

STATE OF MICHIGAN
COURT OF APPEALS

GARY L. BUSH, Guardian of GARY E. BUSH, a
Protected Person,

Plaintiff-Appellee,

v

BEHROOZ-BRUCE SHABAHANG, M.D.,

Defendant-Appellant,

and

JOHN CHARLES HEISER, M.D., WEST
MICHIGAN CARDIOVASCULAR SURGEONS,
GEORGE T. SUGIYAMA, M.D., M. ASHRAF
MANSOUR, M.D., VASCULAR ASSOCIATES,
P.C., and SPECTRUM HEALTH
BUTTERWORTH CAMPUS,

Defendants.

GARY L. BUSH, Guardian of GARY E. BUSH, a
Protected Person,

Plaintiff-Appellee,

v

BEHROOZ-BRUCE SHABAHANG, M.D.,
GEORGE T. SUGIYAMA, M.D., M. ASHRAF
MANSOUR, M.D., VASCULAR ASSOCIATES,
P.C., and SPECTRUM HEALTH
BUTTERWORTH CAMPUS,

Defendants,

and

FOR PUBLICATION
May 1, 2008

No. 274708
Kent Circuit Court
LC No. 06-000982-NM

Advance Sheets Version

No. 274709
Kent Circuit Court
LC No. 06-000982-NM

JOHN CHARLES HEISER, M.D., and WEST
MICHIGAN CARDIOVASCULAR SURGEONS,

Defendants-Appellants.

GARY L. BUSH, Guardian of GARY E. BUSH, a
Protected Person,

Plaintiff-Appellee,

v

No. 274726
Kent Circuit Court
LC No. 06-000982-NM

BEHROOZ-BRUCE SHABAHANG, M.D., JOHN
CHARLES HEISER, M.D., WEST MICHIGAN
CARDIOVASCULAR SURGEONS, GEORGE T.
SUGIYAMA, M.D., M. ASHRAF MANSOUR,
M.D., and VASCULAR ASSOCIATES, P.C.,

Defendants,

and

SPECTRUM HEALTH BUTTERWORTH
CAMPUS,

Defendant-Appellant.

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

FITZGERALD, P.J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's conclusion in part III that the shortened notice period contained in MCL 600.2912b(8) applies when a plaintiff unilaterally determines that a defendant's response does not satisfy the requirements of MCL 600.2912b(7).

In *Westfall v McCririe*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2006 (Docket No. 265386),¹ the plaintiffs argued that they were relieved of their obligation to wait 182 days to file their complaint because the defendants' response to their notice of intent (NOI) failed to comply with MCL 600.2912b(7), thus triggering the shortened

¹ The Supreme Court denied leave to appeal in an order dated April 24, 2007. 477 Mich 1110 (2007). I was a member of the *Westfall* panel.

154-day notice provision in MCL 600.2912b(8) and eliminating the 182-day notice provision of MCL 600.2912b(1). A panel of this Court determined on p 3 that: “Resolution of this issue requires this Court to construe MCL 600.2912b to ascertain whether the Legislature intended to authorize a plaintiff in a medical malpractice case to unilaterally determine that a defendant’s response failed to comply with MCL 600.2912b(7) so as to relieve the plaintiff of the obligation to wait 182 days after filing the NOI before filing the complaint.” The panel disagreed with the plaintiffs’ argument, and opined on p 4:

Plaintiffs, who filed their complaint against defendants 156 days after providing defendants with the NOI, argue that the shortened notice period contained in MCL 600.2912b(8) applies in this case. However, plaintiffs did receive defendants’ written response within the 154-day time period. The language of MCL 600.2912b(8) does not permit a plaintiff to unilaterally determine whether a defendant’s response satisfies the detailed requirements of MCL 600.2912b(7). Furthermore, MCL 600.2912b does not authorize a plaintiff to ignore the 182-day notice requirement in MCL 600.2912b(1) if the defendant’s response does not comply with MCL 600.2912b(7). The Legislature could have specifically authorized a plaintiff to make a determination regarding whether a defendant’s response complied with MCL 600.2912b(7). However, it did not do so. If the Legislature had intended to allow medical malpractice plaintiffs to unilaterally determine whether a defendant’s response failed to comply with MCL 600.2912b(7) so as to relieve plaintiffs of the obligation to wait 182 days after submitting their NOI before filing a complaint, it would have expressly provided such authority in MCL 600.2912b. Nothing in the language of MCL 600.2912b indicates that the Legislature intended to grant plaintiffs the authority to unilaterally make such a determination. When the language of a statute is not ambiguous, a statute must be enforced as written. *Pohutski [v City of Allen Park]*, 465 Mich 675, 683; 641 NW2d 219 (2002)]. A court may not speculate as to the probable intent of the Legislature beyond the language used in the statute. *Cherry Growers, Inc [v Agricultural Marketing & Bargaining Bd]*, 240 Mich App 153, 173; 610 NW2d 613 (2000)]. Furthermore, in construing a statute, this Court should assume that an omission in the statute was intentional. *People v Wilson*, 257 Mich App 337, 345; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004). Because the Legislature did not specifically authorize a medical malpractice plaintiff to unilaterally determine whether a medical malpractice defendant’s response complied with MCL 600.2912b(7) as to relieve the plaintiff of his obligation to wait 182 days after filing the NOI before filing the complaint, we presume that the Legislature’s omission of such language was intentional and [refuse] to expand MCL 600.2912b(8) beyond the language used in the statute. Irrespective of whether defendants’ response satisfied the detailed requirements of MCL 600.2912b(7), plaintiffs received defendants’ response within 154 days after providing defendants with their NOI. Therefore, the shortened notice period contained in MCL 600.2912b(8) does not apply.

I agree with the *Westfall* analysis and, therefore, disagree with the majority’s conclusion that plaintiff could properly choose to file the complaint after the 154-day period specified in MCL 600.2912b(8) on the basis that the defendant’s response did not meet the requirements of MCL

600.2912b(7). Even assuming, as the majority does, that “a plaintiff’s unilateral decision to file early in the belief that the defendant’s response under MCL 600.2912b(7) was deficient does not substantively affect the defendant’s rights,” *ante* at ___, such a policy consideration is not relevant to determining whether the language of the statute is clear on its face.

/s/ E. Thomas Fitzgerald