

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Special Conflict Panel

Murphy, CJ, Markey, O'Connell, Talbot, Meter, Borrello, and Beckering, JJ

SUSAN FURR and WILLIAM FURR,

Supreme Court Docket No. _____

Plaintiffs-Appellees,

Court of Appeals Docket No. 310652 *Publ Appn 4-10-14*

vs.

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,~~

Kalamazoo County Circuit Court
Case No. 10-0551-NH

A. Lipsey

Defendants-Appellants.

OK

Mark Granzotto (P31492)
MARK GRANZOTTO, P.C.
Attorney for Plaintiffs-Appellees
2684 11 Mile Rd - Ste 100
Berkley, MI 48072
(248) 546-4649

Stephanie C. Hoffer (P71536)
Paul M. Oleniczak (P27525)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendants-Appellants
100 Monroe Center NW
Grand Rapids, MI 49503-2802
(616) 774-8000

Ramona C. Howard (P48996)
SOMMERS SCHWARTZ, P.C.
Co-Counsel for Plaintiffs-Appellees
One Town Square - Suite 1700
Southfield, MI 48076
(313) 355-0300

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DEFENDANTS-APPELLANTS' APPLICATION
FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

This Application is an appeal from the April 10, 2014, decision of the Court of Appeals conflict panel. **(Exhibit A.)** That Order affirmed the Circuit Court's denial of Defendants' Motion for Summary Disposition. This Application is filed within 42 days after the filing of the opinion from which review is sought. Therefore, the Application is timely and the Court has jurisdiction pursuant to MCR 7.302(C).

STATEMENT OF QUESTION INVOLVED

- I. **SHOULD PLAINTIFFS' MEDICAL MALPRACTICE COMPLAINT HAVE BEEN DISMISSED WITH PREJUDICE WHERE THEY FILED THEIR COMPLAINT BEFORE THE EXPIRATION OF THE MANDATORY WAITING PERIOD, SUPREME COURT PRECEDENT HOLDS THAT A PREMATURELY FILED COMPLAINT DOES NOT PROPERLY COMMENCE AN ACTION AND DOES NOT TOLL THE STATUTE OF LIMITATIONS, AND ALLOWING MCL 600.2301 TO BE USED TO AMEND A FILING DATE VIOLATES DEFENDANTS' RIGHTS AND PUBLIC POLICY?**

Plaintiffs-Appellees say, "No."

Defendants-Appellants say, "Yes."

The Court of Appeals would have said, "Yes."

The Court of Appeals Special Conflict Panel said, "No."

GROUND'S FOR APPLICATION:
THE ORDER APPEALED FROM AND RELIEF SOUGHT

This is a medical malpractice case. Plaintiffs failed to wait 182 days after serving their Notice of Intent (NOI) before filing the Complaint, as required by MCL 600.2912b. Consequently, they did not “commence” a lawsuit and the statute of limitations was not tolled; it has since expired. Despite Supreme Court precedent establishing that the legislative mandate requires strict compliance, the Circuit Court (on remand from the Court of Appeals) decided it could either ignore the premature filing or amend the filing date. The Court of Appeals again granted leave. The panel disagreed with the Circuit Court, but was bound by an earlier published decision, *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208, 840 NW2d 730 (2013), which held that when a plaintiff failed to abide by the 182-day period, trial courts had to determine an appropriate sanction by considering the plaintiff’s good faith, the prejudice to the defendant, and whether a lesser sanction would be better suited. An Application is currently pending before the Court in that case. (Supreme Court Docket No. 148087).

The Court of Appeals convened a conflict panel. In a 4-3 split, the panel affirmed *Tyra*, noting that it was best left to this Court to issue a determinative ruling on the narrow issue presented: What is the appropriate remedy where, as here, a plaintiff in a medical malpractice case fails to wait a full 182 days before filing his or her medical malpractice case as required by MCL 600.2912b?

For the past five years, this has been one of the “hot button” issues in medical malpractice law. Panels of the Court of Appeals cannot agree on whether prior Supreme Court precedent remains “good law”. Circuit Courts are likewise split.¹

¹ Compare *Ellout v Detroit Medical Center*, Wayne County Circuit Court No. 06-635635-NH, June 4, 2008; *Zwiers v Growney*, Kent County Circuit Court No. 08-002009-NO, July 7, 2008; *Tyra v Organ Procurement Agency of Michigan*, Oakland County Circuit Court No. 298444,

The issue was seemingly resolved almost ten years ago in *Burton v Reed City Hospital Corp.*, 471 Mich 745, 691 NW2d 424 (2005) when the Court considered “whether a complaint alleging medical malpractice that is filed before the expiration of the notice period provided by MCL 600.2912b tolls the limitations period.” It held that the limitations period was not tolled. The issue was laid to rest until *Zwiers v Growney*, 286 Mich App 38, 778 NW2d 81 (2009). There, the Court of Appeals extending this Court’s decision in *Bush v Shabahang*, 484 Mich 156, 772 NW2d 272 (2009), and ruled that an early filing could be ignored.

Bush, however, did not involve a premature filing. Rather, it addressed the significantly different issue of whether the *content* of a timely-served but defective Notice of Intent (NOI) could be amended. The Court relied on the amendment statute, MCL 600.2301, and held that an NOI was part of a medical malpractice “proceeding” and could be amended.

Zwiers improperly extended *Bush* past the *content* of an NOI and allowed Courts to ignore filing dates.

Following *Zwiers*, this Court issued an opinion in *Driver v Naini*, 490 Mich 239, 802 NW2d 311 (2011) that effectively and implicitly overruled the holding of *Zwiers*.² There the Court held that *Burton* remains good, controlling law, and that the Court’s holding in *Bush v Shabahang* does not allow the trial court to ignore the problem of a prematurely filed complaint.

May 20, 2010 (granting defendants’ Motions for Summary Disposition) with *Driver v Naini*, Wayne County Circuit Court No. 06-6298876-NH, Sept. 5, 2007; *Furr v McLeod*, Kalamazoo County Circuit Court No. 10-000551-NH (denying defendants Motions for Summary Disposition).

² *Zwiers* likewise has a complicated procedural history. There, the Circuit Court granted the defendant’s motion for summary disposition based on the plaintiff prematurely filing the Complaint. The Court of Appeals reversed. See *Zwiers v Growney*, 286 Mich App 38, 778 NW2d 81 (2009). However, after *Driver* was issued, the defendant renewed its Motion. The Circuit Court agreed that *Driver* required the defendant’s Motion to be dismissed. Kent County Circuit Court Order, August 6, 2012, Case No. 08-002009-NO. The plaintiff appealed. See

The panel in *Furr* agreed that *Driver* overruled *Zwiers* and that §2301 could not be used to excuse a premature filing error. Unfortunately for these Defendants, before the panel issued its decision, a different panel issued *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208, 840 NW2d 730 (2013).

The panel in *Tyra* recognized that *Driver* reaffirmed *Burton* and that “it therefore remains binding precedent that a prematurely filed complaint does not commence a medical malpractice action or toll the running of the limitations period.” *Id.* at 223. Nevertheless, it remanded to the trial court (which had granted the defendant’s motion for summary disposition), holding that §2301 could potentially be used to ignore a premature filing or amend a filing date. *Id.* at 225-226.

The *Tyra* opinion is directly contrary to *Burton* – which is still binding precedent – and *Driver*. *Zwiers* and *Tyra* also epitomize the slippery slope that results from allowing §2301 to amend filing dates or ignore timing defects. In *Zwiers*, the filing was approximately one day early. In *Tyra*, it was 70 days early.

The initial *Furr* panel, disagreeing with *Tyra* panel, took the extraordinary action of requesting a conflict panel pursuant to MCR 7.215(J). Not surprisingly based on the history of divergence on this issue, there was significant disagreement within the conflict panel. In a 4-3 decision, *Tyra* was affirmed. The majority noted the issues was best left to this Court to decide ore directly than it did in *Driver*.

It is from this Order that Defendants seek review from the Court. The 182-day waiting period is a clear mandate from the Legislature. The effect of a premature filing was conclusively decided in *Burton* – a premature filing fails to toll the statute of limitations. The appropriate

Court of Appeals Docket No. 312133. That appeal was stayed pending the resolution of *Furr*

remedy is dismissal. This is one of the few bright-line rules in the law. The alternative, a rule whereby Circuit Courts are considering if premature filings – whether by one day or seventy – should be excused, inserts uncertainty into a substantive area of the law where there should be no uncertainty. As such, Defendants request that this Court REVERSE the decision of the Court of Appeals and REMAND to the Circuit Court with instructions that Defendants’ Motion for Summary Disposition be GRANTED.

conflict panel. It has since been submitted on case call.

STATEMENT OF FACTS

I. SUBSTANTIVE FACTS

The facts relevant to the issues on appeal are few and undisputed. This is a medical malpractice case. The plaintiffs provided a Notice of Intent dated April 1, 2010, but mailed as late as April 4, 2010.³ Consequently, the first possible day of the statutory Notice of Intent waiting period (during which the Complaint could not be filed) was April 2, 2010 (MCR 1.108). The Notice of Intent was received by the defendants on April 5, 2010.

Defendants provided a timely Response to the Notice of Intent by letter dated and faxed September 7, 2010.⁴ Defendants' response letter stated the factual basis for defending against Plaintiffs' claims, set forth the applicable standards of care, explained the manner in which Defendants complied with the standard of care, and included a statement regarding the absence of proximate causation. The response said nothing at all about whether Defendants would, or would not, consider settlement.

Here is a chart of the relevant dates:

April 1, 2010	Earliest date NOI was mailed
April 4, 2010	Likely date NOI was mailed
April 5, 2010	NOI Received
Sept. 7, 2010	NOI Response Due and Submitted
Oct. 1, 2010	First day Plaintiffs could file if NOI was mailed on April 1, 2010
Oct. 4, 2010	First day Plaintiffs could file if NOI was mailed on April 4, 2010

³ In response to the Application for Leave to Appeal, Plaintiffs acknowledged the Notice of Intent was mailed on April 4, 2010. Thus, the first day of the waiting period was more likely April 5, 2010.

⁴ September 6, 2010, was Labor Day. See MCR 1.108.

Plaintiffs did not wait until October 4, 2010, to file this action. In fact, they did not even wait until October 1, 2010.

II. PROCEDURAL HISTORY

Plaintiffs filed a Complaint in the Circuit Court on September 30, 2010. They did so at least one day early (and more likely four days early), given that they were required to wait until at least October 1, 2010, (and more likely October 4, 2010) to be in compliance with statutory requirements.

Defendants filed a Motion for Summary Disposition on November 24, 2010, based on the premature filing of the Complaint. Plaintiffs' brief to the Circuit Court opposing defendants' Motion for Summary Disposition frankly acknowledged their mistake: "In this case, plaintiffs' complaint was inadvertently filed one day early." Plaintiff's Response to Defendants' Motion for Summary Disposition, p. 8.

The trial court denied Defendants' Motion in an Order dated January 31, 2011. Defendants filed an Application for Leave to Appeal, and in lieu of granting the Application, the Court of Appeals vacated the Circuit Court's Order and remanded to the Circuit Court for reconsideration of Defendants' Motion for Summary Disposition on March 12, 2012 in light of this Court's opinion in *Driver v Naini*, 490 Mich 239, 802 NW2d 311 (2011). On May 22, 2012, the Circuit Court issued an Opinion and Order and, drawing spurious distinctions between *Driver* and this case, again denied Defendants' Motion.

The Court of Appeals again intervened, granting Defendants' Emergency Application for Leave to Appeal on June 22, 2012.

After briefing and oral argument but before the panel issued an opinion, a separate panel decided *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208, 840 NW2d 730

(2013). That Opinion, which considered the effect of *Driver*, held that a premature complaint filing in a medical malpractice case could be ignored or a filing date amended pursuant to MCL 600.2301. The *Tyra* panel attempted to distinguish *Driver* based on differences between when the statute of limitations expired in each case. However, the reasoning of *Driver* is applicable regardless of whether applying the amendment statute revives a statute of limitations that expired during the notice period or one that expired after the complaint was ostensibly filed. Quite simply, a prematurely filed complaint does not operate to toll the statute of limitations and the amendment statute cannot be used to revive a stale claim.

The panel in this case disagreed with, but was bound to follow, *Tyra*. See MCR 7.215(J). However, it then took the rare step of calling for the convening of a conflict resolution panel. The Court of Appeals voted and an Order issued on November 20, 2013, indicating a conflict panel would be convened.

On April 10, 2014, in a 4-3 split, the Conflict Panel affirmed *Tyra*. The majority concluded: “[T]here is a lack of clarity in the language of *Driver* to the degree that we simply cannot hold, with any level of confidence, that our Supreme Court overruled *Zwiers* or that it implicitly intended to do so.” *Furr v McLeod*, __ Mich App __, __ NW2d __, 2014 WL 1394780 at *1. Rather it “left the issue for a future definitive decision by the Michigan Supreme Court”. *Id.*

Defendants now respectfully request that the Court review the issue and resolve it in Defendants’ favor by ruling that (i) *Burton v Reed City Hospital* remains good law, (ii) MCL 600.2301 cannot be used to ignore or amend the filing date of a complaint, (iii) the appropriate remedy for a premature filing is dismissal, (iv) the statute of limitations is not tolled by a

ARGUMENT

I. STANDARD OF REVIEW

This appeal is taken from the Circuit Court's denial of Defendants' Motion for Summary Disposition. A trial court's decision on a motion for summary disposition, whether granted or denied, is reviewed de novo on appeal. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011); *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Questions of statutory interpretation are also reviewed de novo. *Driver, supra*. The heart of this appeal is a question of law. Such questions are subject, as well, to de novo review on appeal. *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

II. PLAINTIFFS' MEDICAL MALPRACTICE COMPLAINT SHOULD HAVE BEEN DISMISSED WITH PREJUDICE WHERE THEY FILED THEIR COMPLAINT BEFORE THE EXPIRATION OF THE MANDATORY WAITING PERIOD, SUPREME COURT PRECEDENT HOLDS THAT A PREMATURELY FILED COMPLAINT DOES NOT PROPERLY COMMENCE AN ACTION AND DOES NOT TOLL THE STATUTE OF LIMITATIONS, AND ALLOWING MCL 600.2301 TO BE USED TO AMEND A FILING DATE VIOLATES DEFENDANTS' RIGHTS AND PUBLIC POLICY.

Plaintiffs filed their medical malpractice Complaint prior to the expiration of the 182-day notice waiting period. Established Supreme Court precedent requires the dismissal of the Complaint. Further, the statute of limitations was not tolled by the prematurely filed Complaint and has since expired, requiring dismissal to be with prejudice. There is no reason this established rule of law should not be applied to this case.

Quite the contrary. Allowing or requiring trial courts to decide whether to ignore a premature filing in a given case tramples over the tort reform policies set forth by the Legislature. It injects uncertainty into an area where there should be no uncertainty. Such a ruling is a dangerous precedent that inevitably would soon be extended to obliterate statutes of limitations requirements.

A. Supreme Court Precedent Has Already Determined that Strict Compliance with the Notice Waiting Period is Required; the Statute of Limitations is not Tolloed when a Plaintiff Fails to Comply.

1. Burton v Reed City Hosp. Corp. established that a medical malpractice Complaint filed before the expiration of the 182-day statutory waiting period does not operate to "commence" a lawsuit.

It is well-established that a prematurely filed medical malpractice complaint does not operate to toll the statute of limitations period. In fact, the specific issue in *Burton v Reed City Hosp.*, was framed by the Court in this manner: "This case presents the question whether a complaint alleging medical malpractice that is filed before the expiration of the notice period provided by MCL 600.2912b tolls the period of limitations." *Burton v Reed City Hosp.*, 471 Mich 745, 747; 691 NW2d 424 (2005). The Court succinctly held it did not:

MCL 600.2912b(1) unambiguously states that a person "shall not" commence an action alleging medical malpractice until the expiration of the statutory notice period. A complaint filed before the expiration of the notice period violates MCL 600.2912b and is ineffective to toll the limitations period.

Id. at 747.

The Court analogized a prematurely filed Complaint to a Complaint filed without the Affidavit of Merit (AOM) required by MCL 600.2912d.

[I]n *Scarsella [v Pollack]*, 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, 607 N.W.2d 711 (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 N.W.2d 616 [1997]). *Scarsella, supra* at 549, 607 N.W.2d 711. We concluded that **the filing of a complaint without the required affidavit of merit was insufficient to commence the lawsuit.** *Id.*

Burton, supra at 752 (emphasis added). The Court held that the Court of Appeals erroneously considered whether the defendants were prejudiced by the premature filing, continuing the affidavit of merit analogy:

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 of 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.**

Id. at 753-754 (emphasis added).

A couple of years later, the rules regarding affidavits of merit were adjusted in *Kirkaldy v Rim*, 471 Mich 581, 734 NW2d 201 (2007). There, the Court held that where an AOM was timely filed but the *content* was defective, tolling of the statute of limitations would be permitted with the filing of the Complaint until the AOM was successfully challenged. *Id.* at 585-586. The Court specifically distinguished *Scarsella* and the failure to file an AOM. *Id.* at 584. In fact, in *Scarsella*, the Court reserved decision on the effects of a filed but defective AOM. *Id.* at 584 quoting *Scarsella, supra* at 553. The rationale for allowing a defective AOM to toll the statute of limitation was that affidavits are presumed valid, and the presumption can only be rebutted by subsequent judicial proceedings. *Id.* at 586 citing *Saffian v Simmons*, 477 Mich 8, 13; 727 NW2d 132 (2007).

Following *Kirkaldy*, the Court continued the AOM/NOI analogy, and in *Bush v Shabahang*, held that where an NOI was timely filed but the *content* was defective, the statute of limitations would be tolled during the notice period. *Id.* at 484 Mich 156, 772 NW2d 272 (2009). The Court applied the amendment statute, MCL 600.2301, which states:

The court in which any action or proceeding is pending, has the 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.

The Court in *Bush* applied the statute on the following basis:

Service of an NOI is clearly part of a medical malpractice “process” or “proceeding” in Michigan. Section 2912b mandates that “an action alleging medical malpractice” in Michigan “shall not commence...unless the person has given the health professional or health facility written notice....” Since 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, § 2301 applies to the NOI “process.” As Justice Cavanagh opined in his dissent in *Boodt*, this Court has for several decades applies MCL 600.2301 or its predecessor (which contained nearly identical language) to allow amendment of documents that, although not aptly characterized as pleadings, might well fall under the broad category of a “process” or “proceeding.” Accordingly, we hold that § 2301 may be employed to cure defects in an NOI.

Id. at 176-177. The Court, however, specified that before a trial court could allow amendment, it had to determine (1) whether a substantial right of a party is implicated and, (2) whether a cure is in the furtherance of justice. *Id.* at 177.

Bush actually distinguished the situation where a complaint is prematurely filed and where there are substantive defects in a Notice of Intent by indicating that the tolling statute, MCL 600.5856(c), is dependent on complying with the notice waiting period set forth in MCL 600.2912b. *Driver, supra* at 258. The Court in *Bush* relied on a statutory amendment to §5856(c) in holding that the limitations period is tolled if a Notice of Intent is defective as long as the notice waiting period is abided by. The Court specifically stated, “Thus, pursuant to the clear language of §2912b and the new § 5856(c), **if a plaintiff complies with the applicable notice period before commencing a medical malpractice action**, the statute of limitations is tolled.” *Bush, supra* at 169. See also, *id.* at 170 (“The language of the new § 5856(c),

'compliance with the applicable notice period under section 2912b,' clearly and unequivocally sets forth that a plaintiff's NOI must comply only with the applicable notice period.") Therefore, even under *Bush*, the limitations period was not tolled by the premature filing of the Complaint in this case.

Despite the clear distinction these cases made between the act of timely filing and the sufficiency of the content of AOMs and NOIs, in *Zwiers v Growney*, 286 Mich App 38, 778 NW2d 81 (2009), a panel of the Court of Appeals extended *Bush* and § 2301, authorizing trial courts to amend "the filing date of the complaint and affidavit of merit..., thereby meeting the 182-day requirement of the NOI statute, or simply disregard[] the procedural error in filing the complaint and affidavit one day premature...." *Id.* at 52.

After *Zwiers* was decided, this Court issued *Driver*, *supra*, which undermined the reasoning of *Zwiers*; a detailed analysis of *Driver* is below. *Tyra* considered the impact of *Driver* on the rule set forth in *Zwiers*. The *Tyra* Court, however, essentially ignored the reasoning in *Driver*.

The Court in *Tyra* acknowledged the relationship between the case law pertaining to NOIs and that relating to AOMs. It acknowledged that pursuant to *Burton*, the statute of limitations was not tolled. However, it then held: "We are unaware of any readily apparent reason why a defective affidavit of merit or defective notice of intent are sufficient to toll a limitations period but a defective complaint is not." This was error for multiple reasons.

When a plaintiff fails to wait the mandatory 182-day waiting period, the *content* of the complaint is not necessarily defective. Rather, the *filing date* is defective. It is not analogous to the *content* of an NOI or AOM being defective. It is analogous to the failure to timely file an AOM. See *Scarsella*, *supra*.

Bush and the amendment statute simply do not apply to the notice waiting period. Unlike the objective time period here, whether the *content* of an NOI or AOM is deficient is necessarily subjective, lending itself to judicial interpretation and rule.

The Court in *Tyra* also improperly distinguished *Driver* by noting that although an untimely complaint cannot commence an “action”, the “proceedings” are underway when an NOI is served. Since the NOI was served before the limitations period expired, the Court of Appeals reasoned, the amendment statute could be used to resurrect a claim that since expired for lack of tolling. This reasoning ignores (i) that *Driver* applies regardless of whether the statute of limitations expires before or after the ostensible filing of the complaint and (ii) the “proceedings” were no longer pending once the limitations period expired.

Driver and *Burton*, as well as general rules of statutory interpretation and constitutional limitations on judicial power, all support a ruling that §2301 cannot be used to amend the filing date of a complaint after the limitations period has expired.

2. ***Driver v Naini* affirmed that *Burton* remained “good law” following *Bush v Shabahang*.**

The Court undermined the reasoning upon which *Zwiers* was based in *Driver v Naini*, 490 Mich 239, 802 NW2d 311 (2011). There the Court considered whether a plaintiff could amend an original NOI pursuant to *Bush* and § 2301 to add a party to the NOI, with the amendment being applied retroactively to the date of the original NOI to allow tolling. It declined to extend *Bush* or otherwise apply § 2301.

The facts of *Driver* are somewhat complex, but that complexity should not muddy what is otherwise a clear mandate from the Court that § 2301 cannot be used to resurrect a stale claim. There, a plaintiff served an NOI to a physician and a professional corporation. After suit was filed, the defendants filed a notice of non-party fault identifying the physician’s former

professional corporation, Cardiovascular Clinical Associates, P.C. (CCA). The plaintiff then served an NOI on CCA and filed a motion to amend the complaint, which was granted. The plaintiff filed the amended complaint before the notice-waiting period expired.

A relevant complexity of *Driver* is that the accrual date for the plaintiff's claim (a failure to timely diagnose colon cancer) was unclear. An examination of the Court of Appeal's decision reveals that some of the plaintiff's claims were based on acts or omissions that occurred in October 2004, but the patient continued treating through October 2005. The patient was diagnosed with colon cancer in November 2005.⁵ The accrual date is relevant because it establishes whether the claims against CCA were already barred at the time of the amended NOI or not until subsequently. The Court decided the result would be the same regardless of whether the limitations period was expired at the time of the amended NOI or subsequently. The decision not to rule on the actual accrual date precludes the reasoning of the Court pertaining to applicability of § 2301 to the claims that had not yet expired at the time the amended NOI was served from being considered dictum. Since the Court did not rule on the actual accrual date, the reasoning of the Court pertaining to the application of § 2301 was necessary to the ruling. That precludes it from being considered dictum. It is binding precedent and should have been followed by the Circuit Court and Court of Appeals.⁶

The Court in *Driver* held that neither *Bush* nor § 2301 applied to premature filings (seemingly answering the question presented in this Appeal). *Driver, supra* at 253-254. In the

⁵ Although Michigan does not recognize a continuing treatment rule, determining the accrual date in failure to diagnose cases is complicated and involves a complex analysis of both the facts and the way in which the plaintiff pleads the claims. Compare *McKinney v Clayman*, 237 Mich App 198, 602 NW2d 612 (1999) with *Meixner v Henry Ford Health Systems*, unpublished opinion per curiam of the Michigan Court of Appeals, Oct. 25, 2002 (Docket No. 232334) (**Exhibit B**).

first portion of its analysis, the Court interpreted the issue from the perspective of the statute of limitations having already expired as to CCA at the time the amended NOI was served:

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’...” 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 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.

Driver, supra at 254 (footnotes omitted).

The Court added that amendment, even if theoretically permitted, could not be “for the furtherance of justice” and would affect CCA’s “substantial rights”:

Applying MCL 600.2301 in the present case would deprive CCA of its statutory right to a timely notice **followed by the appropriate notice waiting period**, and CCA would be denied an opportunity to consider settlement. CCA would also be denied its right to a statute-of-limitations defense. These outcomes are plainly contrary to, and would not be in furtherance of, the Legislature’s intent in enacting MCL 600.2912b.

Id. (footnotes omitted).

The Court further explained that allowing amendment to add a nonparty defendant “conflicts with the statutory requirements that govern the commencement of a medical malpractice action and the tolling of the statute of limitations.” *Id.* at 255.

⁶ Even if this alternate basis for the ruling could be considered dictum, it is well-reasoned and the Court should now remove it from the realm of dictum in this case and make it binding precedent.

We have construed [MCL 600.2912b] as containing a dual requirement: A plaintiff must (1) submit an NOI to *every* health professional or health facility before filing a complaint and (2) **wait the applicable notice waiting period with respect to each defendant before he or she can commence an action. A plaintiff has the burden of ensuring compliance with these mandates.**

After holding that *Bush* cannot be used to add time-barred parties, the Court reaffirmed *Burton*, stating:

Nor does *Bush* compel the conclusion that a plaintiff can add a nonparty defendant and avoid compliance with the notice waiting period by simply amending the original NOI. **As we explained in *Burton*, when a plaintiff fails to strictly comply with the notice waiting period under MCL 600.2912b, his or her prematurely filed complaint fails to commence an action that tolls the statute of limitations.**

Id. at 256 (emphasis added). The Court reiterated, “**In sum, the significance of *Burton* is that a plaintiff cannot commence an action that tolls the statute of limitations against a particular defendant until the plaintiff complies with the notice-waiting period requirements of MCL 600.2912b.**” *Id.* at 257 (emphasis added). Confirming that *Bush* did not alter the holding in *Burton*, the Court emphasized:

Nothing in *Bush* altered our holding in *Burton*. The central issue in *Bush* involved the effect an NOI had on tolling when the NOI failed to comply with the *content* requirements of MCL 600.2912b(4). The central issue in *Burton* involved the effect the plaintiff’s failure to comply with the *notice waiting period* requirements had on tolling. Indeed, the *Bush* court repeatedly emphasized the focus of MCL 600.5856(c) is compliance with the notice period set forth in MCL 600.2912b. In contrast to placing doubt on the viability of *Burton*, this aspect of *Bush* aligned with *Burton*’s holding that a plaintiff must comply with the notice waiting period to ensure the complaint tolls the statute of limitations. [*Driver, supra* at 256-258, bold emphasis added, italicized emphasis in original, footnotes omitted.]

This holding applies regardless of whether the claim against CCA was barred at the time of the amended NOI or not until after the complaint was filed:

[E]ven if a portion of plaintiff’s claims were governed by the two-year statute of limitations, plaintiff failed to commence an action against CCA that tolled the statute of limitations because his

complaint against CCA was premature. See *Burton*, 471 Mich. At 753-754, 691 N.W.2d 424. Thus, plaintiff's claims would be time-barred even if the two-year period were applicable. See *id.*

Driver, *supra* at p 251, n 33.

To the extent this issue has not already been decided by *Driver*, it is with this framework of Supreme Court precedent that the issue presented by this appeal should be analyzed.

B. The Plain Language Of MCL 600.2912b And The Intent Of The Legislature Requires A Medical Malpractice Plaintiff To Wait A Specified Number Of Days Before Filing Suit.

The precise language of MCL 600.2912b(1) bears repeating:

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.

“In interpreting a statute, [the Court’s] obligation is to discern the legislative intent that may reasonably be inferred from the words actually used in the statute.” *Smitter v Thornapple Twp.*, 494 Mich 121, 129; 833 NW2d 875 (2013) (citation omitted). “[A] clear and unambiguous statute leaves no room for judicial construction or interpretation.” *Id.* (internal quotation omitted). Here, the statutory language is unambiguous. Therefore, “the proper role for the judiciary is simply to apply the terms of the statute to the facts of the particular case.” *Id.* The Circuit Court and Court of Appeals failed to fulfill that role in this case.

The intent of the Legislature is clear from the plain language of the statute. It determined that prospective defendants to a medical malpractice action should be given 182 days’ notice – not 181, not 170.

A judicially created exception to the 182-day requirement or application of § 2301 is prohibited by the doctrine of *expressio unius est exclusion alterius*: “The expression of one thing suggests the exclusion of all others.” See *Johnson v Recca*, 492 Mich 169, 176, n 4; 821 NW2d

520 (2012) quoting *Pittsfield Charter Twp. v Washtenaw Co.*, 468 Mich 792m 712; 664 NW2d 193 (2003).

This doctrine was applied in *Trentadue v Buckler Law Sprinkler*, 479 Mich 378, 738 NW2d 664 (2007), where the Court overruled the common law discovery rule despite the plaintiff's arguments that it would be unfair to prevent him from bringing a lawsuit when he had no knowledge of a potential cause of action. It based its decision on the fact that the Legislature enacted a comprehensive statutory scheme governing accrual of claims, limitations periods, and tolling. *Id.* at 390-391. It emphasized that the accrual statute explicitly stated that a claim accrued "except as otherwise expressly provided", and therefore, courts could not create a different accrual date based on discovery. *Id.* The Court concluded "that courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827...." *Id.* at 392.

Medical malpractice plaintiffs **must** wait 182 days before filing suit. Moreover, there cannot be a judicially created exception. The Legislature specified the exceptions to the 182 day requirement, and expressly limited the exceptions to those specified in the statutory section: "**Except as otherwise provided in this section....**" The statute does not state, 'Except as otherwise provided in this section or this Act....' It does not say, "Except as otherwise provided in this section or as the court may allow...." It does not say, "Except as otherwise provided in this section or as allowed by § 2301."

Rather, the Legislature set forth three exceptions in the statute: (i) a complaint was filed after the 182-day period elapsed and new health care providers were subsequently identified and provided notice, § 2912b(3); (ii) the plaintiff did not receive a written response within the 154-

day period, § 2912b(8); and (iii) the health care provider informs the plaintiff in writing of an intent not to settle, § 2912b(9).

The statute does not provide any language that would suggest it intended any exceptions other than those specified in subsections (3), (8) or (9) or that trial courts could excuse compliance. None of those exceptions apply here, so Plaintiff was required to wait the full 182-day period.

C. **MCL 600.2301 Cannot Be Used To Excuse Plaintiff's Premature Filing Error.**

Principles of statutory construction also preclude § 2301 from being used to ignore a premature filing or amend a filing date. The plain language of § 2301 prohibits it from being used to revive a stale claim. In fact, allowing § 2301 to be used in that manner causes it to conflict with § 2912b – which expressly prohibits an action from being commenced prior to the expiration of the waiting period. The conflict resolves in favor of § 2912b.

In addition to the statutory language precluding amendment of the filing date of a complaint, allowing such amendment to revive an otherwise stale claim is not “for the furtherance of justice” and affects Defendants’ “substantial rights.” See *Driver, supra* at 254. Each of these alternative bases is examined in turn.

1. **The plain language of the statute does not allow the filing date of the Complaint to be amended to revive Plaintiff's stale claim.**

It is indisputable that as this case currently stands, the statute of limitations has long since expired because the ostensible filing of the Complaint did not toll the limitations period. There is no difference between the Court in *Driver* refusing to revive the plaintiff’s stale claim in that case and here – § 2301 cannot be used to resurrect a stale claim. The statute reads:

The court in which any action or proceeding **is pending**, has the 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 (emphasis added).

The first clause contains the prerequisite to a trial court's power to amend - there must be "an action or proceeding" that is "pending".

Black's Law Dictionary, 7th Ed., p 28, provides the following relevant definition of "action": "A civil or criminal judicial proceeding." It also provides the relevant definition of "proceeding": "The regular and orderly progression of a lawsuit, including all acts and events **between the time of commencement** and the entry of judgment." *Id.* at 1221 (emphasis added). So, an "action" is a type of "proceeding." "Pending" is also defined: "Throughout the continuance of; during...." Black's Law Dictionary, 7th Ed., p 1154. Reading these definitions together, a court can only amend in this case during the course of commenced civil proceedings. **"An action is not 'pending' if it cannot be 'commenced'...."** *Driver, supra* at 254

To the extent an NOI has been considered part of a medical malpractice "proceeding", see *Driver, supra* at 254,⁷ when the NOI tolling period ended and the statute of limitations subsequently expired there was no longer any "pending" action or proceeding because the complaint, being prematurely filed, was a nullity. Thus, as succinctly stated by Judge Wilder, "there was no *action* pending in the trial court to which MCL 600.2301 could be retroactively applied." *Tyra, supra* at *11 (Wilder, P.J., dissenting) (emphasis in original).

⁷ Appellants disagree that an NOI can be part of a "proceeding" as defined by Black's Law Dictionary because pursuant to *Burton*, a medical malpractice lawsuit cannot be "commenced", which is the time at which a "proceeding" begins.

2. **Any conflict between §2912b and §2301 must be resolved in favor of § 2912b, the more specific statute.**

To the extent there is a conflict between § 2912b, which was enacted in 1994, and § 2301, which was enacted in 1963, because the former would preclude amendment of a filing date and the latter would not, the “later-enacted specific statute operates as an exception or a qualification to a more general prior statute covering the same subject matter and that, if there is an irreconcilable conflict between the two statutes, the later enacted one will control.” *In re Midland Pub. Co., Inc.*, 420 Mich 148, 163; 362 NW2d 580 (1984). Section 2912b is the later-enacted, more specific statute, applying only to medical malpractice actions, and thus controls.

3. **The Separation of Powers Doctrine Would be Violated by Allowing § 2301 to Be Used To Ignore The Mandate of § 2912b.**

“The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Mich. Const. Art. 3, §2. This separation of powers doctrine is necessary to the proper and appropriate functioning of our system of government.

The Legislature has the power to enact substantive law; the Judiciary has the power to enact rules of practice and procedure. *McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999). A rule is procedural, and thus within the power of the Judiciary, only if “no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified.” *Id.* at 30, quoting *Kirby v Larson*, 400 Mich 585, 598; 256 NW2d 400 (1977) (opinion of Williams, J.)

Section 2912b is part of the wider Tort Reform Amendments in mid-1990s:

Section 2912b(1) is part of 1993 P.A. 78. This public act was enacted for the general purpose of addressing the problems of, and

widespread dissatisfaction with, Michigan's medical liability system, specifically, the availability and affordability of medical care in the case of spiraling costs.

Neal v Oakwood Hosp. Corp., 226 Mich App 701, 719; 575 NW2d 68 (1997) citing Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993.

Clearly this is a public policy statement. "The purpose of the notice 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." *Id.* at 705. It is a policy statement with which some members of the judiciary disagree, considering it a technicality minefield rather than a system designed to implement the public policy of this State in giving health care providers an opportunity to review and settle claims prior to formal litigation. See, for example, *Tyra, supra* at *8 (The Court of Appeals held that the record was insufficient "to determine whether defendant's substantial rights would truly be invaded if it is ultimately required to address the merits of the claim instead of relying on legal technicalities to avoid doing so.") The Legislature determined that 182-days was an appropriate amount of time to evaluate a claim pre-suit. This is a policy determination and the law should not be judicially rewritten with the results varying depending on whether the trial court considers the waiting period a technical trap used by defendants to avoid meritorious claims (which, the same could be said for the statute of limitations), or whether defendants are actually using this time to evaluate claims and want to preserve their rights to this pre-suit notice time.

The analysis used by the Court in *Kyser v Kasson Twp.*, 486 Mich 514, 786 NW2d 543 (2010) is similar to the one that should be applied here. In *Kyser*, the plaintiff wanted to rezone her property to allow gravel mining. Her application for rezoning was denied; the township

determined that allowing the rezoning in that case would undermine the township's comprehensive zoning plan and prompt other applications. The plaintiff sued, relying on the judicially created "no very serious consequences" rule. That rule provided that landowners could remove natural resources from their property as long as "no very serious consequences" would result from the removal. The rule was a departure from the general standard of review for the validity of zoning ordinances, which was a reasonableness standard. *Id.* at 533. After reviewing the various competing policy interests in relation to the rule, the Court held that the rule impermissibly altered the presumption of validity for zoning ordinances to a presumption of invalidity to be upheld only if natural resource removal would result in "very serious consequences." *Id.* It also shifted the burden of proof between the parties. *Id.*

The Court next held that the "no very serious consequences" rule violated the separation of powers doctrine. It restricted its own power, noting that the Judiciary cannot "substitute [its] judgment for that of the legislative body charged with the duty and responsibility in the premises." *Id.* at 535 quoting *Brae Burn, Inc. v Bloomfield Hills*, 350 Mich 425, 431; 86 NW2d 166 (1957). The "judicially created rule established a statewide public policy that prefers natural resource extraction to alternative public policies." *Id.* However, "policy-making is at the core of legislative function." *Id.* at 536. As such, the Court held the judicially created rule usurped the responsibilities belonging to the Legislature. *Id.*

The Court's additional reasoning, the burden on trial courts, is also equally applicable in this Case. There the Court noted that the rule required courts to "engage in an expansive and detailed analysis." Reviewing the trial court's analysis in that case, the Court noted: "[T] [trial] court's deliberations illustrate the kind of balancing of factors, line-drawing, policy judgments, and exercise of discretion that belong to legislative bodies exercising the constitution's

'legislative power.'" *Id.* at 537 citing *Brae Burn, supra* at 431. Thus, the separation of powers doctrine was deemed violated by the judicially created rule.

Applying the *Kyser* analysis here demonstrates that allowing trial courts to use § 2301 as an exception to the 182-day waiting period requirement violates the separation of powers doctrine. Essentially, it would be a judicially created exception.

Every medical malpractice defendant has a right to an NOI followed by the requisite waiting period. See *Driver, supra* at 254-255. The legislature determined that the appropriate amount of time to grant a defendant to evaluate a plaintiff's claims was 182 days, absent a statutory exception. Allowing trial court judges to judicially alter the waiting period under the guise of § 2301 nullifies the clear mandate from the Legislature that a medical malpractice case "shall not" be filed without the full waiting period. Judicially rewriting the tort reform statutes usurps the power of the Legislature.

The danger of allowing such legislating from the bench is demonstrated in the following statement from the *Tyra* majority: "We conclude that if a prematurity of one day may be amended pursuant to MCL 600.2301, then it is not possible to foreclose out of hand the possibility that a prematurity of 70 days may also be amended pursuant to MCL 600.2301." *Tyra, supra* at *8 (emphasis added). This is "plainly contrary to, and would not be in furtherance of, the Legislature's intent in enacting MCL 600.2912b." *Driver, supra* at 255.

Just as in *Kyser*, allowing the judicially created rule effectively shifts the burden of compliance from the plaintiff to imposing a burden on defendants to show prejudice. In fact,

Tyra demonstrates this usurpation of power by declaring the premature filing (by 70 days) to be a technical error and creating a hybrid *Bush* / discovery sanction⁸ test:

Whether such amendment can, and therefore should, be granted in any particular case will, of course, depend on an evaluation of the specific facts and circumstances of each case. In particular, the court must examine whether the party seeking amendment lacked good faith and whether the party opposing the amendment will suffer prejudice that cannot be remedied by a lesser sanction than dismissal. That evaluation must initially be made by the trial court after the parties have had an opportunity to be heard on the question.

Tyra, supra at *8.

Imposing a burden on defendants of showing prejudice, albeit not under the amendment statute, has already been rejected by the Court. See *Burton, supra* at 753 (“The Court of Appeals erred, however, by basing its decision to reverse the decision of the trial court on the alleged lack of prejudice to defendants, a factor that is not contained in the relevant statutes.”).

The Court of Appeals in *Tyra* (and thus in *Furr* to the extent that test must now be applied by the trial court) erroneously created this judicial test. There is no basis in the statute to impose a burden of prejudice on the defendants, or to excuse a plaintiff’s non-compliance merely by showing a lack of bad faith. As this Court already distinguished in *Driver*, compliance with the notice waiting period is significantly different than a judicial evaluation of the content requirements of an NOI. With the latter, the analysis is necessarily subjective; there are many shades of gray. The former is solely an objective analysis – either a plaintiff waited 182-days or they did not; there is no reason to consider a plaintiff’s good faith attempt or any prejudice to the defendant.

⁸ See *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990) (requiring courts, in evaluating an appropriate discovery sanction, to consider “whether a lesser sanction would better serve the interests of justice.”).

As part of a declaration of public policy and substantive law, the Legislature clearly and unambiguously required a plaintiff to wait 182-days after serving the Notice of Intent before filing a medical malpractice complaint. It is not for the Judiciary to question the length of time chosen or excuse non-compliance – to do so is an unconstitutional usurpation of Legislative power.

4. **Allowing amendment would not be in the furtherance of justice and would affect Defendants’ substantial rights.**

Even if the trial court had the power to invoke § 2301 to allow amendment to retroactively resurrect Plaintiff’s time-barred complaint, doing so would not be in the furtherance of justice and would affect Defendants’ substantial rights. Those are the two prerequisites contained in the statute:

The court in which any action or proceeding is pending, has the 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.

Ignoring clear Legislative mandates and inserting uncertainty into the law is not “in the furtherance of justice”. Rather, it allows trial courts to allow their views of tort reform to define what “justice” requires on an issue for which there should be no discretion.

Defendants’ substantial rights are also affected by allowing amendment. Defendants have a right to a 182-day period during which they can consider settlement without participating in litigation. That right is substantially affected where there is uncertainty unnecessarily injected into the law. With the law as it stands under *Zwiers* and *Tyra*, a health care provider who receives an NOI has no expectation that it will have any time to advise its insurance company of the claim, meet with counsel, obtain authorizations for medical records, review medical records,

obtain an standard of care review and possibly a causation review, and analyze the damages caused by the alleged injury. Rather, it might have 181 days, or 110, or 90 or 50. Under the current state of the law, a plaintiff could file after any period of time, forcing a defendant to respond and either have the court engage in a prejudice analysis or lose its pre-suit period.

Defendants' rights are also substantially affected where, as here, the statute of limitations has expired. The import of the Court's holding in *Driver* that the amendment statute cannot be retroactively applied to resurrect the plaintiff's stale cause of action applies regardless of whether the cause of action became stale before or after the NOI or Complaint were filed. *Driver, supra* at 251, n 33, 254-256.

As soon as the statute of limitations expired on October 4, 2010 (at the latest), Defendants were vested with a statute of limitations defense. There was no medical malpractice action commenced or pending against them as of that date. Allowing a retroactive change in the filing date of the Complaint after the limitations period expired denies Defendants of their right to a statute of limitations defense and therefore, affects a substantial right. The result would be no different than plaintiffs' routinely ignoring or miscalculating the statute of limitations and courts utilizing § 2301 to retroactively change the filing date. It is impermissible.

Plaintiff did not commence her medical malpractice action within the limitations period and therefore, her claim is barred. It cannot be resurrected by applying § 2301 to change the filing date of the complaint.

D. Applying these rules, Plaintiff's prematurely filed medical malpractice Complaint should be dismissed with prejudice because the statute of limitations has expired.

Plaintiff failed to commence her medical malpractice action within the limitations period. It is well-established that where a complaint is dismissed for failure to comply with the medical malpractice statutes, and no time remains within the limitations period to refile, dismissal with

prejudice is appropriate. See *Scarsella, supra* (clarifying that when a case is dismissed for failure to file an AOM and the statute of limitations has expired, dismissal should be **with prejudice**), *Ligons v Crittenton Hospital*, 490 Mich 61, 803 NW2d 271 (2011)(dismissal with prejudice appropriate where complaint filed with defective affidavit of merit did not toll the statute of limitations).

Plaintiff's claim is barred by the statute of limitations, and thus, dismissal should be with prejudice. "The decision whether to grant dismissal with or without prejudice, by definition, determines whether a party may refile a claim or whether the claim is permanently barred." *ABB Paint Finishing, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 223 Mich App 559, 562; 567 NW2d 456 (1997) citing *Thomas v Michigan Employment Security Comm.*, 154 Mich App 736, 742; 398 NW2d 514 (1986). The Court in *ABB* explained that the court "should consider whether the doctrine of res judicata would bar subsequent actions involving the same claim." *Id.* at 562.

"The doctrine of res judicata is a manifestation of the recognition that interminable litigation leads to vexation, confusion, and chaos for the litigants, resulting in inefficient use of judicial time." *Schwartz v. Flint*, 187 Mich.App. 191, 194, 466 N.W.2d 357 (1991). "For [res judicata] to apply, (1) there must have been a prior decisions on the merits, (2) the issues must have been resolved in the first action, and (3) both actions must be between the same parties or their privies." *Moore v. Wicks*, 184 Mich.App. 517, 519-520, 458 N.W.2d 653 (1990). Where a trial court dismisses a case on the merits, the plaintiff should not be allowed to refile the same suit against the same defendant and dismissal should therefore be with prejudice.

ABB, supra at 562-563.

A dismissal based on the statute of limitations acts as an adjudication on the merits for res judicata purposes. *Washington v Sinai Hosp. of Greater Detroit*, 478 Mich 412,418-419; 733 NW2d 755 (2007), *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc (On Remand)*, 279 Mich App 741, 744; 760 NW2d 583 (2008). Thus, the first element is fulfilled.

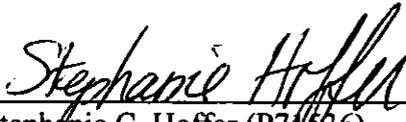
If plaintiff were to refile this medical malpractice action, the same issues would be presented – i.e., whether the defendant-physician negligently performed the surgery, satisfying the second element. Finally, if plaintiff refiled, it would necessarily be against the surgeons or hospital, as they are the only entities that could potentially be held liable. Consequently, a subsequent action would be barred by res judicata.

Because the doctrine of res judicata would bar a subsequent action, the dismissal here should be with prejudice.

RELIEF REQUESTED

For the reasons set forth above, Defendants respectfully request that this Court REVERSE the Court of Appeals Conflict Panel decision and REMAND to the Circuit Court with instructions that Defendants' Motion for Summary Disposition be GRANTED and Plaintiff's Complaint DISMISSED WITH PREJUDICE.

DATED: May 21, 2014



Stephanie C. Hoffer (P77536)
Paul M. Oleniczak (P27525)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendants-Appellants
100 Monroe Center NW
Grand Rapids, MI 49503-2802
(616) 774-8000