TORTS

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I. INTRODUCTION

This *Survey* on torts is unfortunately a brief subject as of late. The Michigan Supreme Court has eradicated many causes of action in this area. Products liability is virtually non-existent. Nearly every theory of premises liability is no longer available to injury victims. Business owners have been granted immunity from suit. They are no longer required to repair defects, put salt on ice or make aisle ways safe for shoppers. This *Survey* will show that more victims' rights have been chipped away via appellate and Michigan Supreme Court decisions during the 2008 *Survey* period, from May 23, 2007 to July 30, 2008. While there have been some favorable rulings, for the most part, the doors of the courtroom and the ears of the jury have been closed to Michigan individuals.

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II. EMPLOYER TORT LIABILITY

Plaintiff Lisa Brown worked as a security guard at a Detroit plant during the night shift.[1] The defendant Michael Brown worked at the plant as a foreman.[2] He subjected Lisa Brown to sexually explicit comments.[3] The verbal harassment continued from early 2000 until November 17th, 2000, when the defendant raped Lisa Brown.[4] On at least three occasions beforehand, plaintiff complained about these offensive comments to defendant's plant manager.[5] The plaintiff argued in her case that the rape "was a foreseeable result of Brown's offensive speech."[6] While the court explicitly refrained from holding "that an employee's words alone can *never* create a duty between an employer [and] a third party," it disagreed that the rape was a foreseeable result of the lewd comments.[7] The Supreme Court held that in order to invoke employer liability, the defendant would have to "clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim."[8]

Justice Cavanagh's noted that plaintiff asked Brown to stop making the comments on numerous occasions.[9] Despite these multiple complaints and the manager "telling Plaintiff each time that he would 'take care of it,' Brown continued to bombard Plaintiff with his sexually aggressive comments until he eventually raped her."[10] Justice Cavanagh, in his dissent, noted that "[w]hether this employer knew or should have known that Brown's 'habits, temperament, or nature' made him unfit to supervise plaintiff on a sparsely populated night shift because of the *potential* for assault (as opposed to the *certainty* of an assault) was a question for the jury."[11] The majority responded to the dissent by suggesting that Justice Cavanagh wanted to eliminate foreseeability from the analysis and thus hold employers strictly liable for employee misbehavior.[12] The majority simply found a way to rule for the defendant

1. Brown v. Brown, 478 Mich. 545, 548, 739 N.W.2d 313, 314 (2007).
2. *Id.*
3. *Id.* at 549, 739 N.W.2d at 315.
4. *Id.*
5. *Id.*
6. *Id.* at 554, 739 N.W.2d at 318.
7. *Brown*, 478 Mich. at 554-55, 739 N.W.2d at 318.
8. *Id.*
9. *Id.* at 571, 739 N.W.2d at 327 (Cavanagh, J., dissenting).
10. *Id.*
11. *Id.* at 579, 739 N.W.2d at 331 (emphasis in original).
12. *Id.* at 562, 739 N.W.2d at 322 (majority opinion).

by legislating its own law of what had to be said to a victim before raping her.

III. GOVERNMENTAL IMMUNITY

A. Public Building Exception

In *Renny v. Michigan Department of Transportation*,[13] the plaintiff alleged that while leaving a rest area, "she slipped on a patch of snow and ice on the sidewalk in front of the doorway" of the rest area building.[14] She argued that her injuries resulted from a defective condition of the building; specifically, that the accumulated snow and ice was attributable to "MDOT's failure to install and maintain gutters and downspouts around the roof of the building . . . [which] would have safely channeled the snow and ice that melted off the roof away from the sidewalks."[15]

In its analysis, the Supreme Court itemized the elements that a plaintiff must prove in order "to avoid governmental immunity under the public building exception."[16] A plaintiff must prove:

> (1) a governmental agency is involved; (2) the public building is open for use by members of the public; (3) a dangerous or defective condition of the public building itself exists; (4) the governmental agency had actual or constructive knowledge of the alleged defect; and, (5) the governmental agency failed to remedy the alleged defective condition after a reasonable amount of time.[17]

The parties disputed whether the plaintiff had satisfied the third element.[18] The court noted that in *Bush v. Oscoda Area Schools*,[19] where it held that the duty to the public is not strictly limited to repair or maintenance, "a building may [also] be dangerous or defective because of improper design, faulty construction or the absence of safety devices."[20]

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13. 478 Mich. 490, 734 N.W.2d 518 (2007).
14. *Id.* at 493, 734 N.W.2d at 520.
15. *Id.* at 493-94, 734 N.W.2d at 520-21.
16. *Id.* at 495-96, 734 N.W.2d at 521-22.
17. *Id.* at 496, 734 N.W.2d at 521-22.
18. *Id.*, 734 N.W.2d 522.
19. 405 Mich. 716, 275 N.W.2d 268 (1979).
20. *Renny*, 478 Mich. at 497, 734 N.W.2d at 522 (citing Reardon v. Dep't of Mental Health, 430 Mich. 398, 409-10, 424 N.W.2d 248 (1988)).

While the plaintiff relied almost exclusively on case law, the Court resorted to rules of statutory construction to determine the legislature's intent.[21] The Court held that the duty to repair or maintain did not encompass a duty to design or redesign the public building in a particular manner.[22] It stated that "design" and "repair and maintain" are "unmistakably disparate concepts, and the Legislature's sole use of 'repair and maintain' unambiguously indicates that it did not intend to include 'design defect claims within the scope of the public building exception.'"[23]

The decision shows the Michigan Supreme Court's continuing outcome-determinative trend, whereby the Court crafts the outcome of the case to the result that it wants to reach. In this case, the rest area building was originally designed without sufficient gutters and downspouts.[24] When it became known, presumably during the first winter, that this building was creating a dangerous-icy condition in front of the doorway, the proper remedy was to repair and maintain as required by the statute. The only way to eradicate this problem would be to install gutters and downspouts. By calling such obvious repairs a "design," the Michigan Supreme Court conveniently robbed this plaintiff from succeeding on her claim.

B. Medical Care Exception

In *Briggs v. Oakland County*,[25] the decedent fell from an upper bunk while detained at a county jail and later died of his injuries in the jail's medical clinic.[26] The plaintiff alleged "the actions or inactions of the defendants proximately caused [the] death."[27] The defendants did not contest the fact that they were "employees or agents of a governmental agency" nor that they were "providing medical care or treatment to the decedent as a patient before his death."[28] The court of appeals held that the medical care exception to governmental immunity, M.C.L. Section 691.1407(4), applied and that the defendants may be subject to liability for medical malpractice.[29] The trial court dismissed the claim, holding that there was no factual support for plaintiff's assertion that defendants

21. *Id.* at 524, 734 N.W.2d at 524.
22. *Id.*
23. *Id.* at 501, 734 N.W.2d at524.
24. *Id.* at 493-94, 734 N.W.2d at 520-21.
25. 276 Mich. App. 369, 742 N.W.2d 136 (2007).
26. *Id.* at 370, 742 N.W.2d at 137.
27. *Id.*
28. *Id.* at 372, 742 N.W.2d at138.
29. *Id.* at 370, 742 N.W.2d at 137.

acted with "gross negligence."[30] The court of appeals reversed the decision of the trial court and remanded for further proceedings on the medical care claim.[31]

IV. ASBESTOS EXPOSURE

The Michigan Supreme Court grappled with a certified question from another state regarding exposure to asbestos by a family member of someone working on the property.[32] "Plaintiffs filed suit in Texas against Defendant, [claiming] that the decedent contracted mesothelioma from washing the work clothes of her stepfather, who worked for independent contractors hired by Defendant [Ford], to reline the interiors of blast furnaces with materials that contained asbestos."[33] After a Texas jury found in favor of the plaintiffs, the Texas Court of Appeals certified a question "[w]hether under Michigan law, Ford, as owner of the property on which asbestos-containing products were located, owed to Caroline Miller, who was never on or near that property, a legal duty to protect her from [asbestos exposure]."[34] The court reasoned that mere foreseeability does not impose a duty upon the defendant to take some kind of action:

> [T]o require the actor to act, some sort of relationship must exist between the actor and the other party which the law or society views as sufficiently strong to require more than mere observation of the events which unfold on the part of the defendant. It is the fact of existence of this relationship which the law usually refers to as a duty on the part of the actor.[35]

As this was an issue of first impression with the Michigan Supreme Court, it looked to the decision of other state courts which addressed similar circumstances.[36] The Supreme Court of Georgia, answering a similar certified question, "held that 'an employer does not owe a duty of care to a third-party, non-employee, who comes in contact with an employee's asbestos-work clothing at locations away from the

30. *Id.* at 371, 742 N.W.2d at 137.

31. *Renny*, 276 Mich. App. at 374-75, 742 N.W.2d at 139.

32. *In re* certified question from the Fourteenth District Court of Appeals of Texas v. Ford Motor Co., 479 Mich. 498, 740 N.W.2d 206 (2007).

33. *Id.* at 501, 740 N.W.2d at 209.

34. *Id.* at 502-03, 740 N.W.2d at 209-10.

35. *Id.* at 508, 740 N.W.2d at 212 (citing Buczkowski v. McKay, 441 Mich. 96, 101, 490 N.W.2d 230 (1992) (quoting Samson v. Saginaw Prof'l Bldg., Inc., 393 Mich. 393, 406, 224 N.W.2d 843 (1975))).

36. *Id.* at 509, 740 N.W.2d at 213.

workplace.'"[37] The Court also looked to New York's highest court which had held that a defendant owed no duty to its employee's wife who was injured from exposure to asbestos on her husband's soiled work clothes which she had laundered.[38] Finally, the Court conducted an analysis in which it purportedly balanced the social benefits of imposing a duty with the social costs of imposing it.[39] The Court stated "asbestos claims have given rise to one of the most costly products-liability crises ever within our nation's legal system."[40] The Court went to great lengths to liken such a duty to opening the flood gates of litigation; suggesting that plaintiff's attorneys could begin naming countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons.[41] It further suggested that adoption of a duty rule for employers could bring about a perverse result, that non-employees with secondary exposures could have greater rights to sue than the employees themselves.[42]

However, nowhere in the Court's analysis did it mention the rights of the victims. It did not consider whether asbestos manufacturing companies knew about the dangerous and fatal effects of asbestos and concealed this from the people working with the products for decades. The court did not see fit to mention that hundreds of thousands of people have suffered and died from mesothelioma and asbestos related illnesses which could have been prevented. They failed to hold the defendants accountable for any sort of crisis. Had they addressed the problem when it first became known that asbestos was a harmful and fatal substance and should not be used, they would not be faced with this crisis of their own making. When this Court "balances" social benefits and costs, it makes an excuse for another outcome-determinative ruling.

V. DOGBITE LIABILITY

In *Koivisto v. Davis*,[43] defendants' dogs escaped from a kennel, entered plaintiff's property and attacked both her and her cats.[44] While the dogs started to tear her cat apart, she yelled at the dogs but they

37. *Id.* at 510, 740 N.W.2d at 213-14 (quoting CSX Transportation, Inc. v. Williams, 278 Ga. 888, 891, 608 S.E.2d 208 (2005)).

38. *Id.* (citing *In re* New York City Asbestos Litigation, 5 N.Y.3d 486 (2005)).

39. *In re Certified Question*, 479 Mich at 518, 740 N.W.2d at 218.

40. *Id.* at 519, 740 N.W.2d at 219.

41. *Id.* at 520, 740 N.W.2d at 219.

42. *Id.*

43. 277 Mich. App. 492, 745 N.W.2d 824 (2008).

44. *Id.* at 493, 745 N.W.2d at 824.

would not stop biting.[45] She stuck her fingers in one of the husky's eyes and pulled it back.[46] After one cat had been rescued, the dogs began attacking the other cat.[47] Plaintiff kicked the dogs and fought to get the cat loose.[48] In doing so, plaintiff sustained twenty-eight puncture wounds to her hands.[49] The trial court granted summary disposition, agreeing that the plaintiff provoked the dogs into attacking her.[50]

The Court of Appeals began its analysis by stating that the Dogbite Statute has "consistently been interpreted as creating 'an almost absolute liability' in the dog owner except when there is provocation."[51] The court distinguished its 2005 decision *Brans v. Extrom*,[52] wherein it held that unintentional acts could constitute provocation within the plain meaning of the statute.[53] The *Koivisto* court stated that the Dogbite Statute appeared to hold the owner of the dog liable for bite injuries to a victim who did not provoke the dog.[54] The court held that:

> [U]nder the circumstances presented in this case, we conclude that plaintiff did not provoke defendants' dog. The dogs came onto plaintiff's property unexpectedly and without her permission. The dogs immediately exhibited vicious and aggressive behaviors. Although plaintiff's response to, or defense against those behaviors, resulted in the dogs attacking her, it is evident by the fact that the dogs were attacking the cats that they were already provoked before plaintiff took any action against them . . . . Therefore plaintiff's response to the dogs' violent behavior cannot be considered "provocation" within the contemplation of MCL 287.351 (1) as a matter of law. The "provocation" defense assumes that the offending dog was not already in a provoked state or, as in this case, a state of attack, and that the victim did something to provoke the dog . . . . Had the dogs simply wandered over to plaintiff's property in a peaceable state and plaintiff approached them and did

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *In re Certified Question*, 277 Mich. App. at 493, 745 N.W.2d at 824.
50. *Id.* at 495, 745 N.W.2d at 827.
51. *Id.*
52. 266 Mich. App. 216, 701 N.W.2d 163 (2005).
53. *Koivisto*, 277 Mich. App. at 496, 745 N.W.2d at 827 (citing *Brans*, 266 Mich. App. at 219, 701 N.W.2d at 163).
54. *Id.* at 497; MICH. COMP. LAW ANN. § 287.351(1) (West 2003).

> something, intentional or unintentional, that elicited a biting response, that would be a different case.[55]

This was a welcome and well-reasoned decision. *Brans* appeared to abrogate strict liability for dog bites by holding that nearly any movement or action by a person could constitute provocation in a dog's mind and be a complete defense to a case.

VI. MEDICAL MALPRACTICE

A. Successor Personal Representative and Notices of Intent

Pursuant to MCR 7.215(J), the Michigan Court of Appeals convened a special panel in *Braverman v. Garden City Hospital* (*Braverman II*),[56] to resolve an apparent conflict between the court's holdings in *Braverman v. Garden City Hosp.* (*Braverman I*),[57] and *Verbrugghe v. Select Specialty Hosp-Macomb Co., Inc.*[58] In *Braverman II*, the court concluded that a "notice of intent sent by a predecessor personal representative can support a complaint filed by a successor personal representative."[59] The decedent's mother was "initially appointed personal representative of [her] estate on October 29, 2002."[60] In June 2004, she "petitioned to resign as personal representative and for the appointment of plaintiff [Eric Braverman] as her successor."[61] While the petition was pending, plaintiff's attorney served defendants with a notice of intent to sue.[62] The notice claimed that "the physicians who treated [the decedent] from April 2000 to November 2001 should not have discharged her without performing further cardiac testing."[63] This could have led to further treatment that may have prevented her death.[64] Plaintiff Eric Braverman was appointed personal representative of the estate on August 18, 2007.[65] In *Braverman I*, the court held that the same

55. *Koivisto*, 277 Mich. App. at 497-98, 745 N.W.2d at 828.
56. 275 Mich. App. 705, 740 N.W.2d 744 (2007).
57. 272 Mich. App. 72, 724 N.W.2d 285 (2006).
58. 270 Mich. App. 383, 715 N.W.2d 72 (2006).
59. *Braverman II*, 275 Mich App, at 707, 740 N.W.2d at 746.
60. *Id.* at 708, 740 N.W.2d at 746.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Braverman II*, 275 Mich. App. at 708, 740 N.W.2d 746.

human being that files the notice of intent must also file the complaint despite any substitution of parties.[66] The court stated:

> [W]e see no reason to conclude that a predecessor personal representative and a successor personal representative are different persons under MCL 600.2912b(1), when each is acting in his or her representative capacity, such that a successor personal representative cannot rely on the notice sent by a predecessor personal representative. Rather we conclude that term 'person' in MCL 600.2912b(1) includes a person acting in a representative capacity and includes the duly appointed personal representative of an estate, whoever that person may be at any given time.[67]

B. Affidavit of Merit, Response to Notice, and Statute of Limitations

In *Vanslembrouck v. Halperin, M.D.*,[68] plaintiff's child was diagnosed with hypoxic-ischemic encephalopathy and cerebral palsy shortly after birth.[69] The trial court had ruled that the affidavits, while notarized, were not certified by a clerk of the court of record in the county where the affidavit was executed.[70] The court of appeals noted the Michigan Supreme Court's decision in *Apsey v. Memorial Hospital*,[71] dictated otherwise.[72] The *Apsey* court decided that certification of an out of state notary was no longer required.[73]

The defense also argued that the plaintiff's claims were barred by the statute of limitations.[74] "Pursuant to M.C.L. 600.5851(7), if a medical malpractice claim accrues to a person under the age of eight years, the person has until her tenth birthday to bring the claim."[75] The plaintiff had not filed her medical malpractice claim before the minor reached her tenth birthday.[76] However, the plaintiff had served the notice of intent to

66. *Id.* at 709, 740 N.W.2d at 747 (citing *Braverman I*, 272 Mich. App. at 77, 724 N.W.2d at 285).

67. *Id.* at 716, 740 N.W.2d at 750.

68. 277 Mich. App. 558, 747 N.W.2d 311 (2008), *leave to appeal granted*, 481 Mich. 918, 750 N.W.2d 591 (2008) (requiring the parties to address whether M.C.L. Section 600.5851(7) provides a period of limitation).

69. *Id.* at 560, 747 N.W.2d at 311-12. (2008).

70. *Id.* at 562-63, 747 N.W.2d at 314.

71. 477 Mich. 120, 730 N.W.2d 695 (2007).

72. *Vanslembrouck*, 277 Mich. App at 563, 747 N.W.2d at 314.

73. *Id.* at 564-65, 747 N.W.2d at 315.

74. *Id.* at 565, 747 N.W.2d at 315.

75. *Id.* at 566, 747 N.W.2d at 316.

76. *Id.*

sue prior to the child obtaining the age of ten, and argued that that notice tolled the statute of limitations.[77] The court looked for guidance in the Supreme Court's decision in *Miller v. Mercy Memorial Hospital*[78] In *Miller*, the Court "concluded that the six month discovery provision in M.C.L. 600.5838(2) was incorporated in the wrongful death statute as a period of limitation."[79] Following the *Miller* Court's logic, the Michigan Court of Appeals held that "the ten-year provision of M.C.L. 600.5851(7) is a period of limitations rather than a saving provision . . . requir[ing] a person who has a cause of action to bring suit within a specified time."[80]

Defendant attempted yet another way out of the case by essentially blaming the plaintiff for inaction.[81] By statute, a plaintiff is permitted to commence a medical malpractice action 154 days after a notice of intent if the health professional fails to provide a written response within that 154-day period.[82] The defense claimed that since they did not respond to the notice of intent that the plaintiff was only entitled to a tolling period of 154 days and therefore filed the lawsuit too late.[83] The court followed *Omelenchuk v. City of Warren*,[84] and held that the limitation period is tolled for 182 days even if the alleged negligent health professional fails to provide written notice and the claimant is permitted to commence, but does not commence, the malpractice action 154 days after notice.[85] Consequently, plaintiff's complaint was timely filed, the circuit court was reversed, and the case remanded for further proceedings.[86]

C. Sufficiency of Notice of Intent

In another medical malpractice action the Michigan Court of Appeals considered the sufficiency of plaintiff's notice of intent to sue and whether the plaintiff had prematurely filed suit.[87] Gary Bush was thirty-three years of age when he had surgery to repair an aortic aneurysm.[88] He claimed that when Dr. Shabahang cut open his chest, he lacerated the

77. *Id.*
78. 466 Mich. 196, 644 N.W.2d 730 (2002).
79. *Vanslembrouck*, 277 Mich. App at 566, 747 N.W.2d at 316.
80. *Id.* at 569, 747 N.W.2d at 317.
81. *Id.*
82. *Id.* at 570, 747 N.W.2d at 318 (citing MICH. COMP. LAWS ANN. § 600.2912b).
83. *Id.*
84. 461 Mich. 567, 609 N.W.2d 177 (2000), *overruled in part on other grounds by* Waltz v. Wyze, 469 Mich. 642, 677 N.W.2d 813 (2004).
85. *Vanslembrouck*, 277 Mich. App at 571, 747 N.W.2d at 318-19.
86. *Id.* at 572, 747 N.W.2d at 319.
87. Bush v. Shabahang, M.D., 278 Mich. App. 703, 753 N.W.2d 271 (2008).
88. *Id.* at 706-07, 753 N.W.2d at 275.

aneurysm, requiring the placement of a heart bypass machine and resulting in injuries rendering plaintiff unable to live independently.[89] The defendants argued that plaintiff's notice of intent was deficient.[90] The court noted that under M.C.L. Section 600.2912b(4), a notice must contain certain enumerated statements.[91] As against the defendant West Michigan Cardiovascular Surgeons, the court ruled that "Plaintiff's notice did not adequately address the standard of care applicable . . . under a direct theory of liability to properly train or hire."[92] The plaintiff had "failed the state how West Michigan Cardiovascular's hiring and training practices violated that standard."[93]

However, the court did not simply read each section of the notice of intent and determine whether it was sufficient; it read the notice as a whole and in doing so found that "the notice did provide West Michigan Cardiovascular with adequate notice of vicarious liability."[94] The court conducted a similar analysis with regard to defendant Heiser.[95] The court found that the standard of care portion of the notice treated all of the physicians together and was stated in the most general of terms.[96] However, the sections related to the manner of breach and the recommended actions that should have been taken had sufficient statements which indicated the standard of care applicable to a cardiothoracic surgeon acting under the given facts.[97] The court ruled that when the plaintiff's notice was read as whole, it "contained a good faith statement of the standard of care."[98] The defendants made a similar argument regarding the proximate cause section.[99] Though defendants were bundled together under one umbrella statement in that section, the notice as a whole was sufficient to explain proximate cause as to individual defendants.[100]

The court next turned its attention to whether plaintiff was permitted to file the lawsuit after 154 days but before the 182 day notice period.[101]

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89. *Id.*
90. *Id.*
91. *Id.* at 710, 753 N.W.2d at 276.
92. *Id.* at 711, 753 N.W.2d at 277.
93. *Bush*, 278 Mich. App. at 711, 753 N.W.2d at 277.
94. *Id.*
95. *Id.* at 712, 753 N.W.2d at 278.
96. *Id.*
97. *Id.* at 712-13, 753 N.W.2d at 278.
98. *Id.* at 713, 753 N.W.2d at 278.
99. *Bush*, 278 Mich. App. at 714, 753 N.W.2d at 279.
100. *Id.* at 715, 753 N.W.2d at 279.
101. *Id.* at 719, 753 N.W.2d at 281.

> Within 154 days after receipt of the notice required by MCL 600.2912b(1), a defendant must furnish a written response to the plaintiff . . . [which contains a] factual basis for the defense, the standard of care . . . the manner in which . . . the [doctor] complied with the standard of care . . . and [how] the [doctor] contends that the alleged negligence was not the proximate cause of plaintiff's injuries.[102]

In this case, the plaintiff deemed defendant's response to be insufficient under the statute and filed after 154 days.[103] The court held that "plaintiff's unilateral decision to file early in the belief that defendant's response under MCL 600.1912b(7) was deficient, was a risky chance to take."[104] A defendant can still challenge the plaintiff filing as premature under M.C.L. Section 600.2912b(1) at anytime.[105] The court cautioned against playing with fire by hurrying to file twenty-eight days early and risking dismissal of the entire case at a later date if the court found that the defendant's response did actually meet the requirements of the statute.[106]

Fortunately, the court allowed plaintiff to rely on the contents of the entire notice.[107] The notice of intent's purpose is to apprise health professionals of the allegations against them.[108] It should not matter where in the notice the required allegations are stated so long as the substance is present. The decision, though favorable to the plaintiff, illuminates how parties are treated differently under the statute. The law appears to mandate the same requirements for both.[109] The notice of intent and the response to the notice of intent have nearly identical requirements for the sections and specificity.[110] If a plaintiff fails to file a notice which is statutorily specific, the plaintiff's case is dismissed.[111] If a defendant fails to file a statutory specific response to the notice, then plaintiff may file his lawsuit four weeks earlier but may risk a dismissal

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102. *Id.* at 719-20, 753 N.W.2d at 281 (citing MICH. COMP. LAW ANN. §§ 600.2912 b(7)(a)-(d) (West 2000)).
103. *Id.* at 720, 753 N.W.2d at 282.
104. *Id.* at 725, 753 N.W.2d at 284.
105. *Bush*, 278 Mich. App. at 725, 753 N.W.2d at 284.
106. *Id.*
107. *Id.* at 718, 753 N.W.2d at 280.
108. *Id.*
109. *See* MICH. COMP. LAW ANN. § 600.2912b (West 2000).
110. *Id.*
111. *Id.*

at a later time if the response is deemed to be sufficient.[112] There is no sanction against a defendant with the same obligation.[113]

D. Financial Incentive to Discharge

In *Johnson v. Botsford General Hospital*,[114] the patient Rick Johnson died after being discharged from the hospital after postponment of his scheduled surgery.[115] It was a precondition for surgery that the decedent's blood platelet level return to a safe level.[116] Although the decedent desired to "leave the hospital, return home and follow up with blood tests on an outpatient basis . . . his family inquired whether [he] should remain hospitalized."[117] The family was concerned as to whether discharge was appropriate given the patient's condition.[118] Dr. Jennings advised them that the plaintiff's "insurance would not cover it" because the "hospitalization was not medical necessary to raise the [patient's] platelet level . . . [and that] continued hospitalization could potentially cost him thousands of dollars a day."[119] At Dr. Jenning's request, Joann Van Camp, a registered nurse employed in Botsford's Continuing Care and Quality Assessment Department, spoke to the patient and his family.[120] "[She] advised them that there would be no insurance coverage for a hospital stay while the surgical team waited for . . . [his] platelet level to improve."[121] Once the patient's blood levels improved, he was cleared for surgery.[122] Before surgery could take place, his aneurysm ruptured and he died.[123]

The trial court held that "the notice of intent only advised the hospital of plaintiff's intent to sue for the negligent discharge of the decedent," dismissing twenty-one out of twenty-two claims.[124] In response, the plaintiff shifted her position and argued that the claim against the hospital was not for medical malpractice but for ordinary administrative negligence.[125] The court held that "a hospital never owes a

112. *Id.*
113. *Id.*
114. 278 Mich. App. 146, 748 N.W.2d 907 (2008).
115. *Id.* at 149, 748 N.W.2d at 909.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Johnson*, 278 Mich. App. at 149, 748 N.W.2d at 909.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 151, 748 N.W.2d at 910.
125. *Id.*

patient the duty to ask family members if they would prefer to pay for hospitalization or have their loved one discharged."[126] The court refused to manufacture such a duty:

> Without evidence that Nurse Van Camp misinformed the decedent about the financial implications of an extended observational hospital stay, and lacking any indication that the decedent wanted to remain hospitalized and would have personally paid for the service, plaintiff fail[ed] to substantiate any cause of action grounded on ordinary negligence against the hospital.[127]

Medical care does not operate in a vacuum, but maybe those providing the care think that it does. There are patients and families with genuine concerns. They have questions and need frank answers on which to base medical care decisions. Botsford's hospital staff clearly utilized financial pressure to steer this family away from hospitalization. The determination whether to keep this patient in the hospital for observation, while suffering from a known deadly condition was based upon money. That type of medical care is not only substandard, but appalling.

VII. CONCLUSION

The departure of Justice Clifford Taylor will start a new day in Michigan jurisprudence. Hopefully the Michigan Supreme Court and the Michigan Court of Appeals will conduct cost-benefit analyses which protect individuals rather than negligent physicians, government employees and manufacturers. Perhaps the 2009 *Survey* of Torts will contain more reported cases of that variety as the appellate system strives to right the wrongs of the last decade.

126. *Johnson*, 278 Mich. App. at 156, 748 N.W.2d at 913 ("There exists no legal duty to press members of patient's family for payment of a loved one's medical expenses.").

127. *Id.* at 157, 748 N.W.2d at 913.