

STATE OF MICHIGAN
IN THE SUPREME COURT

SUSAN FURR and WILLIAM FURR,

Supreme Court No. 149344

Plaintiffs/Appellees/Cross-Appellant,

Court of Appeals No. 310652

-vs-

Lower Court No. 10-0551-NH

MICHAEL McLEOD, M.D., TARA B. MANCL,
M.D., MICHIGAN STATE UNIVERSITY,
KALAMAZOO CENTER FOR MEDICAL STUDIES,
INC. and BORGESS MEDICAL CENTER, Jointly
and Severally,

Defendants/Appellants/Cross-Appellees.

149344

NOTICE OF HEARING

PLAINTIFFS-APPELLEES' RESPONSE TO
APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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STATEMENT OF QUESTIONS PRESENTED

- I. SHOULD THIS COURT DENY DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL SINCE THE COURT OF APPEALS CORRECTLY DETERMINED THAT PLAINTIFFS' MEDICAL MALPRACTICE ACTION WAS NOT SUBJECT TO DISMISSAL ON THE GROUND THAT IT WAS FILED PREMATURELY?

Plaintiffs-Appellees say "Yes".

Defendants-Appellants say "No".

STATEMENT OF FACTS

This is a medical malpractice action arising out of defendants' professional negligence which occurred during a surgical procedure performed on Susan Furr in April 2008..

On April 4, 2010, counsel for Mrs. Furr mailed a notice of her intent to sue to two doctors, Dr. Michael McLeod and Dr. Tara Mancl, and several health facilities. On September 7, 2010, 156 days after the notice of intent was mailed, counsel for the defendants, pursuant to MCL 600.2912b(7), mailed a written response to plaintiffs' notice of intent.

Mr. and Mrs. Furr filed this action in the Kalamazoo County Circuit Court on September 30, 2010. Several weeks after filing their answer, defendants filed a motion for summary disposition. In that motion, defendants contended that the plaintiffs failed to comply with the 182 waiting period called for by MCL 600.2912b, because they filed their complaint 179 days after the mailing of their notice of intent. Based on that argument, defendants contended that plaintiffs' case should be dismissed with prejudice.

The circuit court denied defendants' motion in an order dated January 31, 2011. Defendants applied for leave to appeal in the Court of Appeals. *Furr v McLeod*, Court of Appeals No. 302675. On March 12, 2012, a panel of the Court of Appeals issued an order remanding the case to the circuit court for reconsideration in light of *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011) and *Burton v Reed City Hospital Corp*, 471 Mich 745; 691 NW2d 424 (2005).

On remand, the circuit court issued a written opinion dated May 22, 2012, again denying defendants' motion for summary disposition. Defendants again filed an application for leave to appeal in the Court of Appeals. That application was granted on June 22, 2012.

On October 24, 2013, a three judge panel of the Court of Appeals issued an opinion in which

it reluctantly affirmed the denial of summary disposition. *Furr v McLeod*, 303 Mich App 801 (2013). The panel reached that result only because it was compelled to follow the Court of Appeals prior earlier decision in *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208; 840 NW2d 730 (2013). *Tyra* had held that a medical malpractice complaint filed less than 182 days after the mailing of a notice of intent was not subject to dismissal. In its October 24, 2013 opinion, the panel expressed its disagreement with the holding in *Tyra* and it sought to convene a special panel under the procedures set out in MCR 7.215(J), to resolve the question of whether *Tyra* was properly denied.

On November 20, 2013, the Court of Appeals issued an order convening a special panel. The opinion of the special panel was released on April 10, 2014. *Furr v McLeod*, 304 Mich App 677; 848 NW2d 465 (2014). The special panel ruled 4-3 that the circuit court did not err in denying defendants' motion for summary disposition.

The defendants have now requested leave to appeal from the April 10, 2014 ruling of the special panel.

ARGUMENT

I. THIS COURT SHOULD DENY DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL SINCE THE COURT OF APPEALS MAJORITY CORRECTLY CONCLUDED THAT THE CIRCUIT COURT DID NOT ERR IN DENYING SUMMARY DISPOSITION.

In this case, plaintiffs' medical malpractice action was filed 179 days after the mailing of their presuit notice of intent. The issue presented here is whether the failure to comply with the 182 day waiting period called for by §2912b results in the dismissal of plaintiffs' case with prejudice.¹

Resolution of the legal issue raised in defendants' application requires consideration of three cases decided by this Court, *Burton v Reed City Hospital Corp*, 471 Mich 745; 691 NW2d 424 (2005); *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009) and *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), as well as the decision of the Court of Appeals in *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009).

In *Burton*, the Court held that a medical malpractice action case that was filed 115 days after the mailing of a notice of intent was subject to dismissal under §2912b. The *Burton* Court further concluded that, unless such a case could be refiled within the applicable limitations period, that case would be subject to dismissal on statute of limitations grounds.

Four years after *Burton* was decided, the Court issued its decision in *Bush*. In *Bush*, the plaintiff mailed a notice of intent that did not comply with all of the requirements of §2912b(4). One of the issues that the Court had to address in *Bush* was the appropriate consequences of such

¹In the Court of Appeals, plaintiffs argued that their cause of action was not prematurely filed under another subsection of the notice of intent statute, §2912b(9). In its panel decision dated October 24, 2013, the Court of Appeals rejected that argument. Plaintiffs have filed a cross application for leave to appeal in which they have argued that the Court of Appeals erred in concluding that plaintiffs' action was filed before the expiration of the waiting period called for by MCL 600.2912b.

defective notice of intent. 484 Mich at 170-181. The *Bush* Court found that the resolution of this issue was governed by a Michigan statute, MCL 600.2301, a statute that had not factored into the Court's earlier decision in *Burton*. That statute provides:

The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every state of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

The first sentence of MCL 600.2301 allows amendment of any "process, pleading or proceeding" in the interest of justice. This Court held in *Bush* that a notice of intent falls within this first sentence of §2301 in that it "is clearly part of a medical malpractice 'process' or 'proceeding'". 484 Mich at 176. As a result, the Court held in *Bush* that §2301 applies to notices of intent. *Id.* at 177.

Having found that §2301 applies to the notice of intent process, the *Bush* Court went on to hold that the right to amend a "process" or "proceeding" provided in the first sentence of §2301 had to be applied to a defect in a notice of intent. Thus, the Court held in *Bush* that, rather than dismissing the case because of a defective notice of intent, such a defective notice could in certain circumstances be amended to comply with the requirements of §2912b(4). 484 Mich at 177-180. In a footnote, the Court in *Bush* further held that any amendment of plaintiffs' notice of intent would relate back to the date of the filing of the original notice. *Id.* at 181, n. 47.

The Court of Appeals in its 2009 decision in *Zwiers* was called upon to construe this Court's ruling in *Burton* in light of its later opinion in *Bush*. The facts of *Zwiers* are virtually identical to those in this case. There, the plaintiff in a medical malpractice action filed suit on the 181st day after

the notice of intent was mailed. Relying on *Burton*, the defendants in *Zwiers* argued that summary disposition was appropriate because the plaintiffs' malpractice action was filed before the expiration of the 182 day waiting period called for by §2912.

The panel in *Zwiers* acknowledged that, if the only precedent applicable to the case were *Burton*, the defendants' argument would be correct and plaintiff's case would be subject to dismissal. However, the *Zwiers* Court also had to consider the effect of *Bush* and that case's application of §2301 to notices of intent.

The *Zwiers* Court began its analysis of this issue by recognizing, consistent with *Bush*, that "[s]ervice of an NOI is clearly part of a medical malpractice 'process' or 'proceeding.'" 286 Mich App at 47. On this basis, the panel in *Zwiers*, like this Court in *Bush*, recognized that §2301 had to be applied to the notice of intent issue before it.

Zwiers, however, differed slightly from *Bush* in one important respect. In *Bush*, this Court addressed the first sentence of §2301 and its provision for amendment of a "process" or "proceeding" in "the furtherance of justice." This focus on the first sentence of §2301 was due to the fact that a right to amend the defective notice of intent involved in *Bush* would avoid the dismissal of the plaintiff's cause of action since the amendment of the notice would achieve compliance with the requirements of §2912b(4).

However, the amendment of the notice of intent was not a viable option for the plaintiff in *Zwiers*. Amendment of the contents of plaintiffs' notice of intent in that case would not eliminate the fact that plaintiff's complaint was filed one day before the expiration of the 182 day waiting period called for by §2912b(1).

The *Zwiers* Court, therefore, did not rely on the first sentence of §2301 in reaching the result

that it did. Rather, *Zwiers* placed greater emphasis on the second sentence of §2301, the sentence of that statute which specifies that Michigan courts, “shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.” Thus, the *Zwiers* Court recognized that under the plain language of §2301 and consistent with *Bush*, “a court . . . can disregard any harmless error or defect in the proceedings.” 286 Mich App at 52.

On the basis of this second sentence of §2301, *Zwiers* held that a complaint that was filed only one day before the expiration of the 182 day waiting period should not be subject to dismissal:

Under the circumstances of this case in which a complaint was inadvertently filed *one day early on a 182-day waiting period* and in which no one was harmed or prejudiced by the premature filing, it would simply constitute an injustice to deprive plaintiff of any opportunity to have the merits of her case examined and addressed by a court of law. It would indeed be an understatement to say that summary dismissal of this action on such a hyper-technical basis is placing form over substance. We conclude that the Legislature, through enactment of MCL 600.2301, contemplated circumstances such as those that exist today and decided to give the necessary statutory authority to the courts to rectify harmless defects and errors in accordance with the parameters set in §2301.

286 Mich App at 52 (emphasis in original).

Thus, what the Court of Appeals did in *Zwiers* was to take the clear holding of *Bush* - that §2301 applies to the notice of intent “process” - and it considered the issue presented to it on the basis of the second sentence of §2301, a sentence that was not the focal point of the *Bush* decision.

As the special panel majority noted in this case, the *Zwiers* panel did not hold that *Burton* was no longer good law after the Court’s holding in *Bush*. *Furr*, 304 Mich App at 687. Nor did the *Zweiers* Court challenge the specific holding in *Burton* that the premature filing of a malpractice action did not toll the statute of limitations. 304 Mich App at 688.

The question presented in defendants' application for leave to appeal is whether the holding announced in *Zweirs* can be harmonized with this Court's subsequent decision in *Driver*. *Driver* involved a somewhat complex set of facts. In November 2005 the plaintiff in *Driver* was diagnosed for the first time with colon cancer. The plaintiff had been treated by a physician over two years before that diagnosis was made and plaintiff believed that this physician had been negligent in failing to diagnose the cancer. Under the facts of the *Driver* case, the plaintiff's cause of action could be filed on a timely basis only by utilizing the six month discovery rule of MCL 600.5838a.

The plaintiff in *Driver* retained an attorney who, in April 2006, mailed a notice of intent to the physician who had failed to diagnose the cancer as well as that physician's professional corporation. After the expiration of the waiting period called for by §2912b(1), the plaintiff filed suit on October 23, 2006. That suit was timely filed under the six month discovery rule.

Later, the two named defendants in *Driver* filed a notice of nonparty fault, claiming that another party, Cardiovascular Clinical Associates, P.C. (CCA) was liable for any malpractice committed in the case. The plaintiff sought to add CCA as a named defendant. Thus, in February 2007 plaintiff mailed a notice of intent to CCA. Forty-nine days after mailing that notice of intent, plaintiff filed suit against CCA.

CCA moved for summary disposition based in part on the Supreme Court's ruling in *Burton*. In response to that motion, plaintiff argued that, based on §2301 and this Court's decision in *Bush*, the notice of intent that was mailed to that third defendant in February 2007 should relate back to the filing of the original notice of intent mailed in April 2006.

The Court in *Driver* rejected plaintiff's argument predicated on §2301. The Court quoted that statute, accenting the words "action or proceeding" in the first sentence of §2301. 490 Mich at

253. The *Driver* Court explained that §2301 did not apply in these circumstances because there was no “action” or “proceeding” pending in that case to which §2301 could apply.

The Court in *Driver* first addressed why no “action” was pending:

By its plain language, MCL 600.2301 only applies to actions or proceedings that are *pending*. Here, plaintiff failed to commence an action against CCA before the six-month discovery period expired, and his claim was therefore barred by the statute of limitations. “An action is not ‘pending’ if it cannot be ‘commenced’ . . .”

490 Mich at 254 (emphasis in original).

The Court in *Driver* acknowledged that *Bush* had identified the notice of intent process as a “proceeding” for purposes of §2301 and the *Driver* Court expressly reaffirmed this aspect of *Bush*’s holding. The Court found, however, that this aspect of the *Bush* decision was inapplicable under the facts presented in *Driver*:

In *Bush*, however, this Court explained that an NOI is part of a medical malpractice “proceeding.” The Court explained that, “[s]ince an NOI must be given before a medical malpractice claim can be filed, the service of an NOI is a part of a medical malpractice ‘proceeding.’ As a result, [MCL 600.2301] applies to the NOI ‘process.’” Although plaintiff gave CCA an NOI, he could not file a medical malpractice claim against CCA because the six-month discovery period had already expired. Service of the NOI on CCA could not, then, have been part of any “proceeding” against CCA because plaintiff’s claim was already time-barred when he sent the NOI. A proceeding cannot be pending if it was time-barred at the outset. Therefore, MCL 600.2301 is inapplicable because there was no action or proceeding pending against CCA in this case.

Id. (emphasis in original).

Thus, the precise holding of the Court in *Driver* was that the term “proceedings” as used in §2301 could not apply to the notice of intent issues presented in that case because “plaintiff’s claim was already time-barred when he sent the NOI. A proceeding cannot be pending if it was time-barred at the outset.” 490 Mich at 254.

The *Driver* Court's rejection of §2301 and its potential application to notice of intent "proceedings" was predicated on the fact that at the time the plaintiff mailed his notice of intent to CCA in February 2007, the six month discovery period of limitations had already expired approximately nine months before. Thus, what proved dispositive to the Court in *Driver* in terms of the application of §2301 was that, when the notice of intent was mailed to the third defendant, plaintiff's cause of action against the defendant was already barred by the statute of limitations.

The same is not true in this case. Here, the Furr's' April 4, 2010 notice of intent was mailed prior to the expiration of the applicable statute of limitations. This means, based on the rulings in both *Bush and Driver*, that the notice of intent process constitutes a "proceeding" for purposes of §2301. This is of particular significance in light of the fact that the second sentence of §2301 - the sentence of that statute that was the source of this Court's ruling in *Zwiers* - also uses the word "proceeding."

The special panel majority recognized the distinction that exists between the factual scenario addressed in *Driver* and the facts of this case. In its April 10, 2014 opinion, the special panel ruled:

There is, however, a significant difference between a plaintiff's attempting by way of MCL 600.2301 to bring a defendant into a medical malpractice suit for the first time after failing to file a complaint or to even serve the NOI itself before expiration of the applicable limitations period, as in *Driver*, and a plaintiff's using MCL 600.2301 to preserve an action where the NOI was served and the complaint was filed *within the statute of limitations period*, as in *Zwiers*, thereby negating concerns of a defendant losing the protections afforded by the statute of limitations.

304 Mich App at 696.

The special panel majority also correctly noted that *Zwiers* had focused on the second sentence of §2301 and its indication that courts are to "disregard *any* error or defect in the proceedings which do not affect the substantial rights of the parties." (emphasis added). The impact

of this second sentence was not addressed by the Court in *Driver* and, as the special panel noted, “each of the two sentences comprising MCL 600.2301 can stand on its own.” 304 Mich App at 701.

In light of the purposes served by the 182 day waiting period imposed by §2912b, the special panel did not err in concluding under the facts of this case that the substantial rights of the defendants were not affected by plaintiffs’ filing of a complaint 179 days after the mailing of the notice of intent:

The legislative purpose behind the notice requirement was to provide a mechanism for promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs....” *Driver*, 490 Mich. at 254–255, 802 N.W.2d 311 (quotation marks and citations omitted). We fail to see how every premature filing under MCL 600.2912b would affect a defendant’s substantial rights with respect to attempts at settlement and keeping costs at bay, especially in a situation where, as in *Zwiers* and *Furr*, the mistaken filing occurred one day short of the applicable 182–day period and there were no ongoing settlement negotiations.

Id., at 704-705.

Here, where defendants were not even made aware of the suit until after the 182 days called for by §2912b had elapsed, defendants were not deprived of their chance to resolve this case short of litigation if they had chosen to during that waiting period.² Since they were not deprived of any substantial right, the Court of Appeals special panel correctly concluded that §2301 applied in these circumstances and plaintiffs’ case was not subject to dismissal.

This Court in *Driver* discussed *Bush* and its application to the unique set of facts presented. But, the Court in *Driver* did not address the decision of this Court in *Zwiers*. Nor did the Supreme

²Also relevant in this context is the issue that plaintiffs have raised in their cross-application - whether defendants authorized in writing the immediate filing of a complaint during the 182 day waiting period. See MCL 600.2912b(9).

Court address in any way the *Zwiers* panel's holding that the second sentence of §2301, the sentence that specifies that Michigan courts shall "disregard" any error or defect in the proceedings which do not affect the substantial rights of the parties," is to be applied to a situation in which a plaintiff files a complaint one day before the expiration of the 182 day waiting period called for by §2912b.

II. IF THE COURT IS MOVED TO REVIEW THE COURT OF APPEALS RULING IN THIS CASE IT SHOULD ALSO REVIEW THE QUESTION OF WHETHER ITS DECISION IN *BURTON V REED CITY HOSPITAL CORPORATION*, 471 MICH 745; 691 NW2d 424 (2005), WAS INCORRECTLY DECIDED INASMUCH AS THAT DECISION CANNOT BE HARMONIZED WITH THE UNEQUIVOCAL LANGUAGE CONTAINED IN TWO MICHIGAN STATUTES, MCL 600.5856(a) AND MCL 600.1901.

For reasons discussed in the prior section of this brief, the circuit court's decision to deny defendants' motion for summary disposition should be affirmed. But, if this Court were to reject plaintiffs' argument predicated on the effect of §2301, there is one other issue that this Court should address. Assuming that §2301 does not save this case from dismissal, the question that this Court should take up is the legal effect of such a dismissal.

This is an issue that the Court addressed in *Burton*. The *Burton* Court's resolution of this question, however, is irreconcilable with at least two Michigan statutes, MCL 600.5856(a) and MCL 600.1901. Therefore, if this Court were to review the applicability of its holding in *Burton* in a post-*Bush* case, the Court should also take up the question of whether the *Burton* Court erred in its determination of the effects of a dismissal for the filing of a medical malpractice action prior to the expiration of the waiting period called for by §2912b.

Plaintiffs filed this action 179 days after notices of intent were mailed to the defendants prior to the expiration of the 182 day waiting period called for by §2912b. The defendants contend that

this case is controlled by this Court's decision in *Burton*. In that case, the plaintiff filed a medical malpractice action 115 days after mailing notices of intent to the defendants. After the expiration of the two year limitations period, the defendants in *Burton* moved for summary disposition on the ground that plaintiff's cause of action had been prematurely filed. The plaintiff in *Burton* acknowledged that the waiting period provided in §2912b had not been complied with, but argued that his case should be dismissed without prejudice and that, after such a dismissal, his case could be refiled without running afoul of the statute of limitations. The plaintiff argued in *Burton* that he could successfully refile the case without being barred by the statute of limitations because the statute of limitations was tolled with the filing of his original complaint on the basis of Michigan's statutory tolling provision, MCL 600.5856(a).

The Court of Appeals in *Burton* agreed with the plaintiff and held that the statute of limitations was tolled with the filing of plaintiffs' complaint filed before expiration of §2912b's waiting period. *Burton v Reed City Hospital Corporation*, 259 Mich App 74; 673 NW2d 135 (2003). This Court reversed that decision.

The Court in *Burton* did not dispute plaintiff's contention that any dismissal based on the premature filing of a malpractice suit would be a dismissal *without* prejudice.³ The *Burton* Court ruled, however, that dismissal with or without prejudice would make no difference because the statute of limitations would not be tolled during the pendency of the prematurely filed case.

In the section of its opinion addressed to the tolling question raised by the plaintiff, the

³Such a dismissal without prejudice was fully supported by the Court's subsequent decision in *Bush*. In that case, the Court noted, "[t]o hold that §2912b in and of itself mandates dismissal with prejudice would complicate, prolong and significantly increase the expense of litigation. Dismissal with prejudice would be inconsistent with these stated purposes." 484 Mich at 174-175.

Burton Court focused its attention squarely on the first sentence of §2912b(1), which provides that “a person shall not commence an action alleging medical malpractice . . . unless the person has given . . . written notice under this section not less than 182 days before the action is commenced.” Based on that language, the *Burton* Court rejected plaintiff’s argument that, for statute of limitations purposes, tolling occurred at the point he filed his complaint:

Section 2912b(1) unequivocally provides that a person “shall not” commence an action alleging medical malpractice against a health professional or health facility until the expiration of the statutory notice period. This Court has previously construed other such imperative language in the statutes governing medical malpractice actions. For example, in *Scarsella [v Pollak]*, 461 Mich 547; 607 NW2d 711 (2000) we held that a complaint alleging medical malpractice that is not accompanied by the statutorily required affidavit of merit is not effective to toll the limitations period because the Legislature clearly intended that an affidavit of merit “shall” be filed with the complaint. *Id.* at 549 (citing MCL 600.2912d[1]). In adopting the Court of Appeals opinion in *Scarsella*, we noted that the Legislature’s use of the word “shall” indicates a mandatory and imperative directive (citing *Oakland Co v Michigan*, 456 Mich 144, 154; 566 NW2d 616 [1997]). *Scarsella, supra* at 549. We concluded that the filing of a complaint without the required affidavit of merit was insufficient to commence the lawsuit. *Id.*

471 Mich at 752.

Thus, the Court in *Burton* arrived at the conclusion that the plaintiff’s filing of a medical malpractice complaint before the expiration of the presuit notice period did not toll the statute of limitations based on the “shall not commence” language contained in §2912b(1):

The directive in §2912b(1) that a person “shall not” commence a medical malpractice action until the expiration of the notice period is similar to the directive in §2912d(1) that a plaintiff’s attorney “shall file with the complaint an affidavit of merit . . .” Each statute sets forth a prerequisite condition to the commencement of a medical malpractice lawsuit. The filing of a complaint before the expiration off the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit. In each instance, the failure to comply with the statutory requirement renders the complaint insufficient to commence the action.

471 Mich at 753-754.

This Court's determination in *Burton* regarding the tolling of the statute of limitations is wrong and constitutes a serious judicial rewriting of the statutes applicable to the tolling question presented in that case. *Burton* is, therefore, an anomaly. It is a case in which several members of this Court who have staunchly advocated a limited judicial role in the interpretation of statutes have taken it upon themselves to substantially rewrite statutes that the Michigan Legislature enacted. For the reasons that follow, this Court should revisit its holding with respect to tolling in *Burton*.

The fundamental issue presented to this Court in *Burton* was tolling, *i.e.* whether the statute of limitations was tolled when the plaintiff filed his medical malpractice action before the expiration of the waiting period provided in §2912b. In its opinion in *Burton*, the majority correctly identified tolling as the issue to be addressed. 471 Mich at 752.

The *Burton* Court resolved this tolling issue by reference to language contained in §2912b(1) itself. In approaching the tolling issue presented in *Burton* based solely on the language contained in the notice of intent statute, the *Burton* Court overlooked the obvious fact that §2912b is *not* a tolling statute. The *Burton* Court also overlooked the fact that *there is a statute that specifically addresses the tolling of the statute of limitations under Michigan law*. That statute is not §2912b, the sole focus of the majority opinion in *Burton*. Rather, the specific statute which the Michigan Legislature drafted to address the tolling of the statute of limitations is MCL 600.5856(a).

Thus, after correctly identifying the central issue presented in *Burton* as a question of *tolling*, the *Burton* majority failed to address the one Michigan statute governing the tolling of the statute of limitations, MCL 600.5856(a). Two years before *Burton* was decided, virtually the same members of the Court who comprised the *Burton* majority joined the opinion of this Court in

Gladych v New Family Homes, Inc., 468 Mich 594; 664 NW2d 705 (2003). In *Gladych*, the Court specifically held that “in order to toll the limitations period”, one must file a complaint and “also comply with the requirements of §5856.” 468 Mich at 595.

Thus, in *Gladych*, this Court unequivocally held that any tolling of statutes of limitations must be determined based on the language contained in §5856. Yet, two years later, this basic lesson from *Gladych* was overlooked by this Court’s majority in *Burton*.

Plaintiffs do not contest the fact that §2912b(1) may have something to say about whether a medical malpractice action has been *properly* commenced. But, §2912b has absolutely nothing to say about whether a cause of action has been *commenced*. And, most importantly for purposes of the tolling issue presented to the Court in *Burton*, §2912b has nothing to say about whether the statute of limitations has been *toll*ed in a particular case.

The statute that the Michigan Legislature passed to address the tolling of the statute of limitations is §5856(a). That statute provides as follows:

Sec. 5856. 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.

The tolling of the statute of limitations as provided by the Michigan Legislature in §5856(a) is simple and unequivocal. Statutes of limitations are tolled at the time a complaint is filed, provided that service is effectuated within the time period provided in the Michigan Court Rules. As applied to this case, the simple and unequivocal language of §5856(a) means that *the statute of limitations in this case was tolled on September 30, 2010, the date that Mr. and Mrs. Furr filed this case.*

In the face of the obvious language contained in the one Michigan statute that actually

addresses the subject of the tolling of the statute of limitations, one conclusion with respect to this Court's decision in *Burton* should be obvious. In holding that the plaintiff in *Burton* was not entitled to claim a tolling of the statute of limitations, this Court was required to rewrite §5856(a). That is precisely what the Court did in *Burton*.

What the Michigan Legislature specified in §5856(a) is that tolling of the statute of limitations occurs when a complaint is filed. But, that is not what this statute provides in the wake of this Court's erroneous ruling in *Burton*. Following the decision in that case, the Legislature's tolling statute has been judicially altered, such that it now provides something like this:

Sec. 5856. 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, except in medical malpractice cases, where tolling occurs only after plaintiff also fully complies with all requirements contained in MCL 600.2912b.

This is how Michigan's tolling statute now reads after *Burton*. But, quite obviously, that is not the statute that the Michigan Legislature passed when it enacted §5856(a). The Michigan Legislature could certainly have enacted a tolling statute which would have been consistent with the *Burton* Court's interpretation of how tolling operates in these circumstances. But, the Legislature most certainly did not adopt such a statute.

It is notable that P.A. 1993, No. 78, the public act that established the notice of intent requirement of §2912b, also amended Michigan's tolling statute, §5856. Thus, in 1993 when that public act was adopted, the Legislature not only set out the law regarding presuit notice in medical malpractice cases, it also amended §5856 to include a new tolling provision, one that is now contained in §5856(c).

But, what is of crucial importance for present purposes is that, in amending §5856 in P.A. 1993, No. 78, *the Michigan Legislature made absolutely no changes to §5856(a)* - the provision of Michigan law that provides the answer to the tolling question presented in *Burton*. *Before* the passage of P.A. 1993, No. 78, §5856(a) unequivocally provided that *all* statutes of limitations would be tolled with the filing of a complaint and service of that complaint on the defendant. *After* P.A. 1993, No. 78 was passed and the notice of intent requirement was enshrined in Michigan law, §5856(a) still provided that statutes of limitation would be tolled with the filing of a complaint and service.

This bit of history demonstrates dramatically that the Michigan Legislature certainly had the opportunity in 1993 to rewrite §5856(a) to ensure the result reached by this Court in *Burton*. The Michigan Legislature had the opportunity to amend §5856(a) to require that there would be no tolling of the statute of limitations in a medical malpractice action unless *both* the complaint was filed and the plaintiff fully complied with all of the presuit notice requirements of §2912b. But the Michigan Legislature did not do so.

The Court's decision in *Burton*, which has the effect of adding language to §5856(a) that was not written into that statute by the Michigan Legislature, stands in stark contrast to the often stated jurisprudence of this Court. This Court has emphasized in recent years its unflagging commitment to a literal approach to statutory interpretation. The Court has regularly stressed that, in interpreting a statute, Michigan courts were prohibited from adding language to a 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) (the Court is to apply the statute “as enacted without addition, subtraction or modification.”); *American Federation of State County and Municipal Employees v City of Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003). This Court has also emphasized repeatedly in recent years that where a statute’s language is clear, “we assume that the Legislature intended its plain meaning, and we enforce the statute as written.” *Omelenchuck v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002); *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). This Court has even imbued its strict interpretation of statutory text with a constitutional component, holding that adherence to the literal text of a statute “force[s] courts to respect the constitutional role of the legislature as a policy-making branch of government and constrain[s] the judiciary from encroaching on this dedicated sphere of constitutional responsibility.” *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

Under the principles announced in these cases and numerous other recent decisions of this Court, this Court’s decision in *Burton* is both incorrect and inexplicable. The Court in *Burton* was not free to add language to §5856(a) which does not appear in that statute. That statute unequivocally provides for the tolling of the limitations period where *a complaint* is filed and served on the defendant. That statute says nothing that requires both the filing of a complaint and full compliance with all of the requirements of §2912b before tolling of the statute of limitations may occur.

The *Burton* Court’s failure to apply the literal text of §5856(a), the one Michigan statute that actually addresses the question of the tolling of the statute of limitations, is even more perplexing in light of the fact that within the last twelve years this Court has, on at least three different occasions, insisted on a literal, textual approach to the interpretation of this very statute. In three

cases, *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), *Gladych, supra*, and *Roberts v Mecosta County General Hospital*, 466 Mich 57; 642 NW2d 663 (2002), this Court reached holdings which were based entirely on a literal interpretation of §5856.

In *Waltz*, for example, the Court's majority held that the words "statute of limitations" as used in §5856 could not be rewritten to encompass the statutory savings provision applicable to wrongful death cases, MCL 600.5852. The Court's majority in *Waltz* rejected the plaintiff's attempt to expand the reach of §5856 beyond its literal text. However, that is precisely what the Court itself did in *Burton*, engrafting onto §5856(a) a prerequisite for the tolling of a statute of limitation that the text of that statute simply does not support.

In *Gladych*, this Court held that the literal text of §5856(a), as it then existed, had to be complied with in determining whether a complaint was timely filed. In arriving at this result, the Court in *Gladych* reiterated its often stated view that where the language of a statute is unambiguous, "we presume that the Legislature intended the meaning clearly expressed - no further judicial construction is required or permitted, and the statute must be enforced as written." 448 Mich at 597. This fundamental principle of statutory interpretation, which was applied to §5856(a) in *Gladych*, was disregarded in *Burton*.

Finally in *Roberts*, this Court held that the unambiguous language in what is now §5856(c) dictated that the tolling effect of that statute would not be applicable if the plaintiff's pre-suit notification to the defendants was not "given in compliance with section 2912b." In *Roberts*, the Court stated yet again its commitment to a purely textual approach to the interpretation of statutes:

If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that *a court may read nothing into an*

unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.

466 Mich at 63 (emphasis added).

The Court in *Roberts* applied these principles to its interpretation of §5856. Three years later, the Court in *Burton* overlooked these basic principles, reading language into the unambiguous text of §5856(a) that is not included in that statute by the Legislature.

To summarize, the central issue presented in *Burton* and in this case is a question of *tolling*. There is only *one* Michigan statute that governs that question, §5856. It is the plain, unambiguous language of that statute, not §2912b, that must control this tolling question. And, under the plain, unambiguous language of §5856(a), *the statute of limitations applicable to this case was tolled when plaintiffs filed their complaint in the Kalamazoo County Circuit Court in September 2010.*

There is, however, a second glaring error in the analysis employed by the Court in *Burton*. The Court's majority in that case properly recognized that the central question presented by the plaintiff's argument was whether the statute of limitations was *tolled*. 471 Mich at 752. The *Burton* Court resolved this question *not* by examining §5856, but by addressing an entirely different concept - whether plaintiff's case had been "commenced." Based on §2912b(1)'s language specifying that a plaintiff "shall not commence" a malpractice action without complying with that notice statute, the Court held in *Burton* that, "the failure to comply with the statutory requirements [of §2912b] renders the complaint insufficient to commence the action." 471 Mich at 754.

The *Burton* Court's assessment of whether the plaintiff's cause of action was "commenced" is wrong for two different reasons. First, *Burton's* focus on whether plaintiff's case was *commenced* completely missed the substance of the plaintiff's argument - whether there was *tolling* of the statute

of limitations during the pendency of a prematurely filed malpractice action. As discussed previously, the specific question presented in *Burton* - whether the statute of limitations was tolled - could only be answered by application of the specific statute passed by the Michigan Legislature which actually addresses tolling, §5856, and its provision that the statute of limitations was tolled with the filing of a complaint.

But, there is another serious error in the analysis employed in *Burton* regarding the “commencing” of an action. Even if one were to accept the erroneous assumption that “commencement” of a cause of action somehow governs the tolling of the statute of limitations, the *Burton* majority was *still* wrong in concluding that the plaintiff’s case was not “commenced” when it was filed prior to the expiration of the mandatory waiting period of §2912b. In arriving at that conclusion, the *Burton* majority completely overlooked the fact that there is a Michigan statute that expressly governs the commencement of a cause of action. That statute is MCL 600.1901, which states: “A civil action is commenced by filing a complaint with the court.”

Once again, the language of MCL 600.1901 is simple and it is unambiguous - a case is commenced with the filing of the complaint. This statute as drafted by the Michigan Legislature says absolutely nothing about the commencement of a cause of action being dependent on *both* the filing of a complaint and full compliance with all of the dictates of §2912b. Yet, under this Court’s ruling in *Burton*, the conclusion is unescapable that the unequivocal language chosen by the Michigan Legislature in MCL 600.1901, the single statute that addresses the commencement of a cause of action, has been amended by judicial fiat.

No longer does that statute regarding when and how a cause of action is commenced read the way that the Michigan Legislature drafted it. Following *Burton*, that statute now reads something

like this: “A civil action is commenced by filing a complaint with the court, except in medical malpractice actions where a case is commenced only when a complaint is filed and there has been full compliance with the requirements of MCL 600.2912b.” Again, the Michigan Legislature could have drafted §1901 in a way which would have been consistent with the result reached by this Court in *Burton*. But, the Michigan Legislature most certainly did not draft such a statute.

Thus, even if *Burton* had been correct in concluding that tolling of the statute of limitations was somehow dependent on whether the case was “commenced”, *Burton* was still absolutely wrong in concluding that plaintiff’s cause of action was not commenced when he filed his complaint. The plaintiff’s malpractice cause of action in *Burton*, like the plaintiffs’ claim in this case, was without question “commenced” for purposes of §1901 when the complaint was filed.

What the text of §1901 demonstrates is that, while the mandatory language of §2912b(1) may determine whether a medical malpractice action has been *properly* commenced, *i.e.*, whether it is subject to dismissal for failing to comply with all of the requirements of §2912b, *that statute has absolutely nothing to say about whether such a case has been commenced*. Under the unequivocal language chosen by the Michigan Legislature in §1901, *this case filed by Mrs. and Mr. Furr was commenced on September 30, 2010, when their complaint was filed, regardless of what §2912b says*.

This Court has in recent years exhibited a willingness to overrule prior precedents interpreting statutes where these prior decisions reached results that cannot be harmonized with the literal text chosen by the Michigan Legislature. *See e.g. Sington v Chrysler Corp*, 467 Mich 144, 167, n. 15; 648 NW2d 624 (2002); *Mack v City of Detroit*, 467 Mich 186, 224, n. 9; 649 NW2d 47 (2002) (J. Cavanaugh, dissenting). Indeed, this Court indicated in *Sington* that it has a *duty* “to re-examine a precedent when its reasoning . . . is fairly called into question.” *Id.* at 161, *citing*

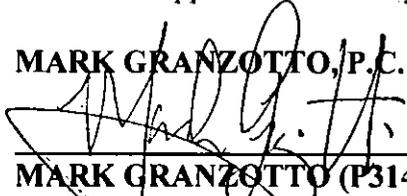
Robinson v City of Detroit, 462 Mich 439, 464; 613 NW2d 307 (2000). This Court has even asserted that its duty to reexamine prior Supreme Court precedent which conflicts with statutory text rests in separation of powers concerns. *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 284, n. 10; 696 NW2d 646 (2005). This Court should add *Burton*, a decision which cannot be harmonized with the unambiguous text of either §5856(a) or §1901, to this list of overruled precedents.

If this Court grants leave to review the Court of Appeals ruling in this case, it should also reexamine the holding in *Burton*. The Court should on the basis of the unequivocal language of both §5856(a) and §1901, hold that *Burton* was incorrect in its interpretation of the tolling question presented in that case. It should further hold that the dismissal of a case for failing to comply with the dictates of §2912b's waiting period is without prejudice to the refiling of plaintiffs' case and that the statute of limitations was tolled during the entire pendency of that case.

RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellees, Susan and William Furr, respectfully request that, the Court deny defendants' application for leave to appeal in its entirety.

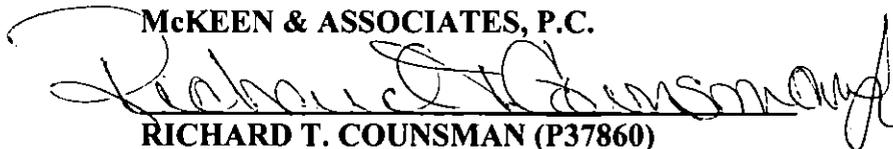
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