

STATE OF MICHIGAN
IN THE SUPREME COURT

LISA TYRA,

Plaintiff-Appellee,

vs.

Supreme Court No. *Publ Ofc 8-15-13 Rec 12-11-13*
Court of Appeals No. 298444
L.C. Case No. 09-103111-NH

ORGAN PROCUREMENT AGENCY OF
MICHIGAN, a ~~Michigan corporation d/b/a~~ *Defendant-Appellee and*
GIFT OF LIFE MICHIGAN, STEVEN COHN,
M.D., and WILLIAM BEAUMONT HOSPITAL,

*Unklnas
N. Grant*

Defendants-Appellants,

And

DILLIP SAMARA PUNGAVAN, M.D. and
JOHN DOE,

Defendants.

OK

148087

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

APAL

EXHIBITS

12/24

CERTIFICATE OF SERVICE

B42652

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FILED

NOV 22 2013

LARRY S. ROYSTER
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ORDER APPEALED FROM AND RELIEF REQUESTED

Defendants-Appellants WILLIAM BEAUMONT HOSPITAL and STEVEN COHN, M.D., (collectively “Defendants” or “Beaumont”) seek leave to appeal from the Michigan Court of Appeals decision in *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; ___ NW2d ___ (2013). (Ex. A, Aug. 15, 2013 Op.; Ex. B, Dissent). This opinion reversed an order of the Oakland County Circuit Court granting Defendants’ Motion for Summary Disposition with prejudice and remanded the case to the trial court to “exercise its discretion in either granting or denying [amendment of the filing date of Plaintiff’s complaint], pursuant to MCL 600.2301 and [*Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), *lv. den.* 783 NW2d 514 (2010)].” *Tyra, supra*, slip op at 10. Defendants’ timely filed Motion for Reconsideration was denied October 11, 2013 (Ex. C, Oct. 11, 2013 Order). The dissenting judge would have granted rehearing. (*Id.*)

The issue presented in this Application is one with which this Court is familiar and which it has addressed and decided on previous occasions: whether a complaint alleging medical malpractice that is filed prior to the expiration of the applicable notice period provided by MCL 600.2912b(1) is effective to commence a lawsuit and toll the period of limitations. The Court’s answer in *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005) was “no.” *Burton* held that the language of § 2912b(1) “unambiguously states that a person ‘shall not’ commence an action alleging medical malpractice until the expiration of the statutory notice period.” *Id.* at 747. Therefore, a “complaint filed before the expiration of the notice period violates MCL 600.2912b and is ineffective to toll the limitations period.” *Id.*

This issue was again before the Court in *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011) (“*Driver*”) where the Court directed the parties to address “whether this Court’s decision

in [*Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009)] allows for the application of MCL 600.2301 in cases involving prematurely filed complaints under MCL 600.2912b(1), and whether [*Burton*] retains any viability in light of *Bush*.” *Driver, supra* at 246, n19, citing *Driver v Cardiovascular Clinical Assoc*, 488 Mich 957; 790 NW2d 697 (2010).

Driver reaffirmed the holding of *Burton*. “[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.” *Id.* at 257. “Nothing in *Bush* altered our holding in *Burton*. . . . *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.” *Id.* at 257-258 (emphasis in original). *Bush* only applies where a defendant receives a timely but defective notice of intent (“NOI”). *Id.* at 253.

Despite this Court’s clear pronouncements, the Court of Appeals, while acknowledging the continued force of *Burton* and *Driver*, instead followed *Zwiers* which mistakenly interpreted *Bush* and MCL 600.2301 to apply to the entire NOI process, including premature filing of a complaint as a defect or error which was subject to cure under § 2301.

Defendants contend that the decision of the Court of Appeals was clearly erroneous and conflicts with *Driver* and *Bush*. The opinion also conflicts with a recently issued Court of Appeals decision, *Furr v McLeod*, ___ Mich App ___, ___ NW2d ___ (2013) (Docket No. 310652). *Furr* concluded that *Driver* and *Burton* controlled and that *Zwiers* was no longer good law after *Driver*. The panel was compelled to follow *Tyra* by MCR 7.215(J), and invoked the conflict panel provision of MCR 7.215(J)(3).

Without additional action by this Court, Defendants will be subject to a decision which is in conflict with clear precedent from this Court. The effect of the Court of Appeals decision will extend well beyond the Beaumont Defendants, however. Allowing this decision to stand would again introduce disorder and uncertainty into an area of law in which this Court has expended considerable effort to ensure a predictable and discernable pattern of law, and to give meaning to the medical malpractice reforms enacted by the Legislature. Thus, the impact of this case is jurisprudentially significant on a broad basis and merits this Court's attention.

Therefore, Defendants request this Court to peremptorily reverse the Court of Appeals decision, overrule *Zwiers* and reinstate the decision of the Oakland County Circuit Court, or alternatively, grant leave to appeal the important legal question raised in this Application and to grant such other or further relief as may be warranted.

STATEMENT OF QUESTIONS PRESENTED

I. 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." *BURTON, SUPRA* AT 747. DOES THIS PROVISION MANDATE DISMISSAL WITH PREJUDICE WHERE PLAINTIFF'S MEDICAL MALPRACTICE COMPLAINT WAS FILED BEFORE THE EXPIRATION OF THE APPLICABLE NOTICE-WAITING-PERIOD, THE FILING OF THE COMPLAINT DID NOT COMMENCE AN ACTION, AND THE STATUTE OF LIMITATIONS HAS EXPIRED?

II. *DRIVER* REAFFIRMED *BURTON* THAT PLAINTIFF CANNOT COMMENCE AN ACTION THAT TOLLS THE STATUTE OF LIMITATIONS AGAINST A PARTICULAR DEFENDANT UNTIL PLAINTIFF COMPLIES WITH THE NOTICE-WAITING-PERIOD REQUIREMENT OF MCL 600.2912b. *BUSH* APPLIED ONLY WHERE DEFENDANTS RECEIVED A TIMELY BUT DEFECTIVE NOI. MCL 600.2301 COULD NOT BE USED TO AMEND AN ORIGINAL NOI BECAUSE PLAINTIFF HAD NOT COMMENCED AN ACTION BEFORE THE STATUTE OF LIMITATIONS EXPIRED. "MCL 600.2301 ONLY APPLIES TO ACTIONS OR PROCEEDINGS THAT ARE *PENDING*." *DRIVER, SUPRA* AT 254. AN ACTION CANNOT BE PENDING IF IT CANNOT BE COMMENCED.

DID THE COURT OF APPEALS ERR IN FINDING THAT § 2301 COULD BE AVAILABLE TO CURE AN ERROR WHERE THE LIMITATIONS PERIOD EXPIRED WITHOUT COMMENCEMENT OF A MEDICAL MALPRACTICE ACTION AND THUS THERE WAS NO ACTION PENDING TO WHICH § 2301 COULD BE RETROACTIVELY APPLIED?

INTRODUCTION

This Application involves Plaintiff's failure to comply with the notice-waiting-period of MCL 600.2912b(1) prior to filing a medical malpractice complaint. The statute of limitations for actions involving medical malpractice is two years. MCL 600.5805(6). The statute is tolled if an NOI complying with MCL 600.2912b is sent. The statute provides that a medical malpractice action cannot be commenced until the applicable notice period following service of the NOI has expired. In *Burton*, this Court held that the language of § 2912b(1) "unambiguously states that a person 'shall not' commence an action alleging medical malpractice until the expiration of the statutory notice period." *Burton, supra* at 747.

Plaintiff timely served an NOI to Defendants on April 23, 2009 (Ex. D, NOI). That acted to extend the statute of limitations for 182 days. There is no dispute that Plaintiff failed to wait the 182 days prior to filing suit, however. Instead, she filed her complaint in circuit court on August 13, 2009, 112 days after sending notice to Defendants (Ex. E, Compl.). As a result, she filed the complaint at least 42 days and potentially as many as 70 days before expiration of the notice period. The statute continued to run and finally expired on December 8, 2009.

Defendant Organ Procurement Agency of Michigan d/b/a Gift of Life ("Gift of Life") sought summary disposition on this basis and the Beaumont Defendants concurred. Plaintiff's sole argument was that Defendants' affirmative defenses were insufficient to inform her of the premature filing and were thus waived, an argument which the circuit court rejected, relying on *Burton*. The court granted summary disposition pursuant to MCR 2.116(C)(7) and *Burton* (Ex. F, May 20, 2010 Order & Op. Granting Summ. Disposition).

On appeal, the panel acknowledged this Court's opinions in *Burton* and *Driver*, but nonetheless reversed the circuit court and remanded the case for the court to "exercise its

discretion in either granting or denying [amendment of the filing date of Plaintiff's complaint], pursuant to MCL 600.2301 and *Zwiers*." *Tyra, supra*, slip op at 10. The dissenting judge disagreed concluding that *Burton* and *Driver* continued to be binding and that *Zwiers* had been "significantly undermined by our Supreme Court's later decision in *Driver*." *Id.* (Wilder, J., dissenting), slip op at 3 (Ex. B). Defendant's Motion for Reconsideration was denied (Ex. C).

Defendants now seek review of the decision of the Court of Appeals which is in clear conflict with decisions of this Court.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Underlying Facts

This medical malpractice action alleges that Defendants failed to ensure organ compatibility before proceeding with kidney transplant surgery on June 9, 2007. Plaintiff-Appellee LISA TYRA (“Plaintiff” or “Ms. Tyra”) suffered from renal insufficiency which eventually required a transplant (Ex. E, Compl. at ¶8). Dr. Cohn, a transplant surgeon, along with Dr. Samarapungavan, a nephrologist, evaluated Plaintiff’s condition and concluded the transplant could proceed (*Id.* at ¶10).¹

Gift of Life is an organization which facilitates organ transplants and supplied a donor kidney (*Id.* at ¶2). Ms. Tyra alleged that neither Beaumont nor Gift of Life conducted a cross-match of the donor kidney to ensure compatibility (*Id.* at ¶¶14-15). Ms. Tyra claimed that as a result of the surgery she experienced post-transplant complications and that her quality of life was affected by the transplant (*Id.* at ¶17).

June 9, 2007 was the date of the alleged malpractice (Ex. H, Pl.’s Answer to Def. Gift of Life’s Mot. For Summ. Disposition at ¶5 (without exhibits); Ex. D at p. 2; Ex. E at ¶17). The two year statute of limitations would thus have expired June 9, 2009. On April 23, 2009, Plaintiff served an NOI pursuant to MCL 600.2912b to Defendants. The 182-day notice-waiting-period was set to expire October 22, 2009.

On August 13, 2009, 112 days after mailing the NOI, Plaintiff filed a Complaint in Oakland County Circuit Court. Because Plaintiff served the NOI prior to the expiration of the two year statute of limitations, the statute was tolled pursuant to MCL 600.5856(c), “for the number of days equal to the number of days remaining in the applicable notice period after the

¹ Dr. Samarapungavan was dismissed from the case and is not part of the appeal (Ex. G, Oct. 28, 2009 Order of Partial Dismissal).

date notice is given.” The expiration of the 182 day waiting period was October 22, 2009, at which point the statute of limitations was tolled for an additional 47 days until December 8, 2009, when it expired. Plaintiff failed to properly commence her medical malpractice action against Defendants before the statute of limitations expired on December 8, 2009.

On September 9, 2009, Beaumont filed an Answer with Affirmative Defenses. Among these affirmative defenses, No. 4 asserted the benefit of the provisions of the Michigan Tort Reform Acts, including the 1993 Tort Reform Act (1993 PA 78 was the public act which established the NOI requirements of MCL 600.2912b). Gift of Life filed its Affirmative Defenses on the same date. No. 11 stated that Plaintiff failed to comply with the notice provisions of MCL 600.2912b, Plaintiff’s action was thus barred, and it gave notice that it would move for summary disposition.

Motion for Summary Disposition

On January 13, 2010, Gift of Life filed a motion for summary disposition pursuant to MCR 2.116(C)(7), asserting Plaintiff’s lawsuit was subject to dismissal based on premature filing of her Complaint before the expiration of the 182 day notice waiting period of § 2912b(1). Beaumont filed a brief in concurrence. Plaintiff’s answer did not dispute the premature filing of the complaint or failure to comply with the notice provisions but rather relied on waiver under MCR 2.111(F)(3) in failing to adequately state the affirmative defenses and to provide facts constituting those defenses² (Ex. H).

After a hearing on April 7, 2010, the trial court issued an opinion May 20, 2010 granting summary disposition with prejudice (Ex. F).

² Further, Plaintiff argued that Beaumont’s Affirmative Defense No. 4 and Gift of Life’s Affirmative Defense No. 11 were the same, and that Gift of Life was on notice of inadequacy because Plaintiff had objected to Beaumont’s affirmative defense.

Defendant moves for summary disposition of Plaintiff's medical malpractice claim on grounds that Plaintiff failed to comply with the notice provisions of the medical malpractice act, MCL 600.2912b, by filing her complaint before the six-month waiting period expired. Defendant also argues that Plaintiff's failure to comply precluded her complaint from "commencing" the action and, as a result, the statute of limitations continued to run. The statute of limitations has now expired and, as a result, Plaintiff cannot cure the problem by refile her claim. Thus, the claim must be dismissed with prejudice. [Ex. F, p 2].

The lower court noted that the Plaintiff did not dispute that the complaint was filed prematurely and that it failed to comply with the notice provisions of the medical malpractice act. Plaintiff did not dispute that such defects if properly raised would preclude the complaint from "commencing" the action for purposes of the statute of limitations pursuant to *Burton*. The court rejected Plaintiff's procedural argument that Defendants had waived the right to enforce the affirmative defense through their failure to be more specific, analogizing it to a similar affirmative defense found to be sufficient in *Burton*. *Id.* at 2-3.

Ms. Tyra filed a Claim of Appeal on June 8, 2010.

Court of Appeals Proceedings

Following oral argument April 4, 2013, the Court of Appeals issued a published opinion August 15, 2013. *Tyra, supra*. The majority reversed the order of the trial court and remanded the case for further proceedings on the basis of MCL 600.2301 and *Zwiers*. On remand "plaintiff should be afforded the opportunity to make an argument in support of amending the filing date of her complaint and affidavit of merit . . . and the trial court should exercise its discretion in either granting or denying that amendment, pursuant to MCL 600.2301 and *Zwiers*." *Tyra, supra*, slip op at 10. The dissenting judge concluded that *Burton, supra* and *Driver, supra* continued to be binding on the Court (Ex. B).

The Court of Appeals majority initially considered Plaintiff's argument that Defendants' responsive pleadings asserting their affirmative defenses did not contain sufficient facts to put

Plaintiff on notice that she failed to comply with the notice waiting period and thus these affirmative defenses were waived pursuant to MCR 2.111(F)(3). *Tyra, supra*, slip op at 2. The Court of Appeals majority agreed with that argument. *Id.*, slip op at 3. Notwithstanding that conclusion, the majority concluded that the waiver was of no practical effect, since Plaintiff's premature complaint simply failed to commence the action and Plaintiff's claims were already time-barred at the time the circuit court ruled. *Id.*, slip op at 5-6, citing *Auslander v Chernick*, 739 NW2d 620 (2007), as binding precedent. (See also *Simon v Widrig*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2008 (Docket No. 277070) *lv. den.* 483 Mich 906; 762 NW2d 164 (2009) relying on *Auslander* as binding precedent and finding no waiver (Ex. I)).

The *Tyra* majority acknowledged that “[p]ursuant to *Burton*, a medical malpractice complaint filed prior to the expiration of the waiting period in MCL 600.2912b did not commence the action and did not toll the running of the limitations period pursuant to MCL 600.5856(a).” *Tyra, supra*, slip op at 6-7. The majority further agreed that “because plaintiff’s premature complaint did not continue to toll the running of the limitations period, the limitations period eventually expired. After that expiration, defendants moved for summary disposition. Because the limitations period had expired, plaintiff could not refile; consequently, dismissal must have been with prejudice.” *Id.* at 7.

The majority recognized that *Burton* remained binding and *Driver* had “recently reaffirmed that, pursuant to *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.*, slip op at 8, quoting *Driver, supra* at 256. “Irrespective of the language used in the relevant statutes, 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.*

Despite this, the majority concluded that Plaintiff should be permitted an opportunity to present an argument that she was entitled to amend her complaint relying on *Zwiers v Growney*. As in this case, *Zwiers* involved a plaintiff’s failure to comply with the notice waiting period by inadvertently filing a complaint 181 days after serving the notice of intent. *Zwiers* concluded that tolling could be extended to violations of the notice waiting period of § 2912b(1), as well as the content provisions of § 2912b(4) and that MCL 600.2301 could provide a remedy allowing correction or disregard of an error if good faith by plaintiff was shown and no substantial rights of the defendant were affected.

The majority attempted to distinguish *Driver*. “Although an untimely complaint cannot commence an *action*, the *proceedings* here are underway. In *Driver*, the plaintiffs were barred even from the initial step of the proceedings of filing the notice of intent, whereas here, there is no dispute that the notice of intent was proper.” *Tyra, supra*, slip op at 8. Therefore, it was appropriate to afford Plaintiff the right to make an argument based on MCL 600.2301. *Id.*

The dissenting judge concluded that *Burton* and *Driver* continued to be binding on the Court. “As the majority recognizes, even though a defective notice of intent (NOI) nevertheless tolls the applicable limitations period, [*Bush*], a prematurely filed complaint does not toll the period of limitations, [*Burton*]. Our Supreme Court in *Driver* found no conflict with these parameters and found that *Burton* is still ‘good law...’” *Tyra, supra*, slip op at 1-2 (Wilder, J., dissenting) (internal citations omitted) (Ex. B).

Further, “plaintiff’s complaint cannot be resurrected under MCL 600.2301.” *Id.* slip op at 3 (Wilder, J., dissenting). Although a proceeding was pending at the time Plaintiff sent NOIs

to the Defendants, to which MCL 600.2301 would have applied, “the limitations period expired without commencement of a medical malpractice action because plaintiff’s complaint was filed prematurely. Since [a]n action is not ‘pending’ if it cannot be [or was not] ‘commenced,’ there was no *action* pending in the trial court to which MCL 600.2301 could be retroactively applied.” *Id.* (Wilder, J., dissenting) (internal quotations and citations omitted). Moreover, even assuming the limitation period had not extinguished the proceeding commenced by the NOI, retroactive application of § 2301 would affect Defendants’ substantial rights – Defendants would be denied the right to a statute of limitations defense. *Id.*, slip op at 3 (Wilder, J. dissenting), citing *Driver, supra* at 255. The dissent recognized that *Zwiers* had been “significantly undermined” by *Driver*.³ *Id.*, slip op at 3 (Wilder, J., dissenting). Judge Wilder would have affirmed the trial court’s order granting summary disposition in favor of defendants.

Beaumont’s timely filed Motion for Reconsideration was denied on October 11, 2013. The dissenting judge would have granted re-hearing (Ex. C, Oct. 11, 2013 Order).

³ The dissent disagreed with the majority’s conclusion that Defendants “waived, or even could have waived, an affirmative defense that Plaintiff’s complaint was prematurely filed.” *Id.*, slip op at 2 (Wilder, J., dissenting), citing the order in *Auslander*.

STANDARD OF REVIEW

The trial court's decision regarding summary disposition is reviewed *de novo*. *Bush, supra* at 164. Summary disposition is proper under MCR 2.116(C)(7) when the claim is barred because of the statute of limitations." MCR 2.116(C)(7). *Driver, supra* at 246. Interpretation of a statute is a question of law which is also reviewed *de novo*. *Bush, supra* at 164. The purpose of statutory construction is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). In determining the intent of the Legislature, the Court first looks to the language of the statute. *Id.* When reviewing a statute, courts necessarily must first examine the text of the statute. *Dressel v Ameribank*, 468 Mich 557, 562; 664 NW2d 151 (2003). "If the language of a statute is clear, no further analysis is necessary or allowed." *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

ARGUMENT

- I. APPLICABLE STATUTES AND CASE LAW CONFIRM THAT A MEDICAL MALPRACTICE ACTION CANNOT BE COMMENCED BEFORE EXPIRATION OF THE NOTICE-WAITING-PERIOD OF MCL 600.2912b(1). PLAINTIFF DID NOT COMPLY WITH THE STATUTORY REQUIREMENTS AND AS A RESULT HER PREMATURE COMPLAINT DID NOT TOLL THE STATUTE OF LIMITATIONS WHICH HAS EXPIRED.**

MCL 600.2912b

MCL 600.2912b was enacted as part of the Tort Reform Act of 1993 (1993 PA 78), and requires a plaintiff to provide defendants 182 days notice of a medical malpractice claim prior to commencing an action. The plain and unambiguous language of § 2912b(1), the focus of this appeal, provides:

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

Section 2912b contains other requirements, including the content requirement of § 2912b(4):

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

- (a) The factual basis for the claim.
- (b) The applicable standard of practice or care alleged by the claimant.
- (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
- (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
- (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

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

If Defendant does not respond within 154 days, the action may be commenced immediately § 2912b(7)-(8). Immediate commencement is also allowed any time during the notice period if the health professional or facility states in writing that there is no intent to settle. § 2912b(9). Plaintiff's NOI was served on April 23, 2009; Defendants had not responded by August 13, 2009 when Plaintiff filed her complaint, 112 days later.

Regardless of the length of the notice period, the statute of limitations is tolled at the time notice is given in compliance with § 2912b, if the limitations period would otherwise expire during the notice waiting period. To effectively toll the statute of limitations, a plaintiff must comply with the notice waiting period of MCL 600.2912b.

MCL 600.5856

As amended in 2004, MCL 600.5856 provides in relevant part:

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

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

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

In the lower court, Plaintiff relied on § 5856(a) to argue that filing her complaint tolled the limitation period. Although § 5856(a) provides that the statute of limitations is tolled at the time the complaint is filed if the summons and complaint are timely served, that does not negate the fact that § 2912b does not allow a complaint to be filed without first complying with the

requirements of § 2912b(1) and the burden of full compliance is on the plaintiff. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65-66; 642 NW2d 663 (2002). A timely notice is a “prerequisite condition” to filing a medical malpractice complaint. *Burton, supra*, at 754. The language of § 2912b specifically addresses *whether* a cause of action may be commenced. (“[A] person shall not commence an action alleging medical malpractice . . . unless the person has given . . . written notice . . . not less than 182 days before the action is commenced.” § 2912b(1)). Any attempt to do so during the pre-suit waiting period is legally void and does not invoke the tolling provisions of § 5856.

MCL 600.1901, also relied on by Plaintiff, stating that “[a] civil action is commenced by filing a complaint with the court” is a statute of general application, as is § 5856(a). Section 2912b(1) is specific to medical malpractice actions only. “[M]ore specific statutory provisions control over more general statutory provisions, and thus the specific requirements of § 2912b(1) regarding ‘commenc[ing] an action alleging medical malpractice’ prevail over the general requirements of MCL 600.1901 regarding the commencing of civil actions.” (Ex. J, Sept. 26, 2008 Order Denying Re-Hearing, *Boodi v Borgess Medical Ctr*, 481 Mich 558; 751 NW2d 44 (2008) (concurrency by Markman, J., p 2)). This view is consistent with general principles of statutory interpretation. When two statutes are *in pari materia* but conflict with respect to a particular issue, the more recent and specific statute controls over the older and more general statute. *People v Buehler*, 477 Mich 18, 26-27; 727 NW2d 127 (2007); *Jones v Enertel, Inc*, 467 Mich 266, 270-271; 650 NW2d 334 (2002). To determine which provision is more specific and controlling, the court considers “which provision applies to the more narrow realm of circumstances and which to the more broad realm.” *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008). The Legislature is presumed to have been aware of § 1901 when it

enacted § 2912b approximately thirty years later. See *People v Buckley*, 302 Mich 12, 21; 4 NW2d 448 (1942).

MCL 600.5856(c) does not require that plaintiff's notice must strictly comply with § 2912b in its entirety. *Bush, supra* at 169-170. Tolling may occur under § 5856(c) as long as plaintiff complies with the applicable notice waiting period of § 2912b(1). *Id.* If the complaint is filed before the applicable notice waiting period expires, however, MCL 600.5856(c) does not act to toll the limitations period. *Driver, supra* at 256-257; *Burton, supra* at 747.

Burton v Reed City:

Burton squarely addressed the issue presented 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(1) tolls the period of limitations. *Burton, supra* at 747. This Court held that a complaint filed before expiration of the notice period violates § 2912b(1) and is ineffective to commence an action and toll the limitations period.

In *Burton*, Plaintiff filed his complaint 115 days after providing a notice of intent to the defendants. *Id.* He acknowledged that the complaint was filed prior to expiration of the notice period but nonetheless argued that filing the complaint was sufficient to toll the limitations period and that the appropriate remedy was dismissal without prejudice. *Id.* at 749. After initially denying the motion, the trial court granted summary disposition on reconsideration. The Court of Appeals reversed, reasoning that since plaintiffs filed an affidavit of merit with the complaint, the filing should be deemed to toll the limitation period under MCL 600.5856(a) because defendant would not be prejudiced (distinguishing *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000)). *Burton, supra* at 750. Although acknowledging that the remedy for

non-compliance with § 2912b was dismissal and that plaintiff still must then comply with the applicable statute of limitations, the Court of Appeals used § 5856(a) to find tolling. *Id.*

This Court disagreed; alleged lack of prejudice was not a factor in the relevant statute. *Id.* at 753. The mandatory language of § 2912b(1) “unambiguously states that a person ‘shall not’ commence an action alleging medical malpractice until the expiration of the statutory notice period.” *Id.* at 747. The limitation period was not tolled. Section 2912b(1) was mandatory – the failure to comply with the statutory waiting period “renders the complaint insufficient to commence the action.” *Id.* at 754.

After providing the written notice, the claimant is required to wait for the applicable notice period to pass before filing suit. The claimant generally must wait 182 days after providing the notice of intent before commencing an action alleging medical malpractice. [*Id.* at 751.]

Therefore MCL 600.5856(d) was not effective to toll the limitations period because plaintiff’s notice did not comply with MCL 600.2912b.

MCL 600.5856(d) [now (c) following the 2004 amendment to 1993 PA 78] provides that the two-year period of limitations for medical malpractice actions is tolled during the notice period if notice is given in compliance with MCL 600.2912b. [*Id.* at 752.]

The Court also rejected the Court of Appeals reliance on MCL 600.5856(a), to find that the period of limitations could be further tolled by plaintiff’s prematurely filed complaint. *Id.*

Bush v Shabahang:

Bush did not involve the effect of a prematurely filed complaint. The issue was whether a timely filed but defective NOI could toll the statute of limitations pursuant to MCL 600.5856(c). *Bush, supra* at 160. The Court determined that based on the 2004 amendments to § 5856, (2004 PA 87) specifically § 5856(c), a defective notice would still toll the applicable statute of limitations as long as plaintiff complied with the notice waiting period before

commencing a medical malpractice action. *Id.* at 161. The current statute, § 5856(c), did not mandate strict compliance with the entirety of MCL 600.2912b. Under the former statute, § 5856(d), a defect in the NOI precluded tolling of the statute of limitations during the 182 day waiting period. *Id.* at 165. The current statute “focuses on compliance with only the applicable notice period in § 2912(b) such that a defective NOI tolls the statute of limitations as long as it is compliant with the notice period.” *Id.* at 165.

Relying on the language of § 2912b and the new § 5856(c), the Court held “if a plaintiff complies with the applicable notice period before commencing a medical malpractice action the statute of limitations is tolled.” *Id.* at 169. The Court found the amended statute to “clearly and unequivocally” require that a plaintiff’s NOI must comply only with the applicable notice period. *Id.* at 170. However, a plaintiff should be given the opportunity to correct a substantively defective notice through amendment, citing MCL 600.2301. *Id.* at 176.

MCL 600.2301 states:

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.

This Court established a two-pronged test to determine if § 2301 should be applied to cure a defective complaint – “first, whether a substantial right of a party is implicated and, second, whether a cure is in furtherance of justice.” *Bush, supra* at 177.

The statute of limitations effect of a prematurely filed complaint was not an issue in *Bush*, as it was in *Burton*, although the opinion did not refer to *Burton*.⁴ Comparing the pre- and post-amendment language of § 5856(d) respectively, *Bush* found the change in the language of

⁴ *Bush* distinguished *Roberts, supra* and *Boodt, supra*, both of which held that a defect in a NOI precludes tolling, on the basis that those holdings were premised on the pre-amendment language of § 5856. *Bush, supra* at 165-166.

the statute clarified that in the current statute compliance with the notice waiting period of § 2912b(1) was a prerequisite to tolling, but compliance with the substantive content requirement of § 2912b(4) was not. *Id.* at 178-179. *Bush* provides no support for an interpretation which would extend the scope of its holding to encompass tolling of a complaint which was filed prior to expiration of the notice waiting period of § 2912b(1).

Driver v Naini:

Driver held that a plaintiff is not entitled to amend an original NOI to add non-party defendants so that the amendment relates back to the original notice for purposes of the statute of limitations.⁵ *Driver, supra* at 242-243. *Bush* was “inapplicable” to the circumstances in *Driver*. *Id.* at 251-253. *Bush* 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).” *Id.* (emphasis in original). MCL 600.2301 “only applies to actions or proceedings that are *pending*.” *Id.* at 254 (emphasis in original). However, “[a]n action is not ‘pending’ if it cannot be ‘commenced’...” *Id.* citing *Bush, supra* at 195 (Markman, J., dissenting). MCL 600.2301 cannot apply where “plaintiff’s claim was already time-barred when he sent the NOI.” *Id.* *Bush* did nothing to eliminate the requirement to send every defendant an NOI during the applicable limitations period before filing a complaint. *Id.* at 254-256. *Driver* confirmed that when a plaintiff fails to strictly comply with the notice waiting period of § 2912b, his prematurely filed complaint fails to commence an action that tolls a statute of limitations. *Id.* at 256 citing *Burton, supra* at 753.

⁵ The Court’s order directed the parties to address “whether this Court’s decision in [*Bush, supra*] allows for the application of MCL 600.2301 in cases involving prematurely filed complaints under MCL 600.2912b(1), and whether [*Burton, supra*] retains any viability in light of *Bush*.” *Driver, supra* at 246, n 19. (See attached order, Ex. K).

The Court stated:

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.

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. 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. [*Id.* at 257-258 (emphasis in original).]

In *Driver*, plaintiff sent a timely NOI to the physician and clinic and, following the expiration of the notice waiting period, filed a complaint. Defendants then filed a notice of non-party fault, identifying a potential third party at fault. Plaintiff's motion to amend to add the non-party was granted, but plaintiff failed to comply with the applicable waiting period before filing an amended complaint. *Id.* at 243-244. As a result, the limitation period was not tolled and expired barring plaintiff's complaint. *Id.* at 265.

The Court clearly reaffirmed the holding in *Burton* that a complaint filed before expiration of the mandatory notice waiting period of § 2912b(1) will not act to toll the limitations period. Further, it clarified beyond doubt that *Bush* did not alter the holding in *Burton* and instead involved the effect of an NOI on tolling when the NOI failed to comply with the content requirements of § 2912b(4). *Id.* at 257-258. In contrast, the central issue in *Burton* involved the effect the "failure to comply with the *notice-waiting-period* requirements had on tolling." *Id.* In this aspect, "*Bush* aligned with *Burton's* holding" rather than casting doubt on its viability. *Id.* at 258.

Plaintiff's premature complaint was a nullity and failed to toll the statute of limitations. Because a timely complaint was not filed before the limitation period expired, dismissal with prejudice was required. *Burton, supra* at 753. The conclusion of the Court of Appeals majority that *Zwiers* remains good law and permits the use of § 2301 to determine whether plaintiff's error in prematurely filing a complaint may be corrected or ignored, directly contradicts clear precedent from this Court.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT *ZWIERS* AND MCL 600.2301 MIGHT PERMIT PLAINTIFF TO AMEND HER PREMATURELY FILED COMPLAINT, IN CONTRAVENTION OF CONTROLLING MICHIGAN SUPREME COURT PRECEDENT.

The Court of Appeals majority acknowledged that this Court's holdings in *Burton* and *Driver* required dismissal of plaintiff's lawsuit with prejudice.

As applied to the instant case, because plaintiff's premature complaint did not continue to toll the running of the limitations period, the limitations period eventually expired. After that expiration, defendants moved for summary disposition. Because the limitations period had expired, plaintiff could not refile; consequently, dismissal must have been with prejudice. [*Tyra, supra*, slip op at 7. (Ex. A)]

Our Supreme Court has, in fact, recently reaffirmed that, pursuant to *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." [*Driver, supra* at 256]. Irrespective of the language used in the relevant statutes, 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." [*Tyra, supra*, slip op at 8.]

Nonetheless, the court went on to consider and agree with plaintiff's argument that she might be permitted to amend her complaint pursuant to *Zwiers, supra*, and MCL 600.2301. *Tyra, supra*, slip op at 10. *Zwiers* in turn relied on *Bush* and concluded that § 2301 was applicable to the entire notice process, no substantial right of the defendants was affected and

resolving the matter on its merits was in the interests of justice, thus allowing plaintiff to amend the filing date of the complaint and affidavit of merit. *Id.* *Zwiers* incorrectly applied *Bush* to excuse the premature filing of a complaint. *Tyra* employed the same flawed analysis, even though at the time *Tyra* was decided, two Supreme Court decisions confirmed that compliance with the notice waiting period of § 2912b(1) was mandatory prior to commencing an action.

1. *Zwiers*' Reliance On *Bush* As The Basis For Allowing Tolling Where A Plaintiff Failed To Comply With The Notice-Waiting-Period Of MCL 600.2912b(1) Was Erroneous.

Like *Burton*, *Zwiers* involved the filing of a premature complaint which failed to initiate tolling. The trial court found that the premature filing of the complaint and affidavit of merit was insufficient to commence the action. The limitation period had subsequently expired and the court therefore granted defendant's motion for summary disposition under MCR 2.116(C)(7). On appeal, *Zwiers* recognized that *Burton*, which dealt specifically with the premature filing of a complaint, would compel the Court to affirm. "Standing alone, *Burton* does indeed call for us to affirm dismissal of plaintiff's action." *Zwiers, supra* at 44. *Burton*, however, "did not address or consider MCL 600.2301." *Id.* at 40.

Instead, *Zwiers* applied *Bush*, which analyzed the tolling effect of an NOI with defective content pursuant to MCL 600.5856(c) and MCL 600.2912b(4). *Id.* *Zwiers* incorrectly stated that *Bush* "interpreted MCL 600.2301, determining that it was implicated and applicable with respect to compliance failures under the NOI statute, MCL 600.2912b." *Id.* This was an improper characterization of *Bush*, which did not broadly consider "compliance failures." *Id.* Basing its analysis specifically on the 2004 amendment to MCL 600.5856, *Bush* concluded that the new § 5856(c) focused on compliance with the notice waiting period set forth in § 2912b. *Bush*,

supra at 161. Accordingly, the language of § 5856(c) would allow tolling in cases involving the content requirements of § 2912b(4) where the NOI was timely filed.

Driver stressed this distinction. “Indeed, *Bush* repeatedly recognized that [an] NOI must be timely filed.” *Driver, supra* at 258, n68. *Driver* listed numerous examples from *Bush* to support this conclusion, including, among others: “[T]he current statute, [MCL 600.5856(c)], makes clear that the question whether tolling applies is determined by the timeliness of the NOI.” *Id.*, citing *Bush, supra* at 161; “[T]he focus of the new [MCL 600.5856(c)] is unquestionably limited to compliance with the ‘applicable notice period.’” *Id.*, citing *Bush, supra* at 169; and “[I]f a plaintiff complies with the applicable notice period before commencing a medical malpractice action, the statute of limitations is tolled.” *Id.*, citing *Bush, supra* at 170.

In *Bush*, because this Court determined that the NOI was timely filed (and therefore could initiate tolling based on the language of § 5856(c)), the Court considered the remedial effect of MCL 600.2301. Defective NOIs could be cured pursuant to MCL 600.2301. *Bush* never specified that the same analysis was appropriate in a case where plaintiff had *not* complied with the notice waiting period. Moreover, it warned of the necessity of compliance with the notice waiting period to ensure that the NOI validly commenced the action. *Bush, supra* at 184. The relevant point of *Bush* was that if filing was accomplished in compliance with the notice waiting period, even if the content of the notice was defective it would nonetheless toll the limitations period. *Zwiers* properly identified the relevant statutory provision, § 5856(c) but ignored its specific language and the narrow holding of *Bush*. *Bush* never concluded that § 2301 applied to the notice-waiting period of § 2912b(1) to allow tolling (and indicated as much) yet *Zwiers* determined that § 2301 would apply even though the statute of limitations had admittedly

expired. *Zwiers*' reliance on *Bush* to support its conclusion was unwarranted and provided an untenable basis for the Court of Appeals' decision here.

2. *Burton And Driver Are Controlling Precedent In Cases Which Involve The Premature Filing Of A Complaint Before The Expiration Of The Applicable Statutory Notice Period.*

"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, supra* at 747. The *Burton* Court held that the Court of Appeals erred in concluding that MCL 600.5856(a) operated to toll the period of limitations. *Id.*

The issue in *Burton* is the identical issue before this Court. *Burton's* answer also answers the question here:

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.*]

In *Burton*, the plaintiff filed a complaint 115 days after providing defendants an NOI. *Id.* at 748. Defendants argued that the premature complaint failed to toll the statute of limitations and the Supreme Court agreed. *Id.* at 749, 756. The Court concluded that MCL 600.2912b "unequivocally provides that a person 'shall not' commence an action alleging medical malpractice against a health professional or health facility until the expiration of the statutory notice period." *Id.* at 752.

Burton noted that "the Legislature's use of the word 'shall' indicates a mandatory and imperative directive." *Id.*, citing *Oakland Co v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997). In other cases involving tolling during the notice period, the Court had also held that a plaintiff cannot file suit without first giving the notice required by MCL 600.2912b, including

Roberts, supra at 65, 67⁶ and *Omelenchuk v City of Warren*, 461 Mich 567, 571-572; 609 NW2d 177 (2000), overruled on other grounds by *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). “We also held that MCL 600.2912b clearly places the burden of complying with the notice of intent requirements on the plaintiff and that this clear, unambiguous statute requires full compliance with its provisions as written.” *Burton, supra* at 753, citing *Roberts, supra* at 66.

Driver considered whether the Court’s opinion in *Bush* had altered its holding in *Burton* and concluded that it had not.

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. 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 257-258. (Emphasis in original).]

Zwiers ignored these distinctions and extended the holding in *Bush* to encompass a right to tolling when the notice-waiting period had not been complied with. There was no indication in *Bush* that the Court’s analysis extended to a failure to comply with the applicable notice period and *Zwiers* was unjustified in doing so. *Driver* re-affirmed that *Burton* remained viable with respect to cases involving prematurely filed complaints under MCL 600.2912b(1). Pursuant to *Bush*, defective NOIs may be cured under MCL 600.2301 if its requirements are met. Tolling is not triggered by a prematurely filed complaint however, and if the statute of limitations has expired, dismissal with prejudice is required.

There was no indication in *Burton* that MCL 600.2301 could be used to prevent or cure the consequences of a prematurely filed complaint, based on the mandatory language of MCL

⁶ *Bush* later called into doubt the validity of *Roberts* and *Boodt*, where the holdings interpreted the language of the former statute, MCL 600.5856(d).

600.2912b(1). The new MCL 600.5856(c) confirms that the statutorily mandated notice-waiting period must be complied with, in order to commence an action.

Driver stressed the significance of plaintiff's failure to comply with the notice-waiting-period of § 2912b(3):

Moreover, the dissent overlooks the significance of *Burton*. Plaintiff failed to comply with the 91-day notice waiting period under MCL 600.2912b(3) after he sent CCA an NOI. Pursuant to *Burton*, the premature complaint failed to commence an action that tolled the statute of limitations and his claim was time-barred when the Court of Appeals issued its opinion and order reversing the circuit court's order denying CCA's motion for summary disposition and remanding the case to the circuit court for the entry of an order of summary disposition in CCA's favor. Although the dissent claims that *Burton* is inapplicable to the present case, the dissent would essentially overrule *Burton* and disregard the notice-waiting-period requirements mandated by MCL 600.2912b. Unlike the dissent, we will adhere to the plain language of MCL 600.2912b and binding precedent established in *Burton*. [*Driver, supra* at 263-264.]

Here, Ms. Tyra's claim is time-barred – it is not “pending” because it cannot be commenced. Filing a complaint 112 days after mailing an NOI to Defendants did not continue to toll the statute of limitations, which was tolled for 182 days by § 2912b upon mailing the NOI, after which it resumed running and expired on December 8, 2009. As a result, no action was ever pending which would authorize the trial court to permit an amendment under MCL 600.2301.

While acknowledging the Court's holdings in *Burton* and *Driver*, *Tyra* ignored these decisions and relied on *Zwiers*' incorrect interpretation regarding the scope of *Bush*, rather than the more recent decision in *Driver* which recognized the continued viability of *Burton* and the mandatory requirement to comply with the statutory notice period in MCL 600.2912b. *Driver, supra* at 257-258. *Tyra* acknowledged these decisions in *Burton* and *Driver* but instead chose to follow *Zwiers* and its analysis of *Bush*. *Driver* and *Burton* directly addressed the interpretation of § 2912b(1), whereas *Bush* involved a different issue, the content requirement of § 2912b(4).

Tyra was not justified in following *Zwiers*. Only the Supreme Court has the authority to overrule its prior decisions. Until this Court does so, all lower courts are bound by the prior decision and must follow it even if they believe it is wrongly decided. *Paige v City of Sterling Heights*, 476 Mich 495, 523-524; 720 NW2d 219 (2006), citing *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds by *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007), overruled on other grounds by *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455; 795 NW2d 797 (2010). The Supreme Court's holding on this issue foreclosed the lower court from deciding differently. “[S]tare decisis, provides that a decision of the majority of justices of this Court is binding upon lower courts.” *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987).

3. MCL 600.2301 Does Not Apply To Cure An NOI Which Did Not Comply With The Notice-Waiting-Period And Where The Limitations Period Has Since Expired.

Ms. Tyra is not entitled to use MCL 600.2301 and *Bush* to cure her premature complaint because *Bush* determined that § 2301 only applied to compliance failures under the NOI statute, not to timeliness. The “new § 5856(c) is unquestionably limited to compliance with the ‘applicable notice period.’” *Bush, supra* at 169. Ms. Tyra did not comply with the applicable notice period, filing her complaint after 112 days. The use of § 2301 to amend a substantially defective NOI does not extend to the facts of this case involving circumstances where the error was timeliness, rather than substance. The statute continues to require strict compliance with the notice waiting period. Here, the date on which the NOI was mailed to Defendants and the date on which the complaint was filed are set and clearly do not comply with the mandatory requirements of § 2912b(1). They are not the type of errors within the contemplation of the language of § 2301. Allowing Plaintiff to amend her complaint would render the statutory notice

waiting period a nullity. *Bush* foreclosed this possibility (“[I]f a plaintiff complies with the applicable notice period before commencing a medical malpractice action, the statute of limitations is tolled.”) *Id.* at 169. *Driver* rejected the use of § 2301 because plaintiff had not commenced an action against the defendants before the statute of limitations expired. *Driver, supra* at 253-254.

MCL 600.2301 cannot apply under these circumstances because there is no pending action which would authorize the Court to consider that statute. Even assuming the limitation period had not extinguished the “proceeding” begun by the NOI, use of § 2301 would not be appropriate. The Court cannot disregard an error or defect in the proceedings which affects the substantial rights of the parties. *Zwiers* concluded that *Bush* authorized it to invoke MCL 600.2301. However, *Zwiers* ignored the fact that *Bush* dealt with a violation or defect in the content requirements of § 2912b(4) rather than a violation of the notice-waiting period of § 2912b(1). *Driver* recognized this distinction. *Driver, supra* at 257-258.

No substantial right of a party was implicated in *Bush* because the defendants had sufficient medical experience and the ability to understand the nature of the claims being asserted, notwithstanding defects in the content requirement of the NOI. *Bush, supra* at 178. *Zwiers* failed to consider that a statute of limitations defense is a substantial right to which a defendant is entitled, when considering a violation of the notice-waiting-period. See *DeCosta v Gossage*, 486 Mich 116, 137; 782 NW2d 734 (2010) (Markman, J., dissenting) “Statutes of limitations are not procedural; rather, they ‘are substantive in nature.’” *Id.* at 138, citing *Gladych v New Family Homes, Inc.*, 468 Mich 594, 600; 664 NW2d 705 (2003). Noting the multiple purposes served by statutes of limitations, including setting forth time limits on [defendant’s] exposure to litigation, the dissent stated “[w]hile a plaintiff has a right to sue a defendant *before*

the limitations period expires, a defendant has an equivalent right not to be sued *after* the limitations period expires.” *Id.* (emphasis in original). See also *Johnson v Hurley Medical Group, PC*, 491 Mich 892, 893; 810 NW2d 273 (2012) (Young, C.J., concurring). *Driver* likewise recognized that depriving a party of its right to a statute of limitations defense would affect its “substantial rights.” *Driver*, supra at 254-255. Such an outcome is “plainly contrary to, and would not be in furtherance of, the Legislature’s intent in enacting MCL 600.2912b.” *Id.* at 255.

MCL 600.2301 cannot be used to avoid the effect of Plaintiff’s premature filing of her complaint, which is time-barred. *Zwiers* erred in extending the scope of § 2301, and the instant decision, which had the benefit of *Driver*, erred in relying on *Zwiers*.

RELIEF REQUESTED

WHEREFORE, Defendants STEVEN COHN, M.D. and WILLIAM BEAUMONT HOSPITAL respectfully request this Honorable Court to peremptorily reverse the decision of the Court of Appeals, overrule *Zwiers* and reinstate the decision of the Oakland County Circuit Court granting summary disposition to Defendants or, alternatively, grant Defendants' Application for Leave to Appeal and such other or further relief as the Court deems warranted.

Respectfully submitted,



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Dated: November 22, 2013