

STATE OF MICHIGAN  
IN THE SUPREME COURT

SUSAN FURR and WILLIAM FURR,

Supreme Court No. 149344

Plaintiffs/Appellees/Cross-Appellant,

Court of Appeals No. 310652

-vs-

Lower Court No. 10-0551-NH

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

Defendants/Appellants/Cross-Appellees.

NOTICE OF HEARING

PLAINTIFFS/CROSS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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**FILED**

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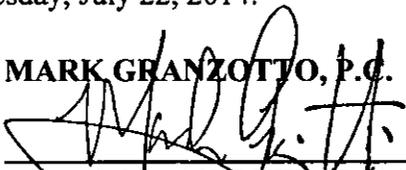
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**NOTICE OF HEARING**

To: Clerk of the Court  
Counsel of Record

PLEASE TAKE NOTICE that Plaintiffs/Cross-Appellants' Application for Leave to Appeal  
will be brought on for hearing on Tuesday, July 22, 2014.

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Dated: June 19, 2014

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**ORDER BEING APPEALED FROM AND RELIEF REQUESTED**

Plaintiff/Cross-Appellants, Susan and William Furr, seek leave to appeal from one aspect of the Michigan Court of Appeals decision dated October 24, 2013. A copy of that Opinion is attached hereto as Exhibit B. In that opinion, the panel ruled that plaintiffs' complaint was prematurely filed. In reaching this result, the panel rejected plaintiffs' argument based on MCL 600.2912b(9) that their complaint was not filed prematurely. Opinion (Exhibit B), at 11-12.

The panel ruled in its October 24, 2013 opinion that, based on the Court of Appeals earlier decision in *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208; 840 NW2d 730 (2013), defendants' request for summary disposition based on a prematurely filed complaint had to be denied. The panel, however, indicated that it considered *Tyra* to be wrongly decided and it requested that the full court vote to convene a special panel under MCR 7.215(J).

The Court of Appeals agreed to present the case to a special panel. That special panel issued a decision on April 10, 2014, affirming the result reached in *Tyra*.

On May 22, 2014, defendants filed an application in this Court seeking leave to appeal from the April 10, 2014 ruling.

Plaintiff/Cross-Appellants, request that, in the event the Court grants leave to consider the special panel's April 10, 2014 decision, this Court also grant leave to consider the preliminary legal question presented in this cross-application.

**STATEMENT REGARDING QUESTIONS PRESENTED**

- I. IN THE EVENT THAT THIS COURT REVIEWS THE SPECIAL PANEL'S APRIL 10, 2014 DECISION, SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER PLAINTIFFS' COMPLAINT WAS NOT FILED PREMATURELY UNDER MCL 600.2912b(9)?

Plaintiffs/Cross-Appellants say "Yes".

Defendants/Cross-Appellees say "No".

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This is a medical malpractice action arising out of defendants' professional negligence which occurred during a surgical procedure, a total thyroidectomy, performed on plaintiff, Susan Furr.

On April 4, 2010, counsel for Susan and William Furr mailed a notice of intent to sue to two physicians, Dr. Michael McLeod and Dr. Tara Mancl, and several health facilities. That notice of intent described how the defendants breached the standard of care and how that breach caused Mrs. Furr's injuries.

On September 7, 2010, 156 days after defendants received the notice of intent, counsel for the defendants mailed a written response to the notice of intent. A copy of that response is attached as Exhibit A. That response began by asserting that the plaintiffs' notice of intent did not fully comply with MCL 600.2912b(4). As a result, defendants' response maintained that "any action filed on behalf of claimant may be barred by the statute of limitations. Response (Exhibit A), at 1.

The defendants' response to the notice of intent went on to assert that the two physicians named in that notice fully complied with the applicable standard of care in all respects. *Id.* at 2-3. The notice further indicated that the institutional defendants identified in the notice of intent also complied with the standard of care. *Id.* at 4. Finally, the response denied that any injuries plaintiffs may have sustained were proximately caused by professional negligence attributable to the doctors and health facilities identified in the notice of intent. *Id.*, at 4.

The response to the notice of intent prepared by defense counsel contained a post-script. That post-script stated in bold print:

**If necessary, please serve any summons and complaint which you may file on me instead of Dr. McLeod or Dr. Mancl. I will accept service for both of them as well as for MSU-KCMS and Borgess. Thank you for your courtesy in that**

regard.

*Id.*, at 4.

Mr. and Mrs. Furr filed this action in the Kalamazoo County Circuit Court on September 30, 2010. Defendants filed an answer to the complaint on November 9, 2010.

Several weeks later, defendants filed a motion for summary disposition. In that motion, defendants contended that the plaintiffs failed to comply with the 182 waiting period called for by MCL 600.2912b, because they filed their complaint 181 days after the mailing of their notice of intent. Based on that argument, defendants contended that plaintiffs' case should be dismissed with prejudice.

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

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

In the Court of Appeals, plaintiffs made several arguments as to why the circuit court's decision denying summary disposition should be affirmed. Among these arguments was that plaintiff's complaint was not prematurely filed based on the language contained in MCL 600.2912b(9).

On October 24, 2013, a three judge panel of the Court of Appeals reluctantly affirmed the

denial of summary disposition. A copy of the October 24, 2013 opinion is attached as Exhibit B. The panel reached that result only because it was compelled to follow the Court's earlier opinion in *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208; 840 NW2d 730 (2013). *Tyra* had held that a medical malpractice complaint filed less than 182 days after the mailing of a notice of intent was not subject to dismissal. In its October 24, 2013 opinion, the panel expressed its disagreement with the decision in *Tyra*, which it was required to follow under MCR 7.215(J). The panel majority sought to convene a special panel under the procedures set out in MCR 7.215(J), to resolve the question of whether *Tyra* was properly denied..

In the course of its October 24, 2013 opinion, the panel rejected plaintiffs' argument that their complaint was not prematurely filed on the basis of MCL 600.2912b(9). Opinion (Exhibit B), at 11-12.

On November 20, 2013, the Court of Appeals issued an order convening a special panel. The opinion of the special panel was released on April 10, 2014. A copy of that opinion is attached as Exhibit C. The special panel ruled 4-3 that the circuit court did not err in denying defendants' motion for summary disposition.

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

## ARGUMENT

**I. IN THE EVENT THE COURT DECIDES TO REVIEW THE SPECIAL PANEL'S APRIL 10, 2014 RULING, THE COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER THE PRELIMINARY QUESTION OF WHETHER DEFENDANTS ARE NOT ENTITLED TO SUMMARY DISPOSITION BECAUSE PLAINTIFFS' CAUSE OF ACTION WAS NOT FILED PREMATURELY.**

Defendants have argued throughout this appeal that plaintiffs' cause of action is subject to dismissal because it was filed prematurely. They contend that, based on MCL 600.2912b(1), plaintiffs had to wait 182 days after mailing their notice of intent before filing a complaint. Based on the 182 day period set out in §2912b(1), defendants contend that plaintiffs had to wait until October 1, 2010 before they filed this case. Because plaintiffs instituted this action on September 30, 2010, one day before the 182 day period expired, defendants claim that summary disposition is in order under this Court's 2005 decision in *Burton v Reed City Hospital*, 471 Mich 745; 691 NW2d 424 (2005). Thus, the entirety of defendants' argument is predicated on its position that plaintiffs had to wait 182 days after the mailing of their notice of intent to file this action.

The question of the appropriate judicial response to a medical malpractice complaint filed prematurely under §2912b was what occupied the original three judge panel in its October 24, 2013, opinion. This question is also the sole subject of the April 10, 2014 special panel decision.

There is, however, a preliminary question presented in this case. Before addressing the question of what a court is to do when presented with a prematurely medical malpractice action, the Court should consider whether plaintiffs' cause of action was, in fact, prematurely filed. This question presents an issue of first impression requiring construction of a subsection of the notice of intent statute, MCL 600.2912b(9), which has never before been addressed by this Court.

MCL 600.2912b(9) contains an exception to the 182 day waiting period called for by the notice of intent statute. That subsection specifies:

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 underlying purpose of the notice of intent requirement and the mandatory waiting period that follows the mailing of such a notice is to “promote[] settlement without the need for formal litigation.” *Bush v Shabahang*, 484 Mich 156, 174; 772 NW2d 272 (2009); *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997). MCL 600.2912b(9) is consistent with this underlying purpose. That subsection recognizes that where a defendant conveys in writing that there will be no settlement of the case within the prescribed waiting period, the plaintiff may file his/her malpractice complaint immediately.

In this case, the defendants’ September 7, 2010 response to the plaintiffs’ notice of intent represented written notice the defendants had no intention of reaching a resolution of the case during the 182 day waiting period. Several aspects of defendants’ response to the notice of intent make this clear.

First, that notice began with a section labeled “General Reservations of Defenses”, in which defendants notified plaintiffs of certain defenses that they would be claiming. Response (Exhibit A), at 1. This section of the response reserved for a later time the defenses that plaintiffs had not complied with the notice of intent statute and it indicated that plaintiffs’ claim, once filed, would be barred by the statute of limitations. Thus, the first section of defendants’ response to the notice of

intent indicated, “[h]aving failed to submit a valid Notice of Intent, *any action filed on behalf of claimant may be barred by the statute of limitations.*” *Id.* (emphasis added).

What is significant about the first section of defendants’ September 7, 2010 response to plaintiffs’ notice of intent is that the “defenses” it set out were not “defenses” to the contents of the notice of intent. They were defenses - failure to comply with §2912b(4) and failure to comply with the statute of limitations - that would be available to the defendants once suit was instituted.<sup>1</sup> The defenses listed in the first section of defendants’ response, therefore, fully anticipated that, after receiving the September 7, 2010 response, plaintiffs would be filing a case alleging medical malpractice.

The second section of the defendants’ September 7, 2010 response was titled “Factual Basis for the Defense.” That section began with a declarative sentence, “Respondents complied with the standard of care in this matter.” *Id.* at 2. Defendants elaborated on this statement in a later section of their response, in which they categorically denied that the two individual defendants, Dr. McLeod and Dr. Mancl, were professionally negligent in any way in connection with the total thyroidectomy that they performed on Ms. Furr:

Dr. McLeod and Dr. Mancl complied with the standards of care applicable to them as is evidenced in the dictated Operative Report. They performed the total thyroidectomy only after the patient had been informed of the potential risks and complications of the procedure, including possible injury to the laryngeal nerve and parathyroid gland. After being informed of the indications, risks and benefits of the procedure, Ms. Furr consented to the total thyroidectomy.

*Dr. McLeod and Dr. Mancl reasonably and appropriately performed the total thyroidectomy, using the appropriate technique and instruments. They reasonably*

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<sup>1</sup>This point is reinforced by the fact that, when defendants ultimately filed their answer to plaintiffs’ complaint, the defenses that were originally inserted into the September 2010 response to the notice of intent were included as affirmative defenses.

dealt with the significant scarring and fibrotic tissue around the thyroid gland by identifying and making all reasonable attempts to protect the laryngeal nerve during the procedure. *The physicians complied with the standard of care by using an appropriate incision, careful retraction, and equipment to allow the best possible visualization of the anatomy.* Additionally, Dr. McLeod and Dr. Mancl complied with the standard of care for this procedure by utilizing an appropriate scalpel for dissection. They also complied with the standard of care by recognizing the injury to the laryngeal nerve intraoperatively, and appropriately repairing same before completion of the procedure. Further, the standard of care was complied with by obtaining reasonable and timely consults from specialists regarding the sequelae of the laryngeal nerve injury.

*Id.* at 3 (emphasis added)..

Defendants' notice also went on to deny that the negligence of Dr. McLeod or Dr. Mancl represented a proximate cause of plaintiffs' injuries. *Id.* at 4.

After categorically denying all responsibility for Ms. Furr's injuries, the September 7, 2010 response ended with a bold letter request as to how plaintiffs' counsel should proceed when suit was filed:

**If necessary, please serve any summons and complaint which you may file on me instead of Dr. McLeod or Dr. Mancl. I will accept service for both of them as well as for MSU-KCMS and Borgess. Thank you for your courtesy in that regard.**

*Id.* at 4.

The contents of defendants' response, when considered as a whole, clearly communicated the fact that defendants "did not intend to settle the claim within the applicable notice period." Defendants' response was filed on September 7, 2010, 156 days after the mailing of the notice of intent. Thus, at the time the response was mailed, only 26 days remained in the 182 day waiting period called for by §2912b(1). Moreover, there is nothing in the defendants' response suggesting that there could be further negotiations to resolve the case during the few days that remained in the

mandatory waiting period.

More importantly, the contents of the response made it crystal clear that defendants had no intent of resolving the case within the notice period. The response contained an unambiguous rejection of two essential elements of plaintiffs' claim - negligence and proximate cause. Moreover, defendants' response explicitly looked ahead to the filing of a malpractice action - not negotiation for the settlement of the claim before suit it was filed - in two significant respects.

First, as noted previously, the response went beyond the requirements set out in MCR 600.2912b(7), by expressly raising defenses that would be available to defendants only *after* plaintiffs filed suit. The same is true with respect to the postscript that ended the response. That postscript consisted of a request that, when plaintiff's counsel filed suit, service be effectuated by sending the complaint to counsel signing the response. Compliance with the response requirements of §2912b(7) did not require this postscript with respect to how service of process was to be effectuated when plaintiffs filed their complaint. But, this postscript, by anticipating what would be done once suit was filed, represented an additional indication that defendants had no intention of settling this case before the expiration of the 182 day notice period.

Under §2912b(9), when a defendant "informs" a claimant who has mailed a notice of intent that he/she "does not intend to settle the claim within the applicable notice period," the claimant may immediately proceed to suit. The statute provides no further illumination as to the meaning of the word "informs" in this context. The Court of Appeals in its October 24, 2013, used the following dictionary definition of the word: "give or impart knowledge of a fact or circumstance." Opinion (Exhibit B), at 12. Plaintiffs are willing to accept this definition. Taken as a whole, it is difficult to understand how the defendants' September 7, 2010 response did not "give or impart knowledge"

of the fact that defendants did *not* “intend to settle the claim within the applicable notice period . . .”

The Court of Appeals concluded, however, that the response contained only the *implication* that defendants did not intend to settle. *Id.* There was no *implication* of the defendants’ intent imbedded in the September 7, 2010 response; defendants’ *intent* was, instead, clearly conveyed - they had no intent of resolving the case in the 26 days that remained in the mandatory waiting period at the time that response was written.

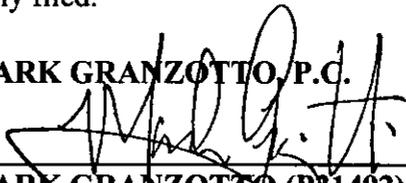
Outside of the panel’s brief and unsatisfying discussion of the implications of §2912b(9), no Michigan court has ever construed this subsection of the notice of intent statute. This novel preliminary question addressing whether plaintiffs’ complaint was prematurely filed is of equal if not greater significance to the jurisprudence of this statute than the issue presented in defendants’ application for leave to appeal.

Therefore, in the event the Court grants leave to consider what a court is to do with a medical malpractice action filed prematurely, the Court should first consider whether the complaint in this case was or was not filed prematurely.

**RELIEF REQUESTED**

Based on the foregoing, plaintiffs/cross appellants, Susan and William Furr, respectfully request that, in the event that this Court decides to review the special panel's April 10, 2014 decision, the Court also grant leave to appeal to consider the legal question presented by §2912b(9), *i.e.* whether plaintiffs' complaint was prematurely filed.

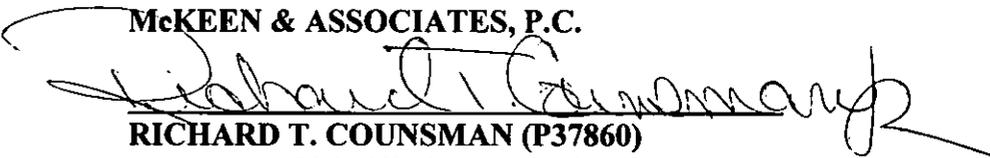
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