

STATE OF MICHIGAN  
IN THE SUPREME COURT

SUSAN FURR and WILLIAM FURR,

Plaintiffs/Appellees/Cross-Appellants,

v

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.

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Supreme Court No. 149344  
Court of Appeals No. 310652  
Lower Court No. 10-0551-NH

*AMICUS CURIAE* BRIEF OF THE MICHIGAN DEFENSE TRIAL COUNSEL  
IN SUPPORT OF APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae, Michigan Defense Trial Counsel (MDTC), is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC facilitates discourse among and advances the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of which are potentially affected by the issues involved in this case.<sup>1</sup>

MDTC is particularly concerned about judicial deviation – essentially premised on concepts of fairness according to the ideals of the individual jurist – from explicit statutory language, which mandates a 182-day waiting period after filing a notice of intent, before the filing of a medical malpractice complaint. The bench, bar, and public would benefit from consistent enforcement of the statute as it is clearly written, and as it has been interpreted by this Court. However, a trio of published Court of Appeals’ cases has sanctioned the use of a generally applicable amendment statute, MCL 600.2301, to circumvent the express legislative mandate in the more specific, more recently enacted medical malpractice statute, MCL 600.2912b. The most recent Court of Appeals case to do so, the instant case, went so far as to say that MCL 600.2301 required courts to disregard the waiting period in MCL 600.2912b, thus

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

judicially abrogating legislative prerogative and usurping legislative power. It is important to bring case law back into conformity with the language of the respective statutes.

## INTRODUCTION AND REASONS SUPPORTING APPEAL

The instant case involves what should be a straightforward issue of statutory interpretation. While this Court has not considered the micro-issue in this case, i.e., whether the courts may use a generally applicable, earlier-enacted statute to circumvent a specific, more recently enacted statute, this Court's holdings with regard to the macro-issue, i.e., that the legislatively mandated notice waiting period must be enforced as written, should have made reconciliation of the two statutes a simple matter. However, a trio of published Court of Appeals' opinions is inconsistent with this Court's precedent. Moreover, the holdings of the Court of Appeals cases have the effect of allowing a trial court judge to abrogate the expressly mandatory legislative waiting period should it so choose not to enforce it. The instant case is the third case in this triumvirate. Its holding was reached only after a conflict panel was convened to determine whether this Court's 2011 opinion in *Driver, infra*, overruled the first case in the triumvirate, *Zwiers, infra*. The conflict panel decision was 4 to 3 and indicated that it simply could not tell whether *Driver* overruled *Zwiers*. It then upheld *Zwiers* as being correctly decided.

Amicus respectfully submits that these three published Court of Appeals opinions were wrongly decided, and that they should be corrected, thereby clarifying the law in this regard. At the 2013 Michigan Appellate Bench Bar Conference, the justices of this Court clarified the meaning of jurisprudential significance. Five justices all agreed that when there is confusion in the law or inconsistent decisions, the issue is jurisprudentially significant.<sup>2</sup> Because the Court of

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<sup>2</sup> Chief Justice Young explained that jurisprudential significance existed where the "pattern of the legal fabric has become disordered, chaotic, or frayed." An example of disorder is when there are divergent and contradictory strands of case law leading to inconsistent results. Justice Cavanagh defined a jurisprudentially significant case as one that needs a definite pronouncement as to the meaning of the law. Justice Markman stated that there are three main factors to consider when determining whether an issue has jurisprudential significance. First, where there is significant confusion among the courts with regard to the issue (this factor appears similar to Chief Justice Young's example of inconsistent case law). Second, where there would

Appeals' decisions are inconsistent with the holdings of this Court, Amicus urges this Court to grant appellant's application for leave to appeal.

### STATEMENT OF FACTS

MDTC adopts the statement of facts contained in defendants/appellants/cross-appellees' application for leave to appeal.

### STANDARD OF REVIEW

MDTC agrees with the standard of review stated in defendants/appellants/cross-appellees' application for leave to appeal.

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be impact from the issue over the next few years (if the issue will have little impact, then it is not jurisprudentially significant). Third, where there is disparity between the written law (statutes, regulations, court rules, constitution) and case law interpreting the written law (if the interpretive case law is inconsistent with the plain language of the written law, correction of the case law involves an issue of jurisprudential significance).

Justice Zahra agreed with the factors stated by Justice Markman. In addition, he opined that the Supreme Court may be less likely to grant leave on an unpublished Court of Appeals decision than it would on a published and precedentially binding decision. An especially compelling application would involve a "first-out" published opinion. It would be more imperative to have a correct decision in this situation because it would be the first of its kind and would not only follow but set the precedent for the entire state. Justice McCormack likewise agreed that a case was jurisprudentially significant if it could be demonstrated that something needed to be done to clarify confusion in the law.

## LEGAL ARGUMENT

### **I. Common Rules of Statutory Construction Compel a Conclusion that MCL 600.2301 May Not Be Used by the Courts to Circumvent the Explicitly Mandated Statutory Notice-Waiting Period of MCL 600.2912b.**

The instant case involves the interaction and interpretation of two statutes. The first, MCL 600.2912b, is contained in Chapter 39 of the Revised Judicature Act, 1961 PA 236, entitled Provisions Concerning Specific Actions, and it pertains specifically to medical malpractice actions. The second is MCL 600.2301, which pertains to amendments applicable to any cause of action in general.

When interpreting a statute, the court must construe the language according to its plain meaning. *Detroit Base Coalition for Human Rights of Handicapped v Director, Dep't of Social Services*, 431 Mich 172, 185; 428 NW2d 335, 341 (1988). The statute must be read as a whole. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Individual words and phrases, while important, must be read in context of the entire legislative scheme. *Herman v Berrien Co*, 480 Mich 352, 366; 750 NW2d 570 (2008). Both the plain meaning of the word or phrase as well as its placement and purpose in the statutory scheme must be considered. *Id.*

The court cannot substitute its own judgment for that of the Legislature. *Kull v Michigan State Apple Com*, 296 Mich 262, 267; 296 NW 250 (1941): See, also *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000) (Courts may not rewrite the plain language of the statute and substitute their own policy decisions for those already made by the Legislature).

#### **A. MCL 600.2912b is clear and unambiguous and requires a plaintiff to wait 182 days after serving the Notice of Intent (NOI) before commencing a medical malpractice action.**

MCL 600.2912b, which pertains specifically to medical malpractice actions, provides a statutorily mandated waiting period after a notice of intent is filed and before a complaint may be filed:

(1) 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.

The first three words of this statute indicate that an exception exists to a general rule: "Except as provided." The next three words indicate where the exception can be found. The exception is located "in this section." The exception is not located elsewhere in some other statute. The remainder of "this section" provides for different means to shorten the notice period if certain conditions are met.<sup>3</sup> Thus, the Legislature has provided specific instances when a

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<sup>3</sup> (2) The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.

(3) The 182-day notice period required in subsection (1) is shortened to 91 days if all of the following conditions exist:

(a) The claimant has previously filed the 182-day notice required in subsection (1) against other health professionals or health facilities involved in the claim.

(b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).

(c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).

(d) The claimant did not identify, and could not reasonably have identified a health professional or health facility to which notice must be sent under subsection (1) as a potential party to the action before filing the complaint.

(4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:

(a) The factual basis for the claim.

(b) The applicable standard of practice or care alleged by the claimant.

(c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

plaintiff does not have to wait the 182-day period between filing the notice of intent and filing the complaint. None of these section provisions refer to MCL 600.2301, the amendment provision generally applicable to causes of action.

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(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

(5) Within 56 days after giving notice under this section, the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. Subject to section 6013(9), within 56 days after receipt of notice under this section, the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility. This subsection does not restrict a health professional or health facility receiving notice under this section from communicating with other health professionals or health facilities and acquiring medical records as permitted in section 2912f. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law.

(6) After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified.

(7) Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

(a) The factual basis for the defense to the claim.

(b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.

(c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.

(d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage.

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

(9) If at any time during the applicable notice period under this section a health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility does not intend to settle the claim within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health professional or health facility, so long as the claim is not barred by the statute of limitations.

The general rule in § 2912b relevantly states, “a person *shall not* commence an action . . . *unless the person has given* the [entity being sued] *written notice . . . not less than 182 days* before the action is commenced.” Use of the word “shall” indicates that compliance is mandatory and imperative. *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Thus, the general rule is that a person is prohibited from filing a malpractice suit unless written notice was provided at least 182 days beforehand. Written notice provided only 181 days beforehand is insufficient because it does not meet the explicit statutory requirements.

**B. The plain language of MCL 600.2301 does not permit amendment of statutorily established time frames for filing suit.**

MCL 600.2301 gives courts the power to amend, but only to amend the substance or form of a process, pleading, or proceeding as follows:

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

Neither form nor substance is defined in the statute, so it is appropriate to turn to a dictionary for the common meaning of these words. “Substance” is relevantly defined as “the meaning or gist, as of speech or writing.” *Random House Webster’s College Dictionary*. “Form” has many definitions, the most relevant being, “a set order of words, as for use in . . . a legal document,” “a document with blank spaces to be filled in with particulars,” and “the manner or style of arranging and coordinating parts for [an] effective result, as in literary . . . composition.” *Id.* Neither “form” nor “substance” refers to the timing of a filing.

Furthermore, the statute only permits amendment of the substance or form of a process, pleading, or proceeding. The term “process” is not explicitly defined by statute or court rule. However, MCR 2.104(A)(1), which governs the proof of service of process, states that proof of

service may be made by “written acknowledgment of the receipt of a summons and a copy of the complaint,” thus defining process by implication as a summons and copy of the complaint. This is consistent with the definition of process in *Black’s Law Dictionary* (6th ed):

When actions were commenced by original writ, instead of, as at present, by summons, the method of compelling the defendant to appear was by what was termed “original process,” being founded on the original writ . . . The word “process,” however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ.

This is also consistent with the relevant dictionary definition of “process,” which states, “the summons, mandate, or writ by which a defendant is brought before court for litigation.” *Random House Webster’s College Dictionary*. “It is the summons which informs the defendant of the fact that an action has been commenced against him and of his rights and duties in connection therewith, such as the time limits for responding to the complaint.” *Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991). Thus, “process” has a distinct legal meaning and is a term of art. Process means a summons, or summons and complaint, as opposed to the more general meaning of process.

MCR 2.102(B) sets forth the form and content of the summons. There is a distinction between a process (or the summons), and service of process (or delivery of the summons), and this distinction is recognized in MCR 2.116(C)(2) (“[t]he process issued in the action was insufficient”) and MCR 2.116(C)(3) (“[t]he service of process was insufficient”). See *Heise v Olympus Optical Co, Ltd*, 111 FRD 1, 5 (ND Ind, 1986) (“The defense of sufficiency of process differs from insufficiency of service of process: the former challenges the content of the summons; the latter challenges the manner or method of service”). Thus, the form and substance of process refers to the summons document itself, not its service. Timing of the service is, therefore, not implicated in MCL 600.3201. Cf. *Redding v Kitchen*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2002 (Docket No. 222997), attached as

Exhibit A (tolling agreement preserving rights regarding statute of limitations did not preserve rights regarding sufficiency of process).<sup>4</sup>

The relevant dictionary definition of “pleading” is “a formal, usu. written statement setting forth the cause of action or defense of a case.” *Random House Webster’s College Dictionary*. The term pleading is specifically defined in MCR 2.110(A) and (B), and it includes a complaint. MCR 2.111 and 2.112 delineate the substance of pleadings, while MCR 2.113 provides the requirements for the form of pleadings. None of these rules refer to the timing of filing of the pleadings, only to what is required for their form and content consistent with the dictionary definitions. Thus, the form and substance of the pleadings do not refer to the timing of their filing, and the timing of their filing is not implicated in MCL 600.2301.

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<sup>4</sup> Presumably, then-Justice Hathaway, who wrote the majority opinion in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), was referring to “process” in its general sense and not as a legal term of art, when she stated:

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 [v Borgess Med Ctr]*, 481 Mich 558, 567-572; 751 NW2d 44(2008), this Court has for several decades applied 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

With all due respect to then Justice Hathaway, it is respectfully submitted that such an interpretation was in error. “[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.” *Macomb Co v AFCSME Council 25 Locals 411 & 893*, 494 Mich 65, 84 n 55; 833 NW2d 225 (2013), quoting MCL 8.3a. While the NOI in a medical malpractice context may in a sense be considered the process or notice to the defendant, service of the NOI would be the equivalent of service of process, and not the process itself.

“Proceeding” is defined as “legal action, esp. as carried on in a court of law.” *Random House Webster’s College Dictionary*. “In Michigan, a ‘proceeding,’ in a general sense, is “the form and manner of conducting juridical business before a court or judicial officer.”” *Ewin v Burnham*, 272 Mich App 253, 258; 728 NW2d 463 (2006), quoting *People v Bobek*, 217 Mich App 524, 530; 553 NW2d 18 (1996), quoting *Black’s Law Dictionary* (6th ed). “A ‘proceeding’ ‘apparently encompasses all matters brought before a court in a specific judicial action.’” *Ewin*, quoting *Bobek*. Although the term proceeding when standing alone may potentially be defined broadly enough to include the filing of a complaint, its definition is limited by the terms substance or form. This Court helped to define what is meant by the “substance or form” of a proceeding when it used a similar statute of amendment, 3 Comp Laws 1929, § 14144,<sup>5</sup> to affirm an order amending *nunc pro tunc*, the praecipe, summons, declaration, and calendar entries to reflect the proper parties in *Miller v Bradway*, 299 Mich 574, 578; 300 NW 89 (1941). In other words, the captions (substance and form) of the filings and calendar entries were amended, not the legislatively prescribed period for filing the documents.

Clearly, MCL 600.2301 gives courts the power to amend the substance and form of a party’s process, pleading or proceeding but does not grant courts the power to amend statutorily established time frames for filing suit.

**C. Even if MCL 600.2301 is construed so as to give courts the power to negate legislatively prescribed periods for filing suit in general, it cannot be given precedence over a specific statute governing time limitations.**

“It is a fundamental rule of statutory construction that ‘apparently conflicting statutes should be construed, if possible, to give each full force and effect.’” *In re Midland Pub Co Ins.*

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<sup>5</sup> The statute read as follows:

The court in which any action or proceedings shall be pending, shall have 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 shall be just, at any time before judgment or decree rendered therein.

420 Mich 148, 163; 362 NW2d 580 (1984), quoting *State Highway Comm'r v Detroit City Controller*, 331 Mich 337, 358; 49 NW2d 318 (1951). It is not difficult to construe MCL 600.2912b and MCL 600.2301 in harmony. All that is required is that the plain language of both statutes be given effect and without a tortured construction. Cf. *Gladych v New Family Homes, Inc*, 468 Mich 594, 601; 664 NW2d 705 (2003) (“There is no reason to continue to adhere to [a prior opinion’s] tortured reading of [the statute] that contradicts the statute’s plain and unambiguous language”). MCL 600.2301 contains no provisions for amending legislatively prescribed periods for filing suit; instead, it provides only for amending the substance and form of documents. MCL 600.2912b contains not only the general rule stated in mandatory language that a person shall not file suit before the 182-day waiting period, it also lists a number of exceptions, thus precluding the judicial addition of other exceptions. Cf. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (Because the statute includes exceptions to or conditions on the statute’s application, “[t]heir enumeration eliminates the possibility of [there] being other exceptions under the legal maxim *expressio unius est exclusio alterius*”).

Nevertheless, even if this Court were to conclude that the language in MCL 600.2301 (giving power to amend the substance or form of processes, pleadings, and proceedings) would permit courts to negate statutorily prescribed periods for filing as a matter of course, this general amendment statute would not supersede a more recently enacted, more specific statute governing the same concept. In the event of a conflict between MCL 600.2301 and MCL 600.2912b, the latter statute would apply because it was enacted later and is the more specific statute. MCL 600.2912b was added by 1993 PA 78, while MCL 600.2301 was enacted by 1961 PA 236. *In re Midland Pub Co Ins*, 420 Mich 148, 163; 362 NW2d 580 (1984) (a “later-enacted specific

statute operates as an exception or a qualification to a more general prior statute covering the same subject matter and . . . if there is an irreconcilable conflict between the two statutes, the later enacted one will control.”).

Whether harmonized or conflicting, MCL 600.2301 does not give courts the power to negate the statutorily prescribed periods of MCL 600.2912b.

**II. Despite This Court’s Binding Interpretations of MCL 600.2912b and MCL 600.2301, the Court of Appeals Has Failed to Follow This Court’s Holdings.**

**A. This Court’s interpretations of MCL 600.2912b make clear that the legislatively prescribed mandatory waiting period may not be circumvented.**

While this Court has never specifically addressed the precise issue involved in the instant case, namely whether judges may use MCL 600.2301 to circumvent the legislatively prescribed mandatory waiting period in MCL 600.2912b(1), this Court has through several of its opinions made clear that the waiting period may not be circumvented. In *Boodi v Borgess Med Center*, 481 Mich 558, 561-562; 751 NW2d 44 (2008), superseded by statute as stated in *Bush v Shabahang*, 484 Mich 156, 170; 772 NW2d 272 (2009), this Court gave two reasons for rejecting the dissenting Justices’ assertion that MCL 600.2301 could be used to amend the defective notice of intent, one of which bears repeating: the notice of intent was not a “proceeding.” *Boodi*, at 563 n 4.

The controlling issue in *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), was identical to the one in the instant case: “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*, 471 Mich at 747. Recognizing that the unequivocal and mandatory language employed in MCL 600.2912b required the plaintiff to wait the entire 182 days before filing suit, this Court held that a prematurely filed complaint did not toll the statute of limitations. *Id.* “[T]he failure to comply with the statutory requirement renders the complaint

insufficient to commence the action.” *Id.* The difference between *Burton* and the instant case is that the relevance and effect of MCL 600.2301 on MCL 600.2912b was not raised in *Burton*. It is surmised that MCL 600.2301 was not raised in *Burton* because of this Court’s holding in *Boodt*.

MCL 600.2301 was considered in *Bush*, but only in regard to a *timely filed* but defective notice of intent (thus amending the substance and/or form of the defective notice of intent but not the timing of the filing).<sup>6</sup> In fact, this Court confirmed that the period of limitation was not tolled unless the plaintiff complied with the applicable notice period: “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*, at 169. Again, “The plain language of § 2912b(1) mandates that a plaintiff shall not commence an action for medical malpractice without filing a timely NOI.” *Bush*, at 172. This Court explicitly applied MCL 600.2301 to only the defective content:

These types of defects fall squarely within the ambit of § 2301 and should be disregarded or cured by amendment. It would not be in the furtherance of justice to dismiss a claim where the plaintiff has made a good-faith attempt to comply with the content requirement of §2912b. [*Bush*, at 180.]

*Ligons v Crittenton Hosp*, 490 Mich 61; 803 NW2d 271 (2011), was largely irrelevant to the instant appeal. In that case, this Court held:

[A] defective [affidavit of merit (AOM)] may not be retroactively amended and that the proper response to a defective AOM is dismissal. Although the timely filing of a defective AOM tolls the limitations period until a court finds the AOM defective, an AOM filed during a saving period after the limitations period has expired tolls nothing, as the limitations period has run and the saving period may not be tolled. [*Id.* at 90.]

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<sup>6</sup> In deciding this case, the majority, led by then-Justice Hathaway, concluded that service of the notice of intent was a “process.” As explained in footnote 3, it is respectfully submitted that this conclusion was in error.

However, in rejecting the plaintiff's argument that an affidavit of merit could be retroactively amended by MCL 600.2301, this Court declined to apply the rationale of *Bush*, beyond its limited statutory focus because, in part, "it would create unnecessary conflict with existing law . . . which *Bush* did not overrule." *Ligons*, at 87. One of the cases that was not overruled by *Bush* was *Burton*.

The culminating opinion from this Court was *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011). In *Driver*, the plaintiff sent a notice of intent to the treating physician and waited the requisite 182 days before filing his complaint. The two-year period of limitation had run on the plaintiff's claim, and the plaintiff relied on the six-month discovery period to argue that his claim was timely filed. The physician filed a notice of nonparty fault. The plaintiff sent a notice of intent to the nonparty, and filed his complaint 49 days afterward, rather than waiting the required 91 days for adding a party. He argued that under *Bush* and MCL 600.2301, he should have been permitted to amend his original notice of intent so that the notice of intent against the nonparty would relate back in time to the original notice of intent. This Court rejected the plaintiff's argument. With regard to the *Burton-Bush* dichotomy, this Court first stressed the holding in *Bush* that §2301 could amend the *content* of a defective notice of intent.

The *Bush* majority held that when an NOI fails to meet all of the *content* requirements under MCL 600.2912b(4), MCL 600.2301 allows a plaintiff to amend the NOI and preserve tolling unless the plaintiff failed to make a good-faith effort to comply with MCL 600.2912b(4). [*Driver*, at 252-253 (emphasis in original).]

This Court then held that *Bush* did not apply because the notice of intent to the non-party was untimely.

[T]he holding in *Bush* that a defective yet *timely* NOI could toll the statute of limitations simply does not apply here because CCA never received a *timely*, albeit defective, NOI. [*Driver*, at 253 (emphasis added).]

This Court then reiterated the test set forth in *Burton* with regard to a plaintiff's compliance requirements under § 2912b(1), and noted that permitting amendment pursuant to *Bush* would render the notice of intent requirement nugatory:

We have construed [MCL 600.2912b(1)] 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*. . . . *Permitting amendment to add time-barred nonparty defendants to an original NOI on the basis of Bush would render the NOI requirement meaningless* and the provision pertaining to nonparty defendants, MCL 600.2912b(3), nugatory. [*Driver*, at 255-256 (emphasis added).]

This Court reaffirmed the consequences set forth in *Burton* with regard to premature filing.

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.

\* \* \*

[T]he 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. [*Driver*, at 256-257.]

It then clarified that *Bush* did not affect *Burton* but, rather, permitted amendment to the contents of the notice of intent rather than the notice waiting period.

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 that the focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b. [*Driver*, at 257-258.]

The overriding import of this Court's opinions is that the legislatively prescribed waiting period in MCL 600.2912b(1) is mandatory. Even *Bush*, which held that MCL 600.2301 could be used to amend the *content* of the notice of intent, recognized that the various documents must be

timely filed in accordance with MCL 600.2912b(1). This Court by no means indicated that MCL 600.2301 could be used to modify the time period for filing.

**B. A trio of published cases from the Court of Appeals is inconsistent with this Court's rulings.**

Despite the clear direction from this Court, a trio of published cases from the Court of Appeals have concluded that MCL 600.2301 may be used to circumvent the statutory mandated waiting period in MCL 600.2912b(1).

**1. *Zwiers v Growney***

In *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), the Court of Appeals, without the benefit of this Court's clarification in *Lignons* and *Driver*, was the first to consider whether MCL 600.2301 could be used to "amend" the filing date of the complaint, which was prematurely filed in violation of MCL 600.2912b(1). The Court first noted that *Burton*, standing alone, would compel affirmance of the trial court's dismissal. *Zwiers*, at 40. The Court of Appeals then quoted the portion of *Bush* that amicus respectfully posits was wrongly decided:

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." [*Zwiers*, at 47, quoting *Bush*, 484 Mich at 176-177.]

The reasons why this analysis was incorrect in *Bush* bear repeating. Presumably, then-Justice Hathaway, who wrote the majority opinion in *Bush*, was referring to "process" in its general sense and not as a legal term of art. With all due respect, it is respectfully submitted that such an interpretation was in error. "[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." *Macomb Co v AFCSME Council 25*

*Locals 411 & 893*, 494 Mich 65, 84 n 55; 833 NW2d 225 (2013), quoting MCL 8.3a. As previously pointed out, “process” refers to a summons and complaint. There is a difference between an insufficiency in the form or substance of the process, and the insufficient service of process. The difference is recognized in the Michigan Court Rules. See MCR 2.116(C)(2) and (3). Even if this Court were to conclude that the NOI in a medical malpractice context is in a sense considered the process or notice to the defendant, service of the NOI would be the equivalent of service of process, rather than the form or substance of the process itself.

Although the Court of Appeals purported to rely on the concepts and principles cited and relied on in *Bush*, the Court disregarded the *Bush* Court’s express affirmation of the legislatively prescribed time constraints. The Court of Appeals made no effort to examine the meaning of “form or substance” – the only aspects of a “process, pleading, or proceeding” permitted to be amended under MCL 600.2301. Instead, the Court of Appeals erroneously concluded that “*Bush* makes it abundantly clear that MCL 600.2301 is applicable to the entire NOI process and any compliance failures under the NOI statute.” The Court of Appeals then summarily concluded that the defendants were not prejudiced by the filing of the medical malpractice action one day early, without considering the fact that it was foreclosing the defendants’ ability to rely on a statute of limitations defense. The plaintiff’s NOI was filed only three days before the expiration of the medical malpractice period of limitations. “[T]he statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.” MCL 600.5856(c). MCL 600.2912b(1) *prohibits* a medical malpractice plaintiff from filing suit early. The premature filing of the complaint fails to toll the period of limitation. *Bush*. Thus, the Court of Appeals’ ruling denied the defendants the right of having the claims against them dismissed as time-barred. It is well known that a statute of limitations

defense is a substantial right of a party. *DeCosta v Gossage*, 486 Mich 116, 138; 782 NW2d 734 (2010) (MARKMAN, J., dissenting), citing *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003).

## 2. *Tyra v Organ Procurement Agency*

The second case in the trio emphasizes why filing even one day early cannot be allowed. In *Tyra v Organ Procurement Agency*, 302 Mich App 208, 210; 840 NW2d 730 (2013), the plaintiff filed her complaint after only 112 days rather than waiting the requisite 182 days. The Court of Appeals noted the 69-day difference between the 70-day premature filing in its case and the 1-day premature filing in *Zwier. Tyra*, at 225. Nevertheless, sliding along the slippery slope, the Court held that the 70-day prematurity could still be amended by MCL 600.2301:

Notably, the applicability of *Zwiers* to the instant case is unclear. Most glaringly, the plaintiff in *Zwiers* filed an action that was prematurely filed by a single day, whereas here, the prematurity was 70 days. Defendants correctly point out that plaintiff's complaint was too soon even for the shortened 154-day period afforded to medical malpractice defendants to provide a written response to the plaintiff.

\* \* \*

We conclude that if a complaint that is filed one day prematurely may be amended pursuant to MCL 600.2301, then it is not possible to foreclose out of hand the possibility that an action that is filed prematurely by 70 days may also be amended pursuant to MCL 600.2301. [*Tyra*, at 225-226.]

The opinion additionally contained numerous contradictions and errors in reasoning. In a bizarre and rambling fashion, the Court of Appeals first concluded that the defendants waived the right to rely on the affirmative defense of failure to comply with the notice period because the defendants' affirmative defense pertained to the notice itself rather than the notice period (thus in effect recognizing the difference between insufficiency of process and insufficient service of process):

An ordinary reading of the affirmative defense alongside the statute could reasonably induce a reader to believe that plaintiff's only alleged violation of MCL 600.2912b – specifically, the “notice provisions” thereof – pertained to the notice *itself*, as distinct from the notice period. [*Tyra*, at 215.]

The Court of Appeals *agreed* that the plaintiff's prematurely filed complaint failed to commence the action, and that dismissal was required by binding precedent. *Id.* at 217-218.

Applying *Burton*, the Court of Appeals stated:

[B]ecause plaintiff's prematurely filed complaint did not toll the running of the limitations period, that period eventually expired. . . . [B]ecause the limitations period had expired, plaintiff could not refile and the dismissal was with prejudice. [*Id.* at 221.]

Despite having earlier recognized the difference between insufficient process and insufficient service of process, the Court ignored the distinction when referring to the prematurely filed complaint as a defective complaint:

Plaintiff contends that because *Burton* analogized a prematurely filed complaint to a defective notice of intent, which at the time was held not to toll the limitations period but now is deemed to toll the limitations period, a prematurely filed complaint should likewise be deemed to toll the limitations period, at least until such time as it is successfully challenged. See, by analogy, [*Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007)] (holding that a defective affidavit of merit tolls the limitations period until it is successfully challenged). We are unaware of any readily apparent reason why a defective affidavit of merit or a defective notice of intent are sufficient to toll a limitations period but a defective complaint is not. [*Tyra*, at 222.]

Despite the fact that MCL 600.5856(c) explicitly tolled the period of limitation pertaining to medical malpractice actions under MCL 600.2912b, the Court of Appeals inexplicably turned to MCL 600.5856(a) to conclude contrary to *Burton* that the period of limitation was tolled when the complaint was filed. Nevertheless, the Court concluded that it was required to follow *Burton* even though the underpinnings of *Burton*'s holding were purportedly eviscerated. *Tyra*, at 223.

Even though the Court correctly recognized it was required to follow *Burton*, and *Driver*, which reaffirmed *Burton*, the Court turned to *Zwiers*. It noted that the record before it was silent

as to whether the plaintiff acted in good faith or whether the defendants were prejudiced by the premature filing. *Tyra*, at 225. While stating that the trial court correctly determined dismissal with prejudice was the only possible outcome, the Court of Appeals inconsistently stated that (a) the plaintiff should be permitted to argue in support of amending the filing date of the complaint, and (b) the trial court should exercise its discretion by either granting or denying the amendment. *Id.* at 226-227. In support of this argument, the Court of Appeals relied on *MM Gantz Co v Alexander*, 258 Mich 695, 697; 242 NW 813 (1932); however, *MM Gantz* did not involve a situation in which the amendment statute was used to circumvent a legislatively prescribed time period for filing.

### 3. *Furr v McLeod*

Just over two months later, the Court of Appeals issued its first opinion in the instant case. The Court concluded that it was required to follow *Tyra*, which determined that *Zwiers* remained good law even after this Court's decision in *Driver*. *Furr v McLeod*, unpublished opinion per curiam of the Court of Appeals, issued October 24, 2013 (Docket No. 310652) (*Furr I*). However, the lead opinion stated that were it not obligated to follow *Tyra* pursuant to MCR 7.215(J), the Court would have reversed the trial court's denial of the defendants' summary disposition motion premised on the premature filing of the complaint. The majority called for the convening of a conflict resolution panel. The lead opinion correctly noted that MCL 600.2301 could only be used to correct the defective content of a notice of intent. *Furr I*, at 9. It opined that *Driver* implicitly overruled *Zwiers*. *Furr I*. On November 20, 2013, the Court of Appeals vacated the *Furr I* opinion and ordered that a conflict panel be convened.

In a 4 to 3 opinion, the conflict panel concluded that it was unclear whether *Driver* overruled *Zwiers*, but appeared to invite this Court to consider the issue. *Furr v McLeod*, 304 Mich App 677, 680; 842 NW2d 465 (2014) (*Furr II*). The majority concluded that *Driver* never

expressly stated that MCL 600.2301 could not be used to disregard the dismissal of a prematurely filed medical malpractice complaint. It reached this conclusion despite *quoting* this Court's opinion in *Driver* as follows:

[MCL 600.2912b contains] a dual requirement: A plaintiff *must . . . (2) wait the applicable notice waiting period* with respect to each defendant *before he or she can commence an action*. [*Furr II*, at 697, quoting *Driver*, at 255-256 (emphasis added).]

*Applying MCL 600.2301* in the instant case *would deprive* [the later-added defendant] *of its statutory right to a timely NOI followed by the appropriate notice waiting period*. [*Furr II*, at 695, quoting *Driver*, at 254-255.]

The Court of Appeals' analysis in *Furr II*, begs the question: If each defendant has a statutory right to the appropriate notice waiting period, as stated in *Driver*, when can MCL 600.2301 *ever* be used to shorten the waiting period and deprive the defendant of this statutory right? Apparently, not acknowledging this statutory right or the fact that MCL 600.2301 would *always* affect this statutory right when used to shorten the waiting period, the panel reached the opposite conclusion that "MCL 600.2301 would appear to *mandate* a court to disregard a premature filing under MCL 600.2912b if a defendant's substantial rights are unaffected." *Furr II*, at 682 (emphasis added). The Court of Appeals reached this conclusion by stating that the above paragraph pertaining to MCL 600.2301, "reflects the Supreme Court's *actually engaging in an examination and evaluation of the criteria in MCL 600.2301*," without recognizing that this Court's analysis would always foreclose the use of MCL 600.2301 to shorten the waiting period. *Id.* at 695 (emphasis in *Furr II*). The Court of Appeals then simply summarily stated without analysis, "The *Zwiers* panel also examined and evaluated the criteria in MCL 600.2301, merely coming to a different conclusion concerning the furtherance of justice and substantial rights." *Furr II*, at 695-696.

The Court of Appeals then dismissed this Court's analysis pertaining to a plaintiff's requirements under MCL 600.2912b by stating "[t]his passage is couched in terms of the prospect of allowing amendment of an original NOI to add a time-barred nonparty defendant, which, again, does not fit the fact pattern in *Zwiers*, *Tyra*, and *Furr* . . ." In doing so, the Court apparently failed to recognize that this Court in *Driver* cited *Burton* for these requirements. *Driver*, 490 Mich at 255, citing *Burton*, 471 Mich at 752-754. The fact pattern in *Burton* certainly was not distinguishable.

The Court of Appeals then explained away this Court's express affirmation in *Driver*, that "[n]othing in *Bush* altered our holding in *Burton*," *Driver*, 490 Mich at 257, by stating that the passage was "again framed in the context of a plaintiff's seeking to amend an original NOI to add a nonparty defendant, which . . . is easily distinguishable . . ." *Furr II*, at 698. The Court of Appeals made no mention of the footnote pertaining to this sentence in *Driver*, which stated that this Court declined to overrule *Burton* and instead chose to adhere to the doctrine of stare decisis.

The Court of Appeals then reasoned that the lead opinion in *Furr I* incorrectly concluded that "only content-based amendments are permitted under MCL 600.2301" because this Court in *Driver* was only distinguishing *Bush*. *Furr II*, at 699. In so concluding, the Court of Appeals lost focus of the context in which the statement was made. This Court noted that (a) *Burton* applied to notice-waiting requirements, (b) *Bush* considered content requirements, (c) *Bush* repeatedly emphasized that the focus of the tolling provision was on the notice-waiting requirements, and, therefore, (d) *Bush* actually supported the *Burton* holding that a plaintiff must comply with the notice waiting period to toll the period of limitation. *Driver*, 490 Mich at 256-258. Even if the Court of Appeals was correct that MCL 600.2301 applied to more than just content because it permitted amendment to the "form" as well as the content/substance, the Court

lost sight of the fact that neither “form” nor “substance” refers to timing, or shortening of statutorily mandated waiting periods.

The Court of Appeals then changed tack. Instead of focusing on the first sentence of § 2301 pertaining to amendments, the Court focused on the second sentence of § 2301, which requires a court to disregard any error that does not affect a party’s substantial rights. *Furr II*, at 700-705. The Court concluded that this sentence was not limited to substance or form, but included “any” error, which encompassed statutory or procedural defects such as the premature filing of a complaint. *Id.* at 703. The Court reasoned that a defendant was not deprived of a statute of limitations defense because the period of limitation would not yet have elapsed at the time of the defect. *Id.* at 705. It then stated, “it cannot reasonably be maintained that every statutory error or defect necessarily affects a party’s *substantial* rights.” *Id.* (emphasis in *Furr II*). Deciding not to decide the issue, the Court of Appeals affirmed the trial court’s denial of summary disposition. *Id.* at 706.

The Court of Appeals cited no case law stating that a statutory right is insubstantial or that courts may abrogate a statutory right or legislatively mandated procedure (whether by amending it or disregarding it). The lack of cited authority may be explained by the long line of authority holding that courts may not judicially abrogate what the Legislature enacts, and the Legislature has the authority to limit causes of action as it so chooses.

“It is suggested that the charter provides for an appeal to the council, and that this may be held to take the place of a hearing before the board of review; but we do not possess the power to dispense with a jurisdictional prerequisite by substituting another procedure which may be thought by us to constitute an equivalent. The appearance before the assessor may have been more convenient and less expensive; but, whether so or not, it is a statutory right which we

cannot deny to the tax-payer.” *Three Rivers Village v Smith*, 99 Mich 507, 512; 58 NW 481 (1894).

Limitations of remedies are purely statutory. . . . [I]t is clearly settled that to prescribe the period within which any right may be enforced is within their power. They may or may not except disabilities, according to their pleasure. If they omit to say anything upon the subject, there is no power in the courts to supply what may have been an accidental or unintentional omission.

\* \* \*

The courts can grant no extension of the statutory time; they can make no exceptions from the general provisions of the statutes to meet the circumstances of hard cases; and if the statutes fail to provide for the cases of disability, like those of infancy, coverture, or absence from the country, the courts are without authority to do so. [*Dumphy v Hilton*, 121 Mich 315, 317-318; 80 NW 1 (1899).]

“No reason can be urged against the rule itself. If observed in making laws, it certainly and accurately expresses the will of the legislature according to the natural meaning of the words used. No principle of sociology would warrant the abrogation of a rule upon which legislation has been enacted and construed since the establishment of the State, because, in a single or a few instances, misfortune follows, not its observance, but its disregard. Nor can it confer upon the court legislative power to correct mistakes in unambiguous laws.” *People v Lowell*, 250 Mich 349, 359-360; 230 NW 202 (1930).

“It is not within the province of this Court to usurp the functions of the legislature and amend the act or its title by judicial interpretation in the absence of clear and express language which dictates such an interpretation.” *Croff v Lakey Foundry & Machine Co*, 320 Mich 581, 595; 31 NW2d 728 (1948) (BUTZEL, J., dissenting). “A fundamental principle scrupulously observed by the courts is that the judiciary may not encroach upon the functions of the legislature or usurp its powers. \* \* \* Since the power to make, alter, or repeal laws is legislative, the courts will not encroach upon the domain of a coordinate department of the government by judicial

enlargement, abridgement, alteration, or repeal of legislative enactments.” *Keating Internat’l Corp v Orion Twp*, 395 Mich 539, 553-554; 236 NW2d 409 (1975) (WILLIAMS, J., dissenting), quoting 16 Am Jur 2d, Constitutional Law, § 225, p 471.

“There is no question that the Legislature had the power to enact this statute and determine the conditions under which a right may accrue and the period in which a right may be asserted.” *Evans v Alford*, 203 Mich App 392, 395; 513 NW2d 164 (1994) (internal citations omitted).

In its bench ruling granting equitable relief to Millen, the trial court stated that a court in equity may provide for nonlegal, equitable remedies to avoid unduly harsh legal doctrines. Its analysis is invalid because, in this case, equity is invoked to avoid application of a statute. Courts must be careful not to usurp the Legislative role under the guise of equity because a statutory penalty is excessively punitive. As the Court of Appeals stated:

“Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.” [*Stokes v Millen Roofing Co*, 466 Mich 660, 671-672; 649 NW2d 371 (2002) (footnotes omitted).]

“[T]he Legislature has the power under our Constitution to abolish or modify nonvested, common-law rights and remedies.” *Phillips v Mirac*, 470 Mich 415, 430; 685 NW2d 174 (2004), citing *Donajkowski v Alpena Power Co*, 460 Mich 243, 256 n 14; 596 NW2d 574 (1999) (internal citations omitted).

This precedent, as applied to the three Court of Appeals’ opinions, makes clear that the Legislature had the authority to enact the mandatory 182-day notice waiting period in MCL 600.2912b, and that the trial courts and Court of Appeals may not use a generally applicable amendment statute to judicially negate this notice waiting period.

## CONCLUSION AND RELIEF REQUESTED

There is vast confusion with regard to the import of MCL 600.2301 on MCL 600.2912b, as a result of this Court's decision in *Bush*. However, even *Bush* does not support the interpretations by the Court of Appeals panels. Statutory analysis does not support the Court of Appeals' holdings, which are inconsistent with the holdings of this Court. Amicus respectfully requests that this Court grant appellant's application for leave to appeal to clarify this apparently confusing issue and bring the appellate holdings in line with the plain language of the statutes.

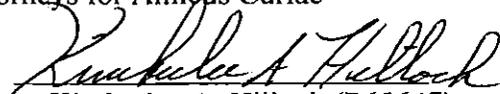
Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

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Dated: November 21, 2014

BY



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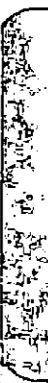
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STATE OF MICHIGAN  
COURT OF APPEALS

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PATRICIA A. REDDING,

Plaintiff-Counterdefendant-  
Appellant,

v

LEONARD K. KITCHEN,

Defendant-Counterplaintiff-  
Appellee,

and

EDWARD H. KOSTER,

Defendant-Appellee.

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UNPUBLISHED  
January 29, 2002

No. 222997  
Washtenaw Circuit Court  
LC No. '97-004226-NM

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff appeals of right from two orders granting defendants' motions for summary disposition. We reverse and remand.

Defendant Kitchen represented plaintiff in a divorce action in 1993, in which defendant Koster subsequently acted as plaintiff's co-counsel and guardian ad litem. Defendants' actions in the divorce proceedings led to the entry of an allegedly inequitable judgment of divorce over plaintiff's objection, and on November 17, 1995, plaintiff filed an action against defendants alleging negligence, intentional infliction of emotional distress, breach of fiduciary duty, and slander [hereinafter referred to as *Redding I*].

At the time the *Redding I* complaint was filed, an appeal by plaintiff of the underlying divorce action was pending before this Court. The summons in *Redding I* was due to expire on February 16, 1996, and plaintiff sought an extension of the summons on February 13, 1996. On December 28, 1995, this Court issued a published opinion reversing and setting aside the judgment of divorce and remanding the case for trial. *Redding v Redding*, 214 Mich App 639; 543 NW2d 75 (1996). The basis for plaintiff's ex parte motion to extend the summons in *Redding I* was that plaintiff wished to resolve the remanded divorce proceedings and ascertain damages resulting from the alleged malpractice of defendants. Plaintiff made no attempt to

actually serve complaints on defendants before filing the motion to extend the summons because of the divorce proceedings.

The trial court granted plaintiff's motion to extend the summons on February 13, 1996, in *Redding I*, and defendants were subsequently served within the time frame of the extended summons. Kitchen filed an answer, affirmative defenses, and a counterclaim in response to the *Redding I* complaint. Koster did not answer the complaint, filing instead a limited appearance and a motion for summary disposition pursuant to MCR 2.116(C)(2) and (3) challenging the sufficiency of process and the order extending the summons. Kitchen did not challenge the sufficiency of process or the order extending the summons in his responsive pleadings or by motion. The trial court denied Koster's motion for summary disposition, and *Redding I* proceeded on the merits until the parties entered into a tolling agreement on February 11, 1997. The tolling agreement provided, in pertinent part:

The parties have agreed to dismiss the referenced lawsuit and counter-complaint without prejudice and without costs, pursuant to this Agreement which will preserve the rights of the parties with respect to the statute of limitations, as those rights were in effect on the date the referenced lawsuit was originally commenced, November 17, 1995.

In consideration of the mutual promises, agreements, and covenants of the parties, IT IS AGREED as follows:

1. The parties will each authorize their respective counsel to sign a Stipulation and Order of Dismissal without prejudice and without costs. A copy of the proposed Stipulation and Order of Dismissal is attached to this Agreement as an exhibit.
2. The parties agree that, with respect to the statute of limitations . . . claims . . . , the statute of limitations shall be tolled from the date the referenced Stipulation and Order of Dismissal is entered by the Court; and, in the event the referenced lawsuit is refiled or reinstated pursuant to the provisions of this Agreement, November 17, 1995 shall be considered the date of commencement for purposes of determining the applicable period of limitations.
3. The parties agree that this Agreement shall terminate thirty (30) days after the date the applicable appeal period expires relevant to the final order and/or judgment entered in the Washtenaw County Circuit Court case of *Donald D. Redding v Patricia A. Redding*, Case No. 92-44750-DM.
4. Nothing contained in this Agreement, or the proposed Stipulated Order of Dismissal, shall be deemed to renew, revive, or resurrect any claim which, on November 17, 1995, was already time-barred.

\* \* \*

6. The purpose of this Agreement, and the Stipulation and Order of Dismissal, is to: allow Patricia A. Redding to mitigate her alleged damages through continuation of the underlying, and referenced, divorce action; to allow the parties to explore ways in which to resolve their dispute without litigation; and, minimize the litigation costs of the parties.

\* \* \*

9. This Agreement constitutes the entire agreement between the undersigned parties with respect to the referenced subject matter, and any prior oral or written statements concerning same are merged into this document for all purposes and shall be of no force and effect.

Pursuant to the terms of the tolling agreement, *Redding I* was dismissed without prejudice.

Subsequently, plaintiff filed the present action [hereinafter referred to as *Redding II*]. In *Redding II*, the trial court granted defendants' separate motions for summary disposition brought pursuant to MCR 2.116(C)(2) and (3) on the ground that there was error in extending the summons in *Redding I*. The trial court concluded that plaintiff did not establish good cause for an extension under MCR 2.102(D) in light of *Bush v Beemer*, 224 Mich App 457; 569 NW2d 636 (1997). The holding of *Bush, supra*, which was issued by this Court after *Redding I* was dismissed, requires due diligence in attempting to serve a defendant in order to establish good cause under MCR 2.102(D). *Id.* at 464.

Plaintiff argues that the trial court erred when it granted defendants' motion for summary disposition. We review rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). When ruling on a motion brought pursuant to MCR 2.116(C)(2) seeking dismissal for reasons under MCR 2.102, the trial court must consider the pleadings, affidavits, and other documentary evidence submitted by the parties. *Richards v McNamee*, 240 Mich App 444, 448; 613 NW2d 366 (2000).

MCR 2.102(D) provides, in part:

A summons expires 91 days after the date the complaint is filed. However, within that 91 days, on a showing of good cause, the judge to whom the action is assigned may order a second summons to issue for a definite period not exceeding 1 year from the date the complaint is filed. If such an extension is granted, the new summons expires at the end of the extended period.

MCR 2.102(E)(1) provides, in part:

On the expiration of the summons as provided in subrule (D), the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction.

Under MCR 2.116(C)(2), summary disposition is appropriate where the process issued in the action is insufficient. MCR 2.116(C)(3) allows summary disposition where the service of process is insufficient. However, MCR 2.116(D)(1) requires that the grounds listed in subrule (C)(1), (2), and (3) "be raised in a party's first motion under this rule or in the party's responsive pleading, whichever is filed first, or they are waived."

Plaintiff claims that Kitchen waived his right to challenge the sufficiency of process by failing to properly raise the issue in his first pleading. In addition to the requirement of MCR 2.116(D)(1) stated above, MCR 2.111(F)(2) states that a party against whom a complaint has been filed must assert in a responsive pleading the defenses the party has against the claim. The rule further states that a

defense not asserted in the responsive pleading or by motion as provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and the failure to state a claim on which relief can be granted. However,

(a) a party who has asserted a defense by motion filed pursuant to MCR 2.116 before filing a responsive pleading need not again assert that defense in a responsive pleading later filed[.]

Here, Kitchen timely filed a verified answer to complaint, affirmative defenses, and verified counterclaim in *Redding I*, but his affirmative defenses did not assert any defense based on insufficient process related to the extension of the summons, and he did not file any motion challenging the summons before filing his answer. Although Kitchen challenged the sufficiency of process in his affirmative defenses in *Redding II*, it is undisputed that both defendants were properly served with a valid summons in *Redding II*. Because Kitchen waived any objection to the sufficiency of process in *Redding I*, his objection in *Redding II* is meaningless, and he cannot circumvent MCR 2.111(F)(2) and (3) and MCR 2.116(D)(1) by claiming that he objected in *Redding II*. Clearly, Kitchen waived any defense based on the sufficiency of process.

By contrast, Koster complied with the requirements of the court rules by filing a limited appearance and a motion for summary disposition pursuant to MCR 2.116(C)(2) and (3) challenging the sufficiency of process before filing a responsive pleading in *Redding I*. Therefore, Koster did not waive objection to process in *Redding I*. However, we do not agree with Koster's claim that the provisions of the tolling agreement in *Redding I* permitted him to raise in *Redding II*, and the trial court to rule upon, an argument concerning the sufficiency of process in *Redding I*.

The tolling agreement in *Redding I* was, in essence, a form of settlement agreement. A settlement agreement is a contract governed by the legal principles applicable to the interpretation and construction of contracts. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). Where a contract is clear and unambiguous, it is to be enforced as written. *Parker v Nationwide Mutual Ins Co*, 188 Mich App 354, 356; 470 NW2d 416 (1991). Here, the tolling agreement specifically stated it would "preserve the rights of the parties with respect to the statute of limitations, as those rights were in effect on the date the referenced lawsuit was originally commenced, November 17, 1995." However, the tolling

agreement says nothing about preserving issues regarding sufficiency of process. We conclude that the tolling agreement is clear and unambiguous and did not preserve any rights regarding sufficiency of process.<sup>1</sup>

Koster claims that because the statute of limitations is inextricably intertwined with process issues, the preservation of rights regarding the statute of limitations included preservation of process issues by implication. This argument lacks merit.

Generally, the limitation period in a civil action is tolled when a complaint is filed and a copy of the summons and complaint are served on the defendant. MCL 600.5856(a); *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Here, the period of limitation was tolled when plaintiff filed the complaint in *Redding I* on November 17, 1995. Because plaintiff received an extension to her summons and served the defendants within the extended period of the summons, the statute of limitations continued to be tolled until *Redding I* was dismissed without prejudice.

Under defendants' theory, no extension should have been granted, resulting in dismissal of plaintiff's complaint without prejudice pursuant to MCR 2.102(E) after February 16, 1996.<sup>2</sup> The result of the dismissal would be that the period of limitation would begin to run again until a new complaint was filed and defendants were served with that new complaint. However, the language of the tolling agreement not only fails to specifically preserve defendants' rights to renew a challenge to the sufficiency of process in *Redding I*, the language implicitly waived any argument concerning process. First, the tolling agreement allowed plaintiff to refile a complaint without limitation, which would necessarily entail the issuance of a new summons and the service of the summons. Second, the tolling agreement specifically stated that "November 17, 1995 shall be considered the date of commencement for purposes of determining the applicable period of limitations." Therefore, both defendants accepted the date of filing the *Redding I* complaint, November 17, 1995, as the date for a court to consider in any future action regarding whether the period of limitation had expired.

Because the language of the tolling agreement simply does not support a finding that the issue regarding the sufficiency of process in *Redding I* was preserved after the dismissal of the action, the issue could not be presented in *Redding II* where process and service were sufficient, and the trial court erred in granting defendants' motions for summary disposition.

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<sup>1</sup> Plaintiff also argues that Koster waived any defense concerning the sufficiency of process by filing a general appearance, requesting a number of extensions from plaintiff to file a response, and by being involved in a scheduling conference and order in *Redding II*. Because we conclude that the tolling agreement in *Redding I* did not permit Koster to raise the sufficiency of process issue in *Redding II*, we decline to address this argument.

<sup>2</sup> This assumes that plaintiff would not have served defendants by February 16, 1996, if her motion to extend the summons had been denied. We believe that scenario to be highly unlikely.

We need not address the remaining issues presented on appeal, including the retroactive applicability of *Bush, supra*, because defendants waived or failed to preserve objections to the sufficiency of process.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Martin M. Doctoroff  
/s/ Helene N. White