HEALTH LAW

MELISSA MARKEY†

I. NOTICE OF INTENT

A. Bush v. Shabahang[1]

"Timing is everything" is true in many things in life, not the least of which (as lest in Michigan) is compliance with the timing requirements related to medical malpractice litigation. In *Bush v. Shabahang*, the Michigan Supreme Court considered (1) whether a defective notice of intent tolled the running of the statute of limitations; (2) whether dismissal was an appropriate action if the notice of intent (NOI) was defective; and (3) whether, and under what circumstances, a plaintiff can file a complaint during the authorized 154-day waiting period when defendants fail to respond, rather than waiting for the running of the entire 182-day NOI period.[2] The court held that, following amendments to the statute, a defective NOI is sufficient to toll the statute of limitations, so long as a plaintiff makes a "good faith effort" to comply

† Attorney, Hall, Render, Killian, Heath & Lyman, P.L.L.C. B.A., 1984, St. Louis University; J.D. *summa cum laude*, 1991, St. Louis University.

1. Bush v. Shabahang, 484 Mich. 156 (2009).

2. *Id.* at 160, 173.

with the notice requirements.[3] Further, the court held that permitting amendments to defective notices, rather than dismissing the case, best served public policy.[4] Finally, the court held that where a defendant fails to make a good faith effort to reply to the NOI, the complaint may be filed in the shorter 154-day period.[5]

On August 7, 2003, the plaintiff, Gary Bush, underwent surgery to repair an aortic aneurism and, according to the complaint, suffered complications related to the laceration of the aneurism during the initial surgical incision.[6] As a result, Mr. Bush lost the ability to lead an independent life.[7] Mr. Bush filed an NOI to sue just days before the expiration of the statute of limitations, and filed the complaint 175 days later.[8] The defendants filed motions for summary disposition, alleging that the complaint was not timely filed and that, because the NOI was defective, it failed to toll the statute of limitations.[9]

Under Michigan law, an individual must file a NOI at least 182 days before a medical malpractice complaint is filed, but before the running of the statute of limitations.[10] The NOI must contain:

> (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 that the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

---

3. *Id.* at 161.
4. *Id.* at 180-81.
5. *Id.* at 161.
6. *Id.* at 161-62.
7. *Bush*, 484 Mich. at 162.
8. *Id.*
9. *Id.*
10. MICH. COMP. LAWS ANN. § 600.2912b(1) (West 2000).

> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.[11]

Once filed, the NOI tolls the statute of limitations.[12] Typically, a complaint may not be filed until 182-days after the NOI is given to the provider.[13] The provider has 154 days in which to respond to each of the elements of the NOI.[14] If the plaintiff "does not receive the written response required . . ." under the statute within the 154-day period, the plaintiff may file the complaint without waiting the entire 182 days. [15]

In analyzing the *Bush* case, the Michigan Supreme Court noted that prior cases held that a defective NOI failed to toll the statute of limitations.[16] However, since those cases had been decided, the Legislature had amended the applicable statutes, and the court took the view that any amendment of legislation must be considered "either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute."[17]

The court's determination of whether a defective NOI tolled the statute of limitations hinged on the intersection of two statutory provisions:[18] the provision relating to the tolling of statutes of limitation in general[19] and the provision requiring notice of intent in medical malpractice cases.[20]

Before the tolling statute was amended in 2004, it read in pertinent part:

> The statutes of limitation or repose are tolled [i]f, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days remaining in the applicable notice period after the date notice is given" in compliance with section 2912b.[21]

---

11. MICH. COMP. LAWS ANN. § 600.2912b(3)-(4).
12. MICH. COMP. LAWS ANN. § 600.5856(c) (West 2000).
13. MICH. COMP. LAWS ANN. § 600.2912b(1).
14. MICH. COMP. LAWS ANN. § 600.2912b(7).
15. MICH. COMP. LAWS ANN. § 600.2912b(8).
16. Roberts v. Mecosta Cnty. Gen. Hosp., 466 Mich. 57, 59 (2002); Boodt v. Borgess Med. Ctr., 481 Mich. 558, 564 (2008).
17. *Bush*, 484 Mich. at 167 (citing Lawrence Baking Co. v. Unemployment Comp. Comm'n, 308 Mich. 198, 205 (1999)).
18. *Id.* at 166.
19. *See* MICH. COMP. LAWS ANN. § 600.5856(c).
20. *See* MICH. COMP. LAWS ANN. § 600.2912b.
21. MICH. COMP. LAWS ANN. § 600.5856(d) (2000) (amended 2004).

Following amendment, the tolling statute reads: "The statutes of limitation or repose are tolled in any of the following circumstances: . . . 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 . . . ."[22]

In the court's view, this revision shifted the focus of the provision from requiring compliance with the entirety of section 2912b to requiring compliance only with the "applicable notice period" reference.[23] Therefore, since the NOI in this case was timely filed, albeit, arguably, with defects, the statute of limitation had been successfully tolled.[24]

The court next focused on the proper response to a defective NOI.[25] While the statute prohibits filing a malpractice claim without filing a NOI, it does not expressly address the consequences of a defective NOI.[26] In attempting to discern the intent of the Legislature, the court found it significant that the Legislature had expressly rejected a mandatory dismissal provision when enacting the statute.[27] Because the purpose of the statute was to encourage settlement, the court determined that the best way to accomplish that purpose would be to permit correction of any defects in the NOI.[28] This approach, the court stated, furthers the legislative intent of a fair, balanced malpractice system.[29] Additionally, this aligns the malpractice process with section 2301 of the Revised Judicature Act, which permits amendment of pleadings "for the furtherance of justice" and permits errors to be disregarded where such errors "do not affect the substantial rights of the parties."[30]

As applied to the immediate case, the court stated:

> Defendants who receive these notices are sophisticated health professionals with extensive medical background and training . . . . A defendant who has enough medical expertise to opine in his or her own defense certainly has the ability to understand the nature of the claims being asserted against him or her even in the presence of defects in the NOI. Accordingly, we conclude that no substantial right of a health care provider is implicated. Further, we hold that the second prong of the test, which requires

22. MICH. COMP. LAWS ANN. § 600.5856(c).
23. *Bush,* 484 Mich. at 169.
24. *Id.* at 170.
25. *Id.*
26. *Id.* at 172.
27. *Id.* at 173.
28. *Id.* at 174-75.
29. *Bush,* 484 Mich. at 175.
30. *Id.* at 177 (quoting MICH. COMP. LAWS ANN. § 600.2301 (West 2000)).

> that the cure be in furtherance of justice, is satisfied when a party makes a good-faith attempt to comply with [the NOI requirements]. . . .[31]

Thus, because the plaintiff's NOI was, for the most part, sufficient, the court allowed the plaintiff to cure the defects.[32] However, when the same question was addressed for the healthcare providers, the court was not as generous, and dismissed the response, stating that it was nothing more than a general denial.[33] The court appeared to view the number of pages of the plaintiff's NOI as a proxy for good faith, noting that the NOI was 13 pages, while the surgeon's response was only one page.[34] The court stated:

> The purpose of the NOI waiting period is to provide a cost-saving method to resolve meritorious claims. If a defendant does not wish to use that process, the plaintiff is entitled to accelerate the filing of the complaint. A defendant can either advise the plaintiff of the decision to waive or the defendant may do nothing at all, either of which triggers the shortened waiting period. However, we cannot allow a defendant to so flagrantly disregard the process and fail to make a good-faith attempt to comply, yet still take advantage of the full waiting period.[35]

Justice Markman, in dissent, noted that while the majority focused on the change in Section 5856, it disregarded the remaining provisions.[36] For example, the obligation of a health care provider to respond under Section 2912b only arises after the claimant in the case has given the health care professional a written notice under the same section.[37] The statute requires that the written notice contain certain specific information, and the tolling period can only begin if the notice meets statutory requirements.[38] Given that the claimant's NOI failed to state a standard of care for certain of the defendants, at least with respect to those defendants, the statute of limitations was not tolled, and thus, the complaint was not timely filed.[39] Further, because the tolling statute is

31. *Id.* at 178.
32. *Id.* at 180.
33. *Id.* at 183-84.
34. *See id.* at 178, 182.
35. *Bush*, 484 Mich. at 183-84.
36. *Id.* at 190-91 (Markman, J., dissenting).
37. *Id.* at 192 (Markman, J., dissenting).
38. *Id.* (Markman, J., dissenting).
39. *Id.* at 192-93 (Markman, J., dissenting).

calibrated solely on the notice period, if the notice does not meet statutory requirements, the notice period never begins and the tolling statute is not triggered.[40]

With respect to the ability of a claimant to amend the NOI to cure defects, Justice Markman pointed out that the statutory provision relied on by the majority addressed the ability of the courts to permit litigants to cure defects in a *pending* action or proceeding, but the Section 2912b notice process is a pre-condition to filing suit.[41] Therefore, Justice Markman noted, section 2301 of the Revised Judicature Act was inapplicable in the current case.[42]

Justice Markman further took issue with the majority's assumption that mistakes on the part of the claimant can be excused, and that defendants, by virtue of their professional training, can "fill the gaps" left by the claimant's defective notice. Noting that precedent had established that the NOI must be responsive to the statutory requirements, and as specific as possible given the known information at the time of the NOI, the new standard proposed by the majority puts the defendant in the position of attempting to fill in the gaps of the NOI.[43]

B. Potential Impact and Reflections

The dissent may have the stronger analysis. The amendment by the Legislature was, at best, ambiguous. The change may have been intended to clarify or simplify interpretation, rather than to work a substantive change. It is logical that to cure defects in proceedings, the proceedings must have been commenced. Indeed, given the fact that a compliant NOI is required before commencing a court case,[44] it is not clear that the tolling statute properly contributes to the analysis. At first blush, the *Bush* decision may appear to advance the public policy goals of the statute, which may indeed carry out the intentions of the legislature. However, the majority's position risks a rash of poorly-prepared, incomplete NOIs with which defendants are supposed to somehow "complete" the plaintiff's theory of the case when drafting responses.[45] Rather than leading to increased certainty and encouraging early

40. *Id.* (Markman, J., dissenting).

41. *Bush*, 484 Mich. at 194-95 (Markman, J., dissenting).

42. *Id.* at 198 (Markman, J., dissenting).

43. *Id.*

44. *See* MICH. COMP. LAWS ANN. § 600.2912b.

45. Markman, J. noted the change from rigid compliance with § 600.2912b to the majority's subjective "fill the gaps" approach to compliance with the NOI requirement. *Bush*, 484 Mich. at 198 (Markman, J., dissenting).

settlement of meritorious cases, this case may simply engender even more confusion.

One of the factors the majority apparently relied on in reaching its conclusion is that the NOI is required early in the litigation phase, and that claimants may not have all the information needed.[46] However, the majority fails to recognize that under Michigan law, patients are permitted to request their records from any healthcare provider, at any time, for any reason or no reason, and the healthcare provider is required, with only very narrow exceptions, to promptly provide those records.[47] Therefore, there is no reason for the claimant to suffer from any lack of knowledge regarding the NOI.

The majority also failed to consider the larger consequences of its holding that a defective NOI tolls the statute of limitations. Following the *Bush* decision, defendants must now attempt to "fill in the gaps" of the defective NOI and provide a specific and detailed response that meets all of the statutory requirements. Because medical malpractice defendants are trained in medicine, according to the *Bush* majority, they must also be able to anticipate the claimants' case and potentially suggest additional claims in the defendants' detailed response, or simply remain silent and accept a shorter tolling period. This essentially authorizes a fishing expedition by claimants and truly places defendants between the proverbial rock and hard place. Further, even clearly defective NOIs must now receive a complete and detailed response, lest the courts find that the defects in the NOI were not fatal. Finally, as Justice Markman states in his dissent, the creation of a "good faith" requirement merely increases uncertainty, which tends to increase, rather than decrease, litigation.[48]

II. "CARE" HAS MANY MEANINGS

A. In re Geror[49]

Jennifer Geror is a disabled individual.[50] Her father alleged that decisions made by Ms. Geror's guardian were adversely affecting her health.[51] An attorney was retained to evaluate these allegations, and the attorney's fees were charged to Farm Bureau General Insurance

46. *Id.* at 178.
47. MICH. COMP. LAWS ANN. § 333.26265 (West 2004).
48. *See Bush*, 484 Mich. at 198 (Markman, J., dissenting).
49. *In re Geror*, 286 Mich. App. 132 (2009).
50. *Id.* at 134.
51. *Id.* at 136.

Company (Farm Bureau) by the Probate Court.[52] Farm Bureau appealed, arguing that the Probate Court did not have jurisdiction to order the payment of the fees.[53]

The court of appeals agreed with Farm Bureau that the Probate Court is a court of limited jurisdiction and that appointment of guardians for adult developmentally disabled individuals is governed by the Mental Health Code, which does not expressly authorize charging third parties for attorney fees.[54] The appeals court pointed out that the instant action is properly considered an analysis of attorneys' fees under an insurance contract, and that under Michigan law[55] the Probate Court has jurisdiction over contract actions ". . . by or against an estate, trust or ward. . . ."[56]

Farm Bureau argued that the attorney's fees were not "allowable expenses" under Michigan's No-Fault Insurance Act.[57] The court noted that the purpose of the No-Fault Insurance Act is remedial, and therefore the law should be liberally construed in favor of those intended to be benefitted by it.[58] "Allowable expenses" include ". . . all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."[59] Thus, allowable expenses are not limited to medical expenses, and any expenses reasonably necessary for the care of an injured individual under the No-Fault Insurance Act may be charged.[60] Even though the attorney was not acting as Ms. Geror's guardian, the attorney's acts were directly related to ensuring that she received proper care and ascertaining who could make care-related decisions for her in the future.[61] Thus, the court held that the attorney's services were directly related to the care of an injured individual and chargeable to the insurance company.[62]

---

52. *See id.* at 133.

53. *Id.*

54. *Id.* at 134.

55. MICH. COMP. LAWS ANN. § 700.1301(1)(i) (West 2000).

56. *Geror*, 286 Mich. App. at 134 (quoting *In re* Shilds Estate, 254 Mich. App. 367, 369 (2002)).

57. *Id.* at 134.

58. *Id.*

59. *Id.* at 135 (quoting Sprague v. Farmers Ins. Exch., 251 Mich. App. 260, 267 (2002)).

60. *Id.*

61. *Id.* at 136.

62. *Geror*, 286 Mich. App. at 136.

B. Potential Impact and Reflections

Individuals who have been severely impacted by a traffic-related crash require many different types of support and care. Among these is the need to rely on professionals, whether medical, legal, or otherwise, to evaluate the care provided. It may be helpful for healthcare providers to remember that "allowable expenses" under the No-Fault Insurance Act may include costs related to non-medical components of a patient's care.

III. UNDERSTAND THE CONTRACT BEFORE YOU SIGN IT

A. Holland v. Trinity Health Care Corp.[63]

Ms. Holland, an uninsured individual, sought care from one of the hospitals operated by Trinity Health Care Corporation.[64] The hospital required Ms. Holland to sign an agreement, promising to pay the hospital's "usual and customary charges."[65] The hospital issued a bill for undiscounted "Charge Master" rates.[66] Plaintiff sued, seeking a ruling that "usual and customary charges" referred to the discounted charges most commonly charged to insured individuals.[67] In a case of first impression in Michigan, the appeals court took note of a California court case which was factually on point.[68] The California court noted that hospitals charge all individuals Charge Master prices.[69] However, discounted payments may be accepted in certain situations, such as for insured patients.[70] Evaluation of other cases led to the same conclusion.[71]

B. Potential Impact and Reflections

The phrase "usual and customary charges" can be viewed by some as ambiguous, and has been the subject of a number of cases.[72] While the court of appeals agreed with the hospital that "usual and customary charges" referred to the Charge Master rates,[73] healthcare providers

63. Holland v. Trinity Health Care Corp., 287 Mich. App. 524 (2010).
64. *Id.* at 525.
65. *Id.*
66. *Id.* at 526.
67. *Id.* at 525-26.
68. *Id.* at 529-30.
69. *Holland*, 287 Mich. App. at 530 (quoting DiCarlo v. St. Mary Hosp., 530 F.3d 255, 263 (2008)).
70. *Id.*
71. *Id.* at 532-36.
72. *See id.* at 528.
73. *Id.* at 525.

should recognize that this is an area of possible contention, and consider whether it is advisable to clarify the language in their agreements.

IV. BAD FACTS, BAD LAW?

A. Lee v. Detroit Medical Center[74]

The *Lee* case involves the murder of four-year old Rufus Young, Jr., who had previously been removed from the home of his biological family due to neglect.[75] While Rufus did well at his first foster home, he began demonstrating "failure to thrive" when he went to another foster family.[76] When seen by his family physician, further evaluation was recommended, and Rufus presented at Children's Hospital for a second opinion.[77] Dr. Truong, then a first-year resident, examined Rufus and noted in the medical record "multiple bruising suggesting history of abuse."[78] The attending physician, Dr. Rao, signed off on the medical record.[79] Neither physician reported possible abuse to Child Protective Services.[80] Rufus was seen by at least two other physicians before he was found dead after spending the day with his foster father.[81] The autopsy demonstrated at least 11 blows to the head and many blows to the body.[82] The cause of death was cerebral edema as a result of brain trauma.[83] The foster father confessed to killing Rufus.[84] None of the physicians who saw Rufus in the months prior to his death reported possible abuse to Child Protective Services.[85]

Under Michigan law, individuals who are likely to have extensive contact with children, including physicians, nurses, EMTs, social workers, teachers, clergy and others, are required by law to report to state officials any time the individual has "reasonable cause to suspect child abuse or neglect."[86] The term "child abuse" includes:

---

74. Lee v. Detroit Med. Ctr., 285 Mich. App. 51 (2009).
75. *Id.* at 54.
76. *Id.* at 55.
77. *Id.* at 55-56.
78. *Id.* at 56.
79. *Id.*
80. *Lee*, 285 Mich. App. at 56.
81. *Id.* at 57.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 56-57.
86. MICH. COMP. LAWS ANN. § 722.623(1)(a) (West 2002).

> [H]arm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, teacher's aide, or a member of the clergy.[87]

If an individual who is required to report child abuse fails to do so, the individual is civilly liable for proximately caused damages and guilty of a misdemeanor punishable by fine or imprisonment.[88]

The lawsuit was brought by Rufus' sister, as his personal representative, and alleged that the defendants had breached their statutory duty to report suspected child abuse and neglect.[89] The defendants argued that the proper cause of action sounded in malpractice, while the corporate defendants separately argued that claims of vicarious liability cannot proceed in a case where the statute underlying the cause of action references only individual liability.[90]

The court disagreed with both arguments of the defendants.[91] The court found that although the examination, which led to suspicions of abuse, was conducted in the course of a professional relationship, this did not convert the claim into a malpractice action.[92] Rather, the physicians were liable under the statute to the same extent as non-professionals with a duty to report.[93] The court also stated that medical malpractice cases are characterized by the need for expert testimony.[94] If expert testimony is not required to decide the case, the cause does not sound in medical malpractice.[95] This is true even if the claim arose within the context of a professional relationship.[96]

Defendants argued that their decision not to report was based on their professional judgment that the cause of Rufus' problems and marks seen on Rufus' skin were due to skin disorders, not bruises.[97] However, the court of appeals found that this position was undermined by the fact that the resident had noted multiple bruises that indicated abuse in the

87. MICH. COMP. LAWS ANN. § 722.622(f) (West 2002).
88. MICH. COMP. LAWS ANN. § 722.633(1), (2) (1985).
89. *Lee*, 285 Mich. App. at 57.
90. *Id.* at 58.
91. *Id.* at 58, 65.
92. *Id.* at 62.
93. *Id.* at 62-64.
94. *Id.* at 61.
95. *Lee*, 285 Mich. App. at 61-62.
96. *Id.*
97. *See id.* at 55-56, 62.

medical record,[98] and the attending physician did not indicate disagreement.[99] The court also found that non-medical individuals have a mandatory reporting obligation and that, therefore, all mandatory reporters should be held to the same standard.[100] Further, the court noted that the statute permits little discretion in deciding whether to report; rather, reports are mandated if the reporter has "reasonable cause" to believe abuse or neglect exists.[101] The professional's belief that the injuries noted are not due to abuse is an insufficient excuse to not report.[102] Ultimately, the court of appeals held that the hospital could be vicariously liable for the failure to report, stating that there was no indication in the statute that the Legislature intended to excuse employers from vicarious liability in the abuse and neglect statute.[103] Further, the court of appeals reasoned, holding employers liable would further the purpose of the statute to protect at-risk children.[104]

B. Potential Impact and Reflections

This case demonstrates that the axiom "bad facts lead to bad law" remains valid even today. It also demonstrates the risk that courts run when they fail to narrowly focus on the question presented. Clearly, an abuse report should have been made. The resident noted in the medical record that Rufus, who presented with a new onset of failure to thrive, had many bruises indicating abuse.[105] The attending physician did not indicate any disagreement with this assessment at the time of examination.[106] His growth had slowed, after having improved in the prior foster home.[107] Even under a professional evaluation, it would seem there was reason to suspect abuse.

Physicians and healthcare providers evaluate patients through the prism of their knowledge and training. Asking healthcare providers to disregard knowledge and training is just as likely to harm at-risk children as to help. Healthcare providers look for patterns of injury, injuries which are not consistent with the story provided by the caregiver, and injuries in various stages of healing. To hold that healthcare

98. *Id.* at 56.
99. *Id.*
100. *Id.* at 62.
101. *Lee*, 285 Mich. App. at 62.
102. *Id.* at 64.
103. *Id.* at 67-68.
104. *Id.*
105. *Id.* at 56.
106. *Id.*
107. *Lee*, 285 Mich. App. at 55-56.

professionals should disregard their training in evaluating patients and in making the determination that a child may be suffering abuse removes an extra layer of protection for children. If professional judgment cannot be applied, inappropriate reports will be made. For example, as the court of appeals in *Lee* noted, some children suffer from diseases, such as osteogenesis imperfecta, often known as "brittle bone disease," that cause injuries which, in healthy children, could indicate abuse;[108] the physician should be able to take that health condition into account. It further poses the risk noted in the dissent that physicians will over-report innocuous bruising, further overloading the resources of Child Protective Services, and potentially delaying intervention in a child who is at significant risk.[109]

The problem in this case is not the fact that the physicians in question exercised professional judgment in not reporting Rufus' case; it is, rather, that the physicians failed to report even when, using reasonable professional judgment, there was cause to suspect abuse.

108. *See id.* at 64.
109. *See id.* at 71 (O'Connell, J., dissenting).