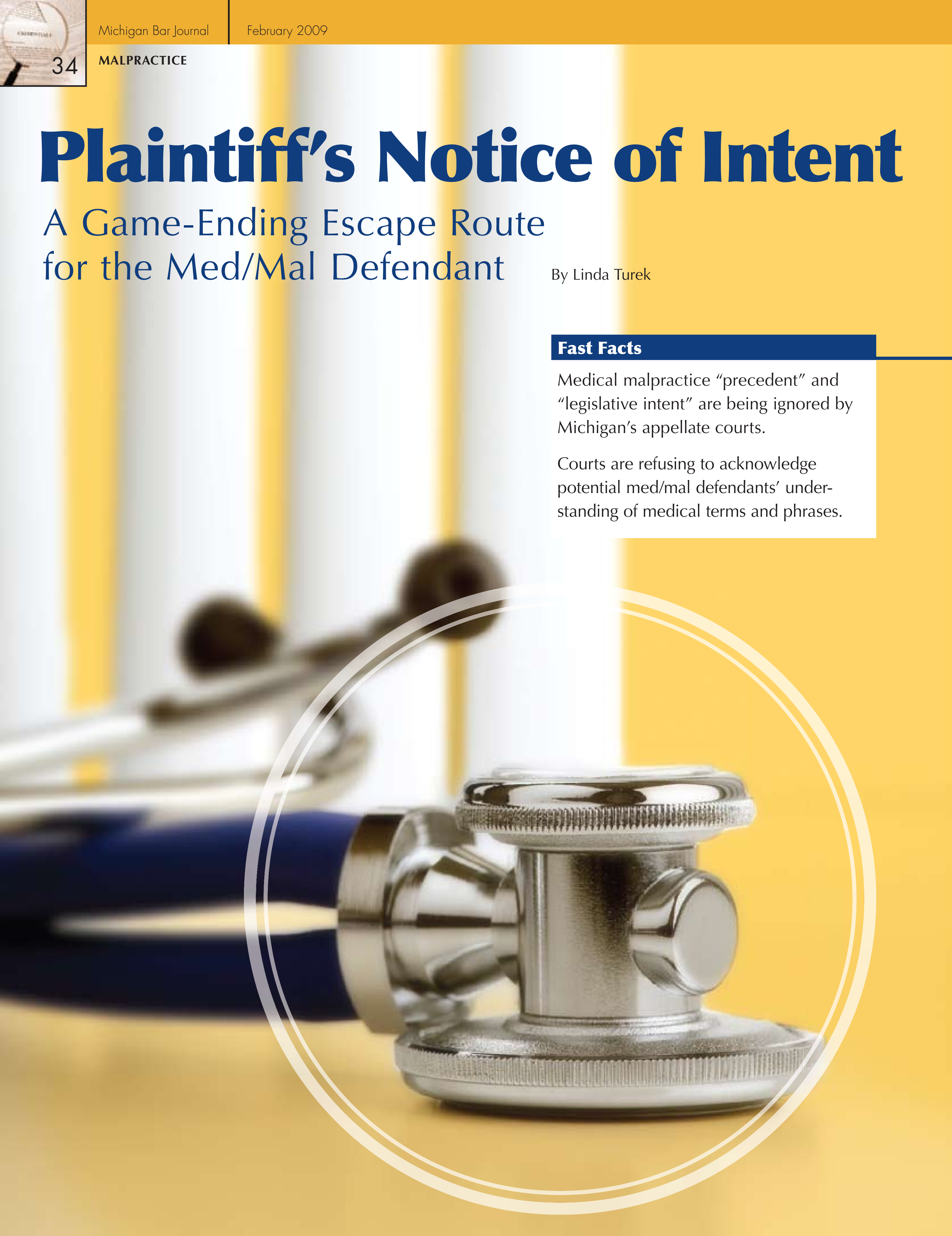
Plaintiff's Notice of Intent

A Game-Ending Escape Route for the Med/Mal Defendant

By Linda Turek

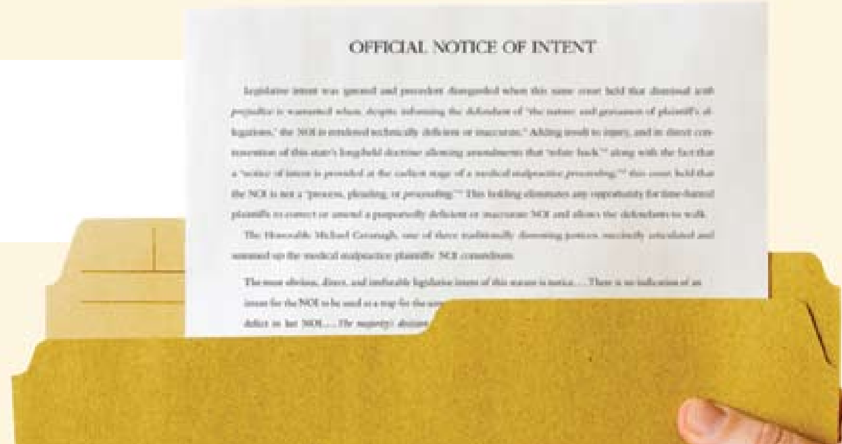


Fast Facts

Medical malpractice "precedent" and "legislative intent" are being ignored by Michigan's appellate courts.

Courts are refusing to acknowledge potential med/mal defendants' understanding of medical terms and phrases.

What was previously considered only a "notice of intent to sue" has been transformed into a magnet for judicial nitpicking.



The last five years have been quite the ride for Michigan attorneys practicing on either side of the medical negligence fence relative to the notice of intent to file claim (NOI, or the 182-day "warning shot").[1] For claimants, this highly specialized and technical area of the law is now fraught with unforeseeable, unpredictable, unnecessary, and potentially fatal nuances.

What was previously considered only a "notice of intent to sue" has been transformed into a magnet for judicial nitpicking. Indeed, the NOI-based trend is toward constructing unexpected and confounding barriers to a jury trial, potentially permitting a tortfeasor to dodge liability.

Some healthcare providers—acutely aware of this trend—often decide to defend regardless of merit. This seemingly wise business practice differs from back in the day when a potential defendant would manage the books in anticipation of preventable injuries, errors, and omissions. Funds were earmarked, reserves determined, and premiums were paid. In the current legal climate, shouldn't individual policyholders really be wondering why their premiums continue to gradually increase, especially in light of the fact that their "team" is being progressively armed with an overflowing arsenal of common-law contrived escape routes?

The most glaring escape route materializes when precedent is rendered a fiction. One example involves the mandatory presuit notice. To toll the statute of limitations or repose,[2] med/mal plaintiffs must mail to all potential defendants a summary of what occurred, what should or should not have been done, and the result of any errors or omissions.[3]

The NOI was Designed to Alleviate the Courts' Load

The reader should be aware of the stated legislative purpose for mandating an NOI—to encourage settlement of these complex, resource- and court-sapping causes of action: "The purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs."[4]

Respect for legislative intent was evident when our state's highest court ruled that the NOI must contain only a "good faith effort" in stating "allegations" and "claims" to permit an understanding of the same.[5] Indeed, "a high degree of specificity" was not required.[6] The Court further opined that "the information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice *as to the nature of the claim* against them."[7]

Judicial Nitpicking Has Gutted the Purpose for the NOI

Legislative intent was ignored and precedent disregarded when this same Court held that dismissal *with prejudice* is warranted when, despite informing the defendant of "the nature and gravamen of plaintiff's allegations," the NOI is rendered technically deficient or inaccurate.[8] Adding insult to injury, and in direct contravention of this state's long-held doctrine allowing amendments that "relate back,"[9] along with the fact that a "notice of intent is provided at the earliest stage of a medical malpractice *proceeding*,"[10] this Court held that the NOI is not a "process, pleading, or *proceeding*."[11] This holding eliminates any opportunity for time-barred plaintiffs to correct or amend a purportedly deficient or inaccurate NOI and allows the defendants to walk.

The Honorable Michael Cavanagh, one of three traditionally dissenting justices, succinctly articulated and summed up the medical malpractice plaintiffs' NOI conundrum:

> The most obvious, direct, and irrefutable legislative intent of this statute is notice....There is no indication of an intent for the NOI to be used as a trap for the unwary, ambushing a plaintiff who is without notice of the technical defect in her NOI.... *The majority's decision annihilates notice for a plaintiff with the slightest deficiency* under MCL.600.2912b. What is worse, a plaintiff may receive this terminal blow, not only without notice of the NOI's deficiency, but after any opportunity to correct the defect is past.[12]

The tendency to microscopically dissect NOIs in search of deficiencies and inaccuracies was recently advanced by the Court of Appeals when it held that the NOI "causation" terminology must be "obvious to a casual observer."[13] All should agree that those licensed healthcare professionals to whom the NOI is addressed corner the market in their understanding of medical terminology. One now must ponder: Who is this "casual observer," and is a fourth-grade reading level explanation of anatomy, physiology, and pathology now required?

The Supreme Court is Guilty of Judicial Activism

Another example of abandoning NOI-related precedent occurred in the wrongful death setting, in which a personal representative (PR) must carry the ball.[14] Michigan's med/mal lawyers (including the bench warmers) conducted themselves with the knowledge that the NOI would toll the two-year legal time limit from appointment of the PR, just as the NOI tolls the two-year statute of limitations in the underlying claim.[15] Even our Supreme Court affirmed this long-held and practiced understanding.[16]

Then in 2004, this same Court explicitly reversed itself in ruling that the NOI no longer tolls the PR appointment time limit, and instead, held that the medical negligence suit must be *filed* within two years of the PR's appointment.[17] Because countless Michigan families relied on the notion of legal precedent, they ultimately lost the right to their day in court.[18]

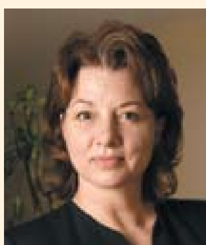
Evolving common law virtually encourages a Michigan defendant to lie in the weeds until expiration of the plaintiff's applicable time limit[19] by banking on a determination that the NOI is one or more of technically deficient, inaccurate, and procedurally incorrect.

Drafting NOIs Given Recent Appellate Decisions

Because NOIs are now fraught with unpredictable and potentially fatal nuances, they are drafted to some degree on a "wing and a prayer." However, the following are suggestions to minimize the risks *currently* associated with an NOI being deemed "deficient":

- Do not ever expect to draft an appeal-proof NOI.
- Draft the NOI at a fourth-grade reading level in an attempt to make it understandable by the "casual observer," a term that has not yet been defined.
- Despite the legislative intent to put the healthcare professionals and facilities on notice, draft the NOI so that the non-medical judiciary can easily comprehend what will be alleged in the complaint.
- Take the time and space to define medical terms commonly found in anatomy, physiology, and pathology 101 textbooks as if the NOI is being used to teach fourth graders.
- Throw in the kitchen sink when it comes to the applicable standards of practice or care and breaches of the same, i.e., do not assume the courts understand that "imaging studies" include "CT" or "MRI scans."
- Describe in detail the cause and manner of injury right down to the cellular or molecular level so there can be no question about the plaintiff's theory of the case.
- Warn your medical malpractice client that the appellate courts are gutting legislative intent and that there is no such thing as a crystal ball to forecast future, additional NOI requirements, but that you will do everything that is currently necessary in preparing the NOI.
- Be forewarned that your NOI may be the key to the defendant's escape from liability.

And—cross your fingers. ■



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FOOTNOTES

1. MCL 600.2912b.
2. MCL 600.5856(c).
3. Medical Malpractice Tort Reform Act of 1993; MCL 600.2912b.
4. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997).
5. *Roberts v Mecosta County General Hospital (After Remand) (Roberts II)*, 470 Mich 679; 684 NW2d 711 (2004).
6. *Id.* at 697, n 15.
7. *Id.* at 701 (emphasis added).
8. *Boodt v Borgess Medical Ctr (Boodt II)*, 481 Mich 558; 751 NW2d 44 (2008).
9. MCL 600.2301.
10. *Roberts II, supra* at 691 (emphasis added).
11. *Boodt II, supra* at 563, n 4 (emphasis added).
12. *Id.* at 567–568 (Cavanagh, J, dissenting) (emphasis added).
13. *Miller v Malik*, 280 Mich App 687; ___ NW2d ___ (2008).
14. MCL 600.2922.
15. MCL 600.5852.
16. *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), rev'd in part by *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).
17. *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).
18. *Mullins v St Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007), a very narrow retrospective "window of opportunity" was carved out for the minority of plaintiffs that had mailed their NOIs in time to file their complaint within 182 days after the date that *Waltz* was published.
19. *Roberts v Mecosta County General Hospital (Roberts I)*, 466 Mich 57; 642 NW2d 663 (2002), rev'd sub nomine *Roberts v Mecosta County General Hospital (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004).