Plaintiff acknowledges that she did not wait for the prescribed period of time before filing her Complaint on August 13, 2009. Like the NOI, the Complaint contends that Plaintiff was injured by alleged acts or omissions that occurred on or before the June 9, 2007 transplant surgery. (Exhibit B: Complaint, ¶¶ 10-18).

On September 9, 2009, Gift of Life filed its Answer and Affirmative Defenses. The following affirmative defenses are related to the statute of limitations issue raised by this Application:

4. Plaintiff's claims set forth in this Complaint are barred by the applicable statute of limitations and/or statute of repose.

11. Plaintiff failed to comply with the notice provisions of MCL 600.2912b; MSA 27A.2912b and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition.

(Exhibit C: Gift of Life Affirmative Defenses, ¶¶ 4, 11). Gift of Life raised a separate affirmative defense that Plaintiff had not provided adequate information as required by MCL 600.2912b. (*Id.*, ¶12).

Because Plaintiff had served a NOI, the statute of limitations was extended from June 9, 2009 to December 8, 2009. See *infra* at 11-12. After this statute of limitations expired, Gift of Life filed its motion for summary disposition on January 13, 2010. Copies of the motion and supporting brief are attached as Exhibit E. In its motion, Gift of Life explained why Plaintiff's premature filing did not toll the statute of limitations and why her claim was now barred by the statute of limitations. (Exhibit E, pp 6-10).

In response, Plaintiff acknowledged that she had not waited for the statutorily required period. (Exhibit F: Plaintiff's Answer to Gift of Life's Motion for Summary Disposition, p 4). She did not explain why she had filed the Complaint so prematurely or argue that the premature filing tolled the statute of limitations. Instead, her sole argument was that the affirmative defenses filed by Gift of Life and the other Defendants were not factually specific enough to advise her that she had the statutory obligation to wait for a specific period of time before filing her medical malpractice complaint. (*Id.*, pp 5-6.) According to Plaintiff, this failure to remind her of her statutory obligations meant that Defendants had "waived" their statute of limitations defense. (*Id.*, pp 6-11).

B. After hearing oral argument, the trial court granted summary disposition to the Defendants pursuant to MCR 2.116(C)(7).

The trial court heard oral argument on April 7, 2010, stating from the bench that a written opinion would follow. On May 20, 2010, the trial court issued its written opinion granting

of limitations defense. (Exhibit G, p 3). Therefore, the trial court granted the motions for summary disposition. (*Id.*).

C. The Court of Appeals issued a lengthy published decision, which reversed the trial court's decision and has remanded the case for further proceedings.

In the Court of Appeals, Plaintiff again argued that Defendants had not preserved a statute of limitations defense because their affirmative defenses did not describe the factual basis for this defense adequately. (Exhibit H: Plaintiff's Brief on Appeal, pp 4-14). Therefore, Plaintiff argued that Defendants had waived this defense, and the trial court erroneously granted summary disposition to Defendants. (*Id.*).

In the Court of Appeals, Plaintiff also argued for the first time that she should be permitted to amend her pleadings under *Zwiers* and its interpretation of MCL 600.2301. (Exhibit H: Plaintiff's Brief on Appeal, pp 19-20). Plaintiff further contended that this Court's decision in *Bush v Shabahang*, 484 Mich 156; 772 NW 2d 272 (2009) allowed her to correct the defect in her case. (*Id.*, pp 17-20). But, Plaintiff did not offer a factual basis for finding that *Bush*, *Zwiers* or MCL 660.2301 applied to this case. (*Id.*).

The Court of Appeals issued a published Opinion on August 15, 2013, which reversed the decision granting summary judgment to Defendants and remanded the case for further proceedings. A copy of this Opinion is attached as Exhibit J. The Court of Appeals did affirm the trial court's finding that Defendants' affirmative defenses were adequate and that Defendants had not waived their statute of limitations defense under *Burton*. (Exhibit J, p 8). Before doing so, however, the Court of Appeals issue a lengthy dissertation regarding its views on affirmative defenses, their amendment and prejudice to plaintiffs who do not comply with statutory requirements. (Exhibit J, pp 4-8). Despite finding that the trial court had correctly decided the only issue before it, the Court of Appeals nonetheless reversed and remanded the case so that the

Plaintiff could explain why she should be allowed to amend her complaint under *Zwiers, supra*, and its interpretation of MCL 600.2301. (Exhibit J, pp 8-10).

The Court of Appeals decision was not unanimous. Judge Wilder issued a dissent, which is attached as Exhibit K. In his dissent, Judge Wilder explained that the majority had erred primarily because *Burton, supra*, and *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011) remain good law. (*Id.*, p 1). Relying upon *Burton* and *Driver*, Judge Wilder found that Plaintiff's complaint should not toll the statute of limitations because it was filed prematurely. (*Id.*, pp 1-2). Following *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007), Judge Wilder also found that Defendants neither waived nor could they have waived this issue of Plaintiff's failure to comply with the mandatory waiting period established by MCL 600.2912b. (*Id.*, p 2).

Judge Wilder explained why the majority's reliance upon *Zwiers* was misplaced in light of this Court's subsequent decision in *Driver*. *Zwiers* relied upon MCL 600.2301 to allow the plaintiff to retroactively amend a NOI that was filed one day prematurely. Judge Wilder recognized that, in *Driver*, this Court held that "MCL 600.2301 only applies to actions or proceeds that are *pending*." (Exhibit K, p 3) (citing *Driver*, 490 Mich at 253) (emphasis in original). Because Plaintiff's complaint was filed prematurely, Judge Wilder found that there was no action pending to which the trial court could apply MCL 600.2301 to disregard the statute of limitations barring Plaintiff's medical malpractice action. (Exhibit K, p 3). Moreover, Judge Wilder determined that *Driver* held "that a statute of limitations defense is a substantive right to which [a] defendant is entitled...." (Exhibit K, p 3). *Zwiers*, however, had held that no substantial right of the defendant was affected by permitting the filing of an amended complaint to cure the premature filing. Therefore, Judge Wilder believed that *Driver* had also eliminated

MCR 2.116(G)(6); *Maiden*, 461 at 119.

This particular case presents a number of questions of statutory interpretation. Interpreting a statute is a question of law, which is reviewed on a de novo basis. *Michigan Dept of Transportation v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008). If the statutory language is clear and unambiguous, then Michigan courts “apply the language as written and judicial construction is not permitted.” *Driver, supra*, 490 Mich at 247. The same rules of interpretation and standard of review apply to the Michigan Court Rules. *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

B. Under the undisputed facts, the Plaintiff did not comply with the clear and unambiguous statutory requirements for filing a medical malpractice action and this failure has resulted in the statute of limitations barring her claim.

There is a two year statute of limitations for malpractice actions in Michigan. MCL 600.5805(6). For medical malpractice actions alone, “a claim . . . accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.” MCL 600.5838a(1). It is undisputed that the Plaintiff’s claim accrued on or before June 9, 2007, the date on which she had her transplant surgery because all allegedly negligence actions or omissions occurred by no later than the date of this surgery. (See, e.g., Exhibit B: Complaint, ¶¶ 10-18).

The Revised Judicature Act (“RJA”) allows the statute of limitations to be tolled under specifically defined circumstances, providing that:

The statutes of limitations or repose are tolled in any of the following circumstances:

(a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

(b) At the time jurisdiction over the defendant is otherwise acquired.

(c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

MCL 600.5856.

Section 2912b of the RJA details the requirements before a medical malpractice claim may be filed. It specifically provides:

Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

MCL 600.2912b(1) (emphasis added). This language is unambiguous and imposes a clear duty upon a person wishing to pursue a medical malpractice claim. The RJA provides only one exception from this 182 day waiting period that might be related to this case, when a health professional or health facility does not provide a written response to the NOI. Under this particular situation, the RJA reduces the waiting period by four weeks, stating that:

If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period.

MCL 600.2912b(8).

Plaintiff served her NOI on April 23, 2009. (Exhibit A: NOI). None of the Defendants had responded before Plaintiff filed her Complaint on August 13, 2009, which is only 112 days after April 23, 2009. (Exhibit B: Complaint). Therefore, Plaintiff she did not wait either the 182 day period established by MCL 600.2912b(1) or the 154 day period set by MCL 600.2912b(8). In fact, Plaintiff conceded in the Court of Appeals that she did not comply with the mandatory notice period of MCL 600.2912b. (Exhibit H: Plaintiff's Brief, p 4).

5. That plaintiff's claim is barred by the applicable statute of limitations.

* * *

12. That plaintiff has failed to comply with the provisions of MCLA 600.2912B and MCLA 600.2912d, *et seq*[], and plaintiff's claim must, therefore be dismissed.

Burton, 471 Mich at 748 (all alterations in original). *Burton* was decided in 2005. Therefore, Gift of Life prepared affirmative defenses modeled upon the affirmative defenses that *Burton* found to be a sufficient method of raising the identical substantive argument: plaintiff's claim was now barred because the statute of limitations had not been tolled by the filing of a premature medical malpractice complaint. *Id.*, p 755.

Defendants, then, were justified in using this precise language to raise this specific legal argument regarding the statute of limitations. Moreover, Plaintiff knew, or should have known, that this precise language in the affirmative defenses was a proper method of raising this precise defense. : Accordingly, the trial court properly determined that this affirmative defense was a sufficient method of raising this defense. (Exhibit G: Trial Court Opinion, pp 2-3). In addition, as both the Court of Appeals majority and dissent by Judge Wilder recognized, under this Court's decision in *Auslander, supra*, 480 Mich 910, alleged flaws in affirmative defenses do not allow Plaintiff to pursue a claim barred by the statute of limitations. (Exhibit J: Court of Appeals Opinion, pp 5-6) (Exhibit K: Wilder Dissent, p 2). Therefore, Plaintiff cannot prevail on the only argument that she briefed in the trial court.

D. This Court should reverse the Court of Appeal decision because it did not apply *Burton, Bush and Driver* correctly.

Despite this, the Court of Appeals relied upon *Zwiers* to justify its decision to remand this case. *Zwiers* interpreted *Bush* to provide a legal basis for not following *Burton*, 286 Mich App at 40, 46-48. In this case, the Court of Appeals also attempted to distinguish the procedural history

the second statutory requirement prerequisite for applying MCL 600.2301. (Exhibit K, pp 3-4). Accordingly, Judge Wilder would have affirmed the trial court's decision to grant summary disposition. (Exhibit K, p 4).

Both Defendants filed timely motions for reconsideration on September 5, 2013. Plaintiff did not file a written response to either motion. On October 11, 2013, the Court of Appeals issued an order denying the motions for reconsideration.³ (Court of Appeals Docket, Item 48). Defendant Gift of Life now seeks leave from this Court to appeal the August 15, 2013 Opinion of the Court of Appeals.

ARGUMENT

Under the undisputed facts in the record of this case, the clear and unambiguous statutory language, and the decisions of this Court, Plaintiff's medical malpractice claim is barred by the statute of limitations. Therefore, this Court should reverse the decision by the Court of Appeals and reinstate the decision of the trial court granting summary disposition to Defendants.

A. Michigan appellate courts review a trial court's decision on a motion for summary disposition on a de novo basis to determine whether the moving party was entitled to judgment as a matter of law.

A defendant may move for summary disposition because a claim is barred by the statute of limitations. MCR 2.116(C)(7). This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence. *Id.*, p 119; MCR 2.116(G)(5). The evidence submitted to support or oppose a motion under MCR 2.116(C)(7) can only be considered to the extent its contents would be admissible.

³ Judge Wilder would have granted the motions for reconsideration.

As this Court has already held, the failure to wait until the statutory notice period expires, means that the filing of the medical malpractice lawsuit did not toll the statute of limitations. *Burton, supra*, 471 Mich at 747, 753-54. The parties, the trial court and the Court of Appeal all agree that the statute of limitations would bar the plaintiff's medical malpractice claim on December 8, 2011 unless filing her complaint on August 13, 2009 tolled the statute of limitations. Neither of Plaintiff's excuses for avoiding this statutory bar justify denying Defendants' motions for summary disposition.

C. The Court of Appeals properly rejected the only argument that Plaintiff raised in the trial court in opposition to the Gift of Life Motion for summary disposition.

The only argument that Plaintiff raised in the trial court was that Defendants had waived their statute of limitations defense because they did not plead that defense with sufficient facts. (Exhibit F: Response to Gift of Life Motion, pp 4-11). This was also the primary argument that Plaintiff briefed in the Court of Appeals. (Exhibit H: Plaintiff's Brief on Appeal, pp 4-14).

In its initial pleading, Gift of Life raised the following affirmative defenses related to the statute of limitations:

4. Plaintiff's claims set forth in this Complaint are barred by the applicable statute of limitations and/or statute of repose.

11. Plaintiff failed to comply with the notice provisions of MCL 600.2912b; MSA 27A.2912b and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition.

(Exhibit C: Gift of Life Affirmative Defenses, ¶¶ 4, 11).

In *Burton*, this Court had determined that the following affirmative defenses were sufficient to raise a statute of limitations defense based, in part, upon the failure to wait of the plaintiff to wait for the statutorily required period before filing her complaint:

from that in *Driver* to avoid affirming the trial court. As Judge Wilder explained in his dissent, however, *Driver* not only confirms that *Burton* remains good law, but it also undermines the legal basis for *Zwiers*. Accordingly, this Court should find that the Court of Appeals erred by finding that the *Zwiers* application of section 2301 of the RJA provides a basis for avoiding the effect of filing a premature medical malpractice claim.

Bush, *Zwiers* and *Driver* all analyzed section 2301 of the RJA, 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. Under the clear and unambiguous language, this section only applies if an “action or proceeding is pending.” Moreover, a court may only use this provision to “disregard any error or defect in the proceedings . . . [when the amendment] do[es] not affect the substantial rights of the parties.” *Id.*

Bush held that section 2301 may be used to correct a content error in a NOI. 484 Mich at 176-178. Essential to this holding was the determination by the majority in *Bush* decision that “[s]ervice of an NOI is clearly part of a medical malpractice ‘process’ or ‘proceeding’ . . .” *Id.*, 176. Moreover, *Bush* specifically found that the thirteen page long NOI was a “good-faith attempt to address [the content requirements] enumerated in section 2912b(4)” *Id.*, 178. *Zwiers* stated that it could consider whether section 2301 might be used to disregard the effect of filing a medical malpractice complaint one day early only because *Burton* had not considered this issue. 286 Mich App at 40. Like the *Bush* court, the *Zwiers* court determined that the error involved – inadvertently filing a medical malpractice claim one day too soon -- was a “good-faith effort to

comply with the NOI statute” and that filing one day early did not affect “defendants’ substantial rights”. *Id.* Therefore, *Zwiers* allowed the claim to proceed.

1. The Court of Appeals erred by following *Zwiers* after this Court explained in *Driver* that section 2301 does not apply unless an “action or proceeding” was pending.

Two years after the Court of Appeals decided *Zwiers*, this Court issued *Driver*. In *Driver*, the plaintiff argued that he should be permitted to use section 2301 to amend his original NOI so that it would apply to a defendant, Cardiovascular Clinical Associates (“CCA”). 490 Mich at 251-252. If he were allowed to make this proposed amendment, then the NOI against CCA would relate back to his original NOI against the other defendants in *Driver*. *Id.* As a result, the statute of limitation would not bar his claim against CCA. *Id.*, p 252. *Driver* rejected plaintiff’s argument for several reasons. Initially, *Driver* found that the facts did not trigger the application of section 2301 because plaintiff had not commenced an action against CCA before the statute of limitations expired. *Id.*, pp 253-254. Therefore, since an action was never pending, section 2301 did not apply. *Id.*, p 254.

Driver also held that allowing the proposed amendment “would not be ‘for the furtherance of justice’” because it would affect CCA’s substantive right of receiving a timely NOI. 490 Mich at 254. Moreover, *Driver* found that allowing the proposed amendment would render the notice requirements of section 2912b of the RJA meaningless. *Id.*, pp 256-257. Finally, *Driver* concluded with two very significant holdings for this case. First, it affirmed the validity of the *Burton* holding that filing a medical malpractice lawsuit before the notice period expired did not toll the statute of limitations. *Id.*, pp 257-258. Second, *Driver* explained that the *Bush* application of section 2301 dealt only with a content error, not with the timing of a lawsuit’s filing. *Id.*

Therefore, as Judge Wilder explained in his dissent, *Driver* and *Burton* require dismissal of this case. Under both its clear and unambiguous language and *Bush*, section 2301 only applies if “an action or proceeding is pending”. *Bush, supra*, 484 Mich at 176-177. Because Plaintiff filed her complaint only 112 days after serving her NOI, her medical malpractice action was not pending because it was never commenced. (Exhibit K: Wilder dissent, pp 2-3). Accordingly, under both *Driver* and the clear language of section 2301, Judge Wilder believed that Plaintiff cannot use section 2301 to cure this defect. (*Id.*).

Judge Wilder also believed that the majority has erred in continuing to follow *Zwiers* because *Driver* explained that *Bush* applies only to correct an error in the content of a timely served NOI. (Exhibit K, p 2) (relying upon *Driver*, 490 Mich at 257-258). Moreover, *Driver* held that *Bush* had not altered the holding in *Burton* that a prematurely filed medical malpractice complaint does not toll the statute of limitations. (*Id.*). Therefore, as Judge Wilder explained, section 2301 cannot be used to avoid the effect of the premature filing of the Complaint, and Plaintiff’s claim is now time barred by the statute of limitations. (Exhibit K, pp 2-3).

Finally, *Zwiers* found that the substantive rights of the defendants were not affected by disregarding the one day error. 286 Mich App at 51-52. *Driver* held that a statute of limitations defense is a substantive right of defendants. 490 Mich at 254-255. Therefore, as Judge Wilder recognized, even if an action had been pending, section 2301 could not be applied to disregard the statute of limitations because doing so would impair the substantive rights of Defendants. (Exhibit K, pp 3-4).

Accordingly, this Court should reverse the decision by the Court of Appeals to rely upon *Zwiers* and section 2301 to reverse the trial court’s decision and remand this case.

2. Even if *Zwiers* remains good law, the Court of Appeals erred by remanding this case to the trial court for further proceedings.

The Court of Appeals also erred because this case presents a significantly different procedural history from that in *Zwiers*. The Court of Appeals found that *Zwiers* may apply to excuse Plaintiff's filing error, but did not believe that it was clear from the record if *Zwiers* should apply. (Exhibit J, p 9). Therefore, the Court of Appeals found that "plaintiff should be afforded the opportunity to make an argument in support of amending the filing date of her complaint. . . ." (*Id.*, p 10). The Court of Appeals then remanded this case so that Plaintiff could make this showing. (*Id.*, pp 9-10).

A remand is not needed because Plaintiff has already had this opportunity and the record of this case is already clear. *Zwiers* was issued a few months before Gift of Life moved for summary disposition. Therefore, Gift of Life discussed *Zwiers* in the initial motion and explained why *Zwiers* did not apply under both the undisputed facts as well as subsequent legal authority. (See, e.g., Exhibit E: Motion for Summary Disposition, pp 11-15). As a result, Plaintiff not only had the hypothetical opportunity to show why *Zwiers* applied, but Gift of Life had already raised the issue of whether *Zwiers* applied and shown why *Zwiers* did not apply.

Despite this notice, Plaintiff chose not to submit any evidence to explain why she filed her case so early. Instead, Plaintiff stated only that "Finally, *Zwiers v Growney*, 2009 WL 3415876, Docket No: 286828, Court of Appeals Decision, October 22, 2009, has shown that reasonable minds can take appropriate action even in the face of black letter law (Exhibit K)." (Exhibit F: Plaintiff's Answer, p 11). Plaintiff failed to submit any evidence even though all of the evidence regarding why she filed her complaint on the 112th day was solely within the possession of the Plaintiff or her counsel. The failure to produce evidence within a party's control raises a presumption that the evidence would operate against that party. See, e.g., {BH459592.DOCX}

Macklem v Warren Const Co, 343 Mich 334, 338; 72 NW2d 60 (1955). Therefore, the failure of Plaintiff to submit evidence showing why the *Zwiers* exception applies means that the presumption that this evidence is unfavorable is un rebutted. Consequently, there is no legal or factual basis to remand this case to consider if *Zwiers* applies.

In addition, both *Bush* and *Zwiers* held that the plaintiffs before them had made a good faith effort to comply with the statutory requirements. In *Zwiers*, for example, the plaintiff's medical malpractice complaint was filed one day before the 182 period expired. 286 Mich App at 40. The record in *Zwiers* showed that this error was "entirely inadvertent" and was based upon a mistaken interpretation of a note in the attorney's file. *Id.*, p 41. The period of limitations in *Zwiers* expired shortly after the complaint was filed, which meant that filing the lawsuit a few days later would have resulted in the statute of limitations barring the claim. *Id.* Therefore, the *Zwiers* record supported this finding of good faith.

Here, Plaintiff filed a medical malpractice complaint only 112 days after serving the NOI. This was at least six weeks before she was allowed to do so, and possibly as many as ten weeks early. See MCL 600.2912(b)(1), (8). A one day error seems to be an inadvertent clerical error on its face. A one week error might be an inadvertent clerical error, but would require additional explanation. The same is not the case here as there is no plausible explanation for the this filing being so premature that would lead to the conclusion that it was the result of an inadvertent, good faith and essentially clerical error as in *Zwiers*. Accordingly, *Zwiers* is a fundamentally different type of case, and the Court of Appeals erred by finding that it might apply.

Finally, the entire NOI process was designed to "promot[e] settlement without the need for formal litigation, reduc[e] the cost of medical malpractice litigation, and provid[e] compensation for meritorious medical malpractice claims" *Bush*, 484 Mich at 174. *Zwiers*

specifically found that inadvertently filing a complaint one day early does not interfere with these goals. 286 Mich App at 87. Filing a lawsuit 70 days early, however, circumvents the statutorily mandated procedure and defeats the purpose of the NOI process.⁴ Accord *Driver, supra*, 490 Mich at 259. In this case, for example, Defendants lost the opportunity to prepare a response to the NOI and attempt to resolve this matter before incurring the time and expense of litigation. Under these circumstances, the premature filing clearly affected the substantive legal rights of the Defendants, which means that section 2301 can never apply.

Therefore, this Court should reverse the decision by the Court of Appeals to remand this case because the record already shows that both *Zwiers* and section 2301 of the RJA do not apply to allow the courts to disregard the error made by Plaintiff's counsel.

CONCLUSION AND RELIEF REQUESTED

This Court should grant this Application, reverse the decision by the Court of Appeals and reinstate the decision by the trial court to grant summary disposition to the Defendants.

Respectfully submitted,

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

By: 

C. THOMAS LUDDEN (P45481)

KAREN A. SMYTH (P43009)

Attorneys for Defendant-Applicant Gift of Life

3910 Telegraph Road, Suite 200

Bloomfield Hills, Michigan 48302

(248) 593-5000

tludden@lipsonneilson.com

ksmyth@lipsonneilson.com

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⁴ In *Furr*, the majority asked for a special panel to be convened to consider this case, and a special panel is being convened. Unlike this case, *Furr* dealt with a minor timing error, which might have resulted from the NOI being served on April 4 even though it was dated April 1. *Furr* did not deal with the much more substantial error and issues raised by this case. Therefore, the special panel may not resolve all the legal issues present in this case.