STATE OF MICHIGAN

COURT OF APPEALS

SUSAN FURR and WILLIAM FURR,

Plaintiffs-Appellees,

v

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

Defendants-Appellants.

FOR PUBLICATION
October 24, 2013
9:15 a.m.

No. 310652
Kalamazoo Circuit Court
LC No. 2010-000551-NH

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

WHITBECK, J.

Defendants, Michael McLeod, M.D., Tara B. Mancl, M.D., Michigan State University Kalamazoo Center for Medical Studies, Inc., and Borgess Medical Center (the healthcare providers) appeal as on leave granted the trial court's denial of their motion for summary disposition under MCR 2.116(C)(7). The healthcare providers moved for summary disposition on the basis that plaintiffs, Susan and William Furr, commenced their suit before the end of the 182 day notice waiting period in MCL 600.2912b(1). The trial court denied the healthcare providers' motion on the basis that this Court's decision in *Zwiers v Growney*[1] determined the outcome of this case. We conclude that this Court's decision in *Tyra v Organ Procurement Agency*[2] which determined that this Court's decision in *Zwiers* remains good law and that a plaintiff may amend his or her prematurely filed complaint, controls our decision in this case. Therefore, we must affirm the trial court's decision in this case.

However, we believe that *Tyra* was wrongly decided in that it fails to comport with relevant Supreme Court precedent. We therefore affirm only because MCR 7.215(J) obligates us

[1] *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009).

[2] *Tyra v Organ Procurement Agency of Mich*, ___ Mich App ___; ___ NW2d ___ (2013) (Docket No. 298444).

to do so, and but for the *Tyra* decision we would reverse and remand. As is appropriate under such circumstances, we therefore call for the convening of a conflict resolution panel pursuant to MCR 7.215(3).

I. FACTS

A. BACKGROUND FACTS

According to the Furr's complaint, Susan Furr suffered from Graves' disease, an autoimmune condition that affects a person's thyroid gland. After other treatments failed to adequately treat the condition, Furr's doctors recommended a total thyroidectomy. While undergoing the thyroidectomy procedure at Borgess Medical Center on April 4, 2008, Furr's left recurrent laryngeal nerve was transected. The healthcare providers reconnected the nerve during the surgery, but Furr experienced respiratory problems. On April 5, 2008, an otolaryngologist performed a laryngoscopy on Furr and discovered that she had "bilateral true vocal cord paralysis." Furr continued to suffer from respiratory problems.

B. PROCEDURAL HISTORY

The Furrs served the healthcare providers with a notice of intent to sue in April 2010. Though the notice of intent is dated April 1, 2010, the Furrs concede on appeal that the notice of intent was not actually mailed until April 4, 2010.

On September 30, 2010, the Furrs filed their complaint for medical malpractice. In November 2010, the healthcare providers moved the trial court for summary disposition, contending that the Furrs had filed their complaint before the end of the notice waiting period in MCL 600.2912b(1) and, therefore, the statute of limitations was not tolled and now barred their complaint. The Furrs responded that under this Court's holding in *Zwiers*,[3] the trial court could invoke MCL 600.2301 to ignore the defect, as long as doing so did not prejudice a substantial right of a party.

The trial court denied the healthcare providers' motion for summary disposition on the basis that *Zwiers* applied to this case. The trial court found that settlement negotiations were not ongoing when the Furrs filed their complaint and that the healthcare providers would not be prejudiced if the trial court allowed them to do so. It also found that it was not in the interests of justice to deny the Furrs their day in court. Therefore, the trial court believed that it could amend the Furrs' pleading under MCL 600.2301 to correct the Furrs' mistaken filing.

The healthcare providers appealed. After the trial court made its decision, the Michigan Supreme Court, in *Driver v Naini*, clarified the continued role of *Burton v Reed City Hospital Corporation*[4] in medical malpractice disputes.[5] In lieu of granting leave to appeal in this case,

---

[3] *Zwiers*, 286 Mich App at 52-53.

[4] *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005).

[5] *Driver v Naini*, 490 Mich 239, 257; 802 NW2d 311 (2011).

this Court remanded for the trial court to reconsider the healthcare providers' motion in light of the Michigan Supreme Court's decisions in *Burton* and *Driver*.

On remand, the trial court requested additional briefing from the parties, but concluded that both *Driver* and *Burton* were distinguishable. It instead applied *Zwiers* and determined that the interests of justice required it to either amend the filing date or disregard the Furrs' mistake. The trial court determined in the alternative that the healthcare providers were not entitled to summary disposition because they did not respond to the Furrs' notice of intent within 154 days, as MCL 600.2912b(7) requires. The trial court again denied the healthcare providers' motion for summary disposition.

This Court granted the healthcare providers' application for leave to appeal.[6]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition.[7] Summary disposition is proper under MCR 2.116(C)(7) when the "claim is barred because of . . . [the] statute of limitations . . . ." This Court also reviews de novo questions of statutory interpretation.[8]

When interpreting a statute, this Court's primary goal is to "discern the intent of the Legislature by first examining the plain language of the statute."[9] This Court reads statutory provisions in context, and gives a statute's words their plain and ordinary meanings.[10] We do not engage in judicial construction of unambiguous statues.[11]

III. LEGAL STANDARDS FOR TOLLING THE STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE ACTIONS

A. STATUTORY BACKGROUND

The limitations period for a claim of medical malpractice is two years.[12] MCL 600.2912b(1) provides that, subject to exceptions that do not apply in this case, "a person shall not commence an action alleging medical malpractice against a health professional or health

---

[6] *Furr v McLeod*, unpublished order of the Court of Appeals, entered June 22, 2012 (Docket No. 310652).

[7] *Driver*, 490 Mich at 246.

[8] *Id.*

[9] *Driver*, 490 Mich at 246-247.

[10] *Id.* at 247.

[11] *Id.*

[12] MCL 600.5805(6).

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." The proper filing of a notice of intent tolls the statute of limitations for 182 days.[13]

B. *BURTON v REED CITY HOSPITAL CORPORATION*

In *Burton v Reed City Hospital Corporation*, the Michigan Supreme Court held that if a plaintiff files his or her complaint before the notice waiting period expires, MCL 600.2912b does not toll the limitations period.[14] It reasoned that the language of MCL 600.2912b(1)—with its use of the phrase "shall not"—is mandatory, and that MCL 600.5856(d) only tolled the limitations period if the plaintiff's notice complied with MCL 600.2912b.[15]

In *Burton*, the plaintiff filed his medical malpractice complaint 115 days after providing his notice of the intent to the defendants.[16] Because the plaintiff did not comply with the mandatory language of MCL 600.2912b, the Michigan Supreme Court concluded that this Court erred by reversing the trial court's grant of summary disposition.[17]

C. *BUSH v SHABAHANG*

In *Bush v Shabahang*, the Michigan Supreme Court held that MCL 600.5856 allowed a defective notice of intent to toll the statute of limitations if the notice of intent was timely.[18] The Court recognized that it had previously held that a defect in the notice of intent precluded tolling the statute of limitations during the 182-day waiting period of MCL 600.5856(d).[19] However, the Court recognized that the Legislature had amended the statutory language of MCL 600.5856(d).[20] It concluded that the language of MCL 600.5856(c)—the new, equivalent section—did not mandate strict compliance with the entirety of MCL 600.2912b, but instead mandated only "compliance with the applicable notice period."[21]

The Michigan Supreme Court then determined that MCL 600.2301, which allows the trial court to amend any process, pleading, or proceeding for the furtherance of justice, provided a

---

[13] MCL 600.5856(c); *Driver*, 490 Mich at 249.

[14] *Burton*, 471 Mich at 747.

[15] *Id*. at 751-752. 2004 PA 87 modified MCL 600.5856; the pertinent provision is now MCL 600.5856(c).

[16] *Burton*, 471 Mich at 748.

[17] *Id*. at 750, 754.

[18] *Bush v Shabahang*, 484 Mich 156, 161; 772 NW2d 272 (2009).

[19] *Id*. at 165.

[20] *Id*. at 166.

[21] *Id*. at 170, quotation marks omitted.

mechanism by which the trial court could cure a defect in a notice of intent.[22] Reasoning that the plaintiff's service of a notice of intent is "clearly part of a medical malpractice 'process' or 'proceeding[,]'" the Michigan Supreme Court held that a trial court could use MCL 600.2301 to cure its defects as long as amending the pleading was in the furtherance of justice.[23]

In *Bush*, the plaintiff filed his medical malpractice complaint 175 days after serving his notice of intent on the defendants.[24] The trial court denied the defendants' motion for summary disposition on the basis that they failed to make a good-faith attempt to respond to the plaintiff's notice of intent and, therefore, the 154-day waiting period applied instead of the 182-day period.[25] However, the plaintiff's notice of intent did not comply with MCL 600.2912b because it inadequately stated the standard of care.[26]

Applying its reasoning to the facts of the case in *Bush*, the Michigan Supreme Court remanded to allow the plaintiff to correct the errors or defects in its notice as long as those corrections were in the interest of justice.[27] It determined that the plaintiff made a good-faith attempt to comply with MCL 600.2912b(4)'s requirement that the plaintiff notify the defendant of the manner in which it had violated the standard of care.[28] The Court also determined that the plaintiff timely filed their complaint after the 154-day waiting period.[29]

D. *ZWIERS v GROWNEY*

Shortly after the Michigan Supreme Court's decision in *Bush*, a panel of this Court held in *Zwiers* that, under MCL 600.2301 and *Bush*, the trial court could amend a complaint that was filed one day early.[30] This Court reasoned that MCL 600.2301 applies to the entire notice of intent process, and that the premature filing of the complaint constituted an error or defect in the proceedings.[31]

In *Zwiers*, the plaintiff filed her complaint one day before the end of the applicable 182-day waiting period.[32] Applying *Bush*, this Court reasoned that the trial court could modify the

---

[22] *Id*. at 176.

[23] *Bush*, 484 Mich at 176-177.

[24] *Id*. at 162.

[25] *Id*. at 163.

[26] *Id*. at 179.

[27] *Id*. at 184-185.

[28] *Id*. at 178.

[29] *Id*. at 185.

[30] *Zwiers*, 286 Mich App at 39-40.

[31] *Id*. at 50.

[32] *Id*. at 39.

plaintiff's complaint without prejudicing the defendants or implicating their substantial rights.[33] This Court also reasoned that the interests of justice favored the plaintiff because she made a good-faith attempt to comply with the medical malpractice process.[34] This Court determined that depriving the plaintiff of her day in court would be an injustice.[35]

E. *DRIVER v NAINI*

After this Court's decision in *Zwiers*, in *Driver*, the Michigan Supreme Court held that a plaintiff could not amend an original notice of intent to add a nonparty defendant and have the amendment relate back to the original notice for the purposes of the statute of limitations.[36] The Michigan Supreme Court reasoned in part that *Bush* was not applicable to the facts in the case before it.[37] The Court reasoned that *Bush* applied when a plaintiff "fails to meet all of the *content* requirements under MCL 600.2912b(4)[.]"[38] The Court emphasized that *Bush* only applies in cases where a defendant received a timely, but defective, notice of intent.[39] The Court also reasoned that MCL 600.2301 "only applies to actions or proceedings that are *pending*[,]" but an action cannot be pending when the plaintiff's "claim was already time-barred when he sent the [notice of intent]."[40]

In *Driver*, the plaintiff filed a timely notice of intent against Naini, complied with the notice waiting period, and filed a timely complaint against him.[41] Naini subsequently notified the plaintiff that a nonparty might have been at fault for the plaintiff's injury.[42] The trial court granted the plaintiff's motion to amend his notice of intent to include the nonparty; however, the plaintiff failed to comply with the necessary waiting period to add the new defendant to his existing medical malpractice action.[43] Therefore, the statute of limitations barred the plaintiff's complaint against the nonparty.[44]

---

[33] *Id*. at 50-51.

[34] *Id*. at 51.

[35] *Id*. at 52.

[36] *Driver*, 490 Mich at 243.

[37] *Id*. at 253.

[38] *Id*. at 252.

[39] *Id*. at 253.

[40] *Id*. at 254.

[41] *Id*. at 243-244.

[42] *Id*. at 244.

[43] *Id*.

[44] *Id*. at 265.

IV. APPLYING THE STANDARDS

Clearly, the precedent concerning this issue is both complicated and specific. This case raises two major questions: (1) whether the Michigan Supreme Court's opinion in *Driver* overruled this Court's decision in *Zwiers*, and (2) if not, whether *Zwiers* allowed the trial court to amend the Furrs' complaint. This Court's recent decision in *Tyra v Organ Procurement Agency of Michigan*[45] answers the first question in the negative, and the second question in the affirmative. MCR 7.215(J) requires us to follow that decision. Therefore, we must affirm, though for reasons that we will explain, but for the *Tyra* decision we would reach a different result.

A. *TYRA v ORGAN PROCUREMENT AGENCY OF MICHIGAN*

1. THE *TYRA* PANEL'S DECISION

In *Tyra*, the panel was primarily concerned with whether the defendants' responsive pleadings adequately asserted the affirmative defense that the plaintiffs did not comply with the notice waiting period in MCL 600.2912b.[46] The panel concluded that the defendants did not provide an adequate factual statement to support their defense that the plaintiff's suit was untimely and, therefore, waived that defense.[47]

The panel also considered whether the trial court could permit the plaintiff to amend her complaint on the basis of *Zwiers* and MCL 600.2301.[48] The panel considered the holdings of *Burton* and *Bush*, and concluded that the Michigan Supreme Court had not overturned its decision in *Burton*.[49] Specifically, the panel considered the *Zwiers* court's reliance on *Bush*.[50] We also considered the effect of *Driver* on this Court's holding in *Zwiers*.[51]

The *Tyra* panel determined that, though the application of *Zwiers* to the plaintiff's case was unclear, *Zwiers* and MCL 600.2301 might permit the plaintiff to amend her prematurely filed complaint.[52] Therefore, the panel remanded for the trial court to "exercise its discretion in

---

[45] *Tyra*, *supra*.

[46] *Id*. at ___, slip op at 2-4.

[47] *Id*. at ___, slip op at 4.

[48] *Id*. at ___, slip op at 8.

[49] *Id*. at ___, slip op at 6-8.

[50] *Id*.

[51] *Id*. at ___, slip op at 8-9.

[52] *Id*. at ___, slip op at 9.

either granting or denying [the plaintiff's] amendment, pursuant to MCL 600.2301 and *Zwiers*."[53]

2. *TYRA*'S EFFECT ON THIS CASE

We conclude that the first holding in *Tyra* has no effect on the result of this case. Here, the healthcare providers' answer to the plaintiff's complaint indicated the Furrs "failed to wait 182 days after serving their Notice of Intent before filing suit in contravention of MCL 600.2912b." Thus, the healthcare providers provided the factual basis that supported their affirmative defense.

However, the *Tyra* panel's second holding does control the outcome of this case. According to *Tyra*, *Zwiers* remains good law even after the Michigan Supreme Court's decision in *Driver*. If *Zwiers* remains good law, then *Zwiers* controls the outcome of this case. In *Zwiers*, the plaintiff filed her complaint one day before the end of the applicable 182-day waiting period.[54] Also, settlement discussions were not ongoing and the plaintiff made a good-faith attempt to comply with the notice waiting period.[55] Therefore, this Court reasoned that the trial court could modify the plaintiff's notice of intent without prejudicing the defendants or implicating their substantial rights.[56]

Similarly, here, the Furrs filed their complaint one day before the end of the applicable 182-day notice waiting period. The trial court found that the parties were not engaged in settlement discussions and that the Furrs' mistaken filing did not prejudice the healthcare providers. Therefore, if *Tyra* is correct, the trial court properly applied *Zwiers* in this case as *Zwiers* remains good law.

B. *TYRA* IS INCORRECT

For the reasons below, we do not agree with the *Tyra* panel's decision that *Zwiers* remains good law after the Michigan Supreme Court's decision in *Driver*. But for *Tyra*, we would conclude that a trial court may not use *Zwiers* and MCL 600.2301 to correct a plaintiff's prematurely filed complaint.

1. RECONCILING THE PRECEDENTS PRIOR TO *TYRA*

Though the precedent concerning MCL 600.2912b and the tolling of the statute of limitations in medical malpractice actions is complicated, we will attempt to synthesize it in a cogent fashion. A plaintiff's medical malpractice claim accrues when the medical malpractice

[53] *Id*. at ___, slip op at 10.

[54] *Id*. at 39.

[55] *Id*. at 51.

[56] *Id*. at 50-51.

occurs.[57] Subject to a discovery-rule exception that does not apply in this case, the statute of limitations for medical malpractice is two years after the action accrued.[58]

A potential plaintiff must notify a potential defendant of his or her intent to sue them before commencing a medical malpractice action.[59] "This requirement is mandatory[.]"[60] Typically, the plaintiff must then wait 182 days before filing a complaint.[61] But if the defendant does not respond to the notice, or the defendant does not respond in good faith, then the plaintiff need only wait 154 days before filing a complaint.[62] Once the claimant gives the defendant his or her notice of intent, the statute of limitations is tolled for 182 days.[63]

To effectively toll the limitations period, the plaintiff must comply with MCL 600.2912b.[64] MCL 600.5856(c) does not mandate that the plaintiff's notice strictly comply with the entirety of MCL 600.2912b.[65] The trial court may allow a plaintiff to amend his or her notice of intent under MCL 600.2301 if (1) the error does not implicate a substantial right of a party, and (2) it would be in the interests of justice to correct the error.[66] But a plaintiff may only invoke MCL 600.2301 to correct a defective *content* requirement in the notice of intent.[67] If the plaintiff files the complaint before the statutory notice period in MCL 600.2912b expires, MCL 600.5856(c) does not toll the limitations period.[68]

2. *DRIVER* OVERRULED *ZWIERS*

In our view, the Michigan Supreme Court's decision in *Driver* overruled this Court's decision in *Zwiers*. A judicial decision is overruled if

> a later decision, rendered by the same court or by a superior court in the same system, expresses a judgment upon the same question of law directly opposite to

---

[57] MCL 600.5838a(1); *Driver*, 490 Mich at 250.

[58] MCL 600.5805(6); *Burton*, 471 Mich at 748.

[59] MCL 600.2912b(1); *Driver*, 490 Mich at 247-248.

[60] *Driver*, 490 Mich at 247; see *Burton*, 471 Mich at 754.

[61] MCL 600.2912b(1); *Driver*, 490 Mich at 247.

[62] MCL 600.2912b(8); *Bush*, 484 Mich at 185.

[63] MCL 600.5856(c); *Driver*, 490 Mich at 249.

[64] MCL 600.5856(c); *Burton*, 471 Mich at 747.

[65] *Bush*, 484 Mich at 170.

[66] *Id*. at 177.

[67] *Driver*, 490 Mich at 252.

[68] *Burton*, 471 Mich at 747; *Driver*, 490 Mich at 256-257.

> that which was given before, thereby depriving the earlier opinion of all authority as a precedent.[69]

Here, both *Zwiers* and *Driver* addressed the same point of law: whether a party must strictly comply with the notice waiting period in MCL 600.2912b in order to toll the statute of limitations. In *Zwiers*, this Court indicated its belief that the Michigan Supreme Court's decision in *Bush* no longer mandated the trial court to dismiss an action that did not strictly comply with MCL 600.2912b(1)'s notice waiting period requirement because the trial court might save the plaintiff's complaint by applying MCL 600.2301.[70] It is clear that this Court believed that the Michigan Supreme Court's unequivocal holding in *Burton* was no longer controlling law.[71]

Subsequently, and to the contrary, the Michigan Supreme Court in *Driver* held 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 [the] holding in *Burton*. . . . [T]he focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b.[72]

Therefore, but for *Tyra*, we would conclude that the trial court erred when it relied on *Zwiers* to determine that it could amend the plaintiff's complaint under MCL 600.2301. After the Michigan Supreme Court's decision in *Driver* reached the opposite result on this point of law, this Court's holding in *Zwiers* is no longer controlling law.

Here, relying on *Zwiers*, the Furrs contend that if they were required to wait 182 days to file their complaint, they filed their complaint only one day early, and the trial court could use MCL 600.2301 to correct their mistake. The healthcare providers contend that the Furrs instead filed their complaint five days early.

The parties agree that the Furrs filed their complaint prematurely, although they disagree about the exact timing. If MCL 600.2912b(1) required the Furrs to wait 182 days to file their complaint, then (1) the trial court cannot use MCL 600.2301 to correct their mistake, (2) MCL 600.5856(c) did not operate to toll the statute of limitations in this case, and (3) the trial court must dismiss their case. But for *Tyra*, we would conclude that the trial court must grant the healthcare providers' motion for summary disposition.

---

[69] *Sumner v General Motors Corp (On Remand)*, 245 Mich App 653, 664; 633 NW2d 1 (2001), quoting Black's Law Dictionary (6th ed), p 1104.

[70] *Zwiers*, 286 Mich App at 46.

[71] See *Id*. at 46, 52-53.

[72] *Driver*, 490 Mich at 257.

3. APPLICATION OF MCL 600.2912b(9)

The Furrs also contend that the trial court correctly determined that, in the alternative, they only needed to wait 154 days to file their suit because, under MCL 600.2912b(9), the healthcare providers' response to their notice of intent indicated that they did not intend to settle the claim. We disagree.

At the outset, we note that this issue is unpreserved. An issue is preserved if it was raised before, addressed, or decided by the trial court.[73] The Furrs did not raise the application of MCL 600.2912b(9) before the trial court, and the trial court's alternative holding applied only MCL 600.2912b(8). Therefore, we will review this issue for plain error affecting the Furrs' substantial rights.[74] An error is plain if it is clear or obvious.[75]

We conclude that the trial court did not plainly err by failing to apply MCL 600.2912b(9) to the facts of this case. MCL 600.2912b(9) provides that a plaintiff may file his or her complaint immediately if a defendant indicates that it does not intend to settle the claim:

> 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.

A defendant's response to a plaintiff's notice of intent must contain (1) the factual basis for the defense to the claim, (2) a statement of the applicable standard of care and whether the defendant complied with it, (3) the manner in which the defendant complied with the standard of care, and (4) the manner in which any negligence was not the proximate cause of the plaintiff's injury.[76]

Here, the healthcare providers' response to the Furrs' notice of intent included those requirements, a statement of "general reservations of defenses," and a postscript from the health providers' attorney that provided the following:

> 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.

The Furrs contend that the healthcare providers' additional statements indicate that they did not intend to settle the claim. In our view, a list of intended or proposed defenses may give

---

[73] *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

[74] *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

[75] *Id*. at 286.

[76] MCL 600.2912b(7); *Bush*, 484 Mich at 181.

the plaintiff an idea of the strength of the defendants' claims and assist them in preparing for settlement negotiations. And the healthcare providers' postscript appears to be nothing more than a polite informational statement concerning on whom the plaintiffs should serve a summons and complaint, if necessary.

Further, MCL 600.2912b(9) applies if

> 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 primary definition of "to inform," when used as a transitive verb—as it is in MCL 600.2912b—is to "give or impart knowledge of a fact or circumstance."[77] Here, at best, the healthcare providers' additional statements were *implications* that they did not intend to settle the Furrs' claims. Were we to conclude that MCL 600.2192b applies whenever a plaintiff may *imply* a defendant's intent not to settle a claim, it would undermine the Legislature's choice of the word "inform." We conclude that nothing about the healthcare providers' response informed the Furrs that the healthcare providers did not intend to settle the claim. Therefore, the trial court did not plainly err by failing to apply MCL 600.2912b(9).

4. DISMISSAL SHOULD BE WITHOUT PREJUDICE

The healthcare providers contend that if summary disposition was appropriate, this Court should remand for the trial court to dismiss the Furrs' complaint with prejudice because the statute of limitations now bars their claim. We would disagree.

The healthcare providers do not explain why they believe that this case should be dismissed with prejudice. The general rule is that when a plaintiff fails to comply with MCL 600.2912b, the trial court should dismiss the case without prejudice.[78] The trial court may grant the defendants' motion for summary disposition if the plaintiffs refile the complaint after the limitations period has run.[79] But for the fact that *Tyra* requires us to affirm, we would conclude that the trial court should dismiss the Furrs' complaint without prejudice.

C. APPLICATION OF MCL 600.2912b(8)

The healthcare providers contend that the trial court's alternative holding, that the plaintiffs were able to file their suit after a 154-day waiting period because the healthcare providers did not timely respond to their notice, was erroneous. We agree.

---

[77] Random House Webster's College Dictionary (1991).

[78] *Ellout v Detroit Med Ctr*, 285 Mich App 695, 698; 777 NW2d 199 (2009).

[79] *Id*. at 699 n 2.

If a healthcare professional does not respond to the plaintiff's notice of intent within 154 days, a claimant may commence his or her action after the expiration of the 154-day period.[80] The 154-day response period begins when the healthcare professional receives the notice of intent.[81] When counting days, we count as the first day the day after the act, event, or default that triggered the time period.[82] And if the last day of a period is a Saturday, Sunday, or legal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.[83]

Here, the healthcare providers received the notice of intent on April 5, 2010, making April 6, 2010, the first day of the 154-day period. The 154th day was Monday, September 6, 2010, which was Labor Day—a legal holiday. Therefore, the last day of the 154-day period was Tuesday, September 7, 2010. The healthcare providers sent their response to the Furrs' notice of intent by facsimile on September 7, 2010. Because the healthcare providers responded within 154 days of receiving the Furrs' notice of intent, their response was timely.

As mentioned above, the healthcare providers' response also complied with the requirements of MCL 600.2912b(7). The trial court may find that a defendant's response to a plaintiff's notice of intent was not timely if it lacked good faith.[84] Under such circumstances, the 154-day waiting period applies.[85] But here, the trial court made no such finding. We conclude that the trial court erred when it determined that the 154-day waiting period applied because the healthcare providers did not timely respond to the Furrs' notice of intent.

V. CONCLUSION

Because we would conclude that the Michigan Supreme Court's opinion in *Driver* overruled this Court's interpretation of the effects of *Bush* in *Zwiers*, we believe that *Tyra v Organ Procurement Agency of Michigan* was incorrectly decided to the extent that it concluded that *Zwiers* continued to be valid law. We apply *Zwiers* only because MCR 7.215(J) obligates us to do so. Were we not so obligated, we would conclude that the trial court erroneously determined that, under *Zwiers*, it could amend the Furrs' notice of intent to be timely filed under MCL 600.2912b(1) because the Michigan Supreme Court's decisions in *Burton* and *Driver* preclude that result. Therefore, we invoke the conflict panel provisions of the Michigan Court Rules.[86]

---

[80] MCL 600.2921b(8).

[81] MCR 600.2912b(7).

[82] MCR 1.108(1).

[83] Id.

[84] *Bush*, 484 Mich at 163.

[85] *Id*.

[86] MCR 7.215(J)(3).

We affirm. As the prevailing parties, the Furrs may tax costs under MCR 7.219.

/s/ William C. Whitbeck