

## COA Opinion: Res Ipsa is not an appropriate jury instruction in a medical malpractice claim where the harm was caused by a known complication that occurs in the absence of negligence

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In *Swanson v. Port Huron Hospital*, No. 275404, 278491, the Court of Appeals held that providing the jury with a res ipsa loquiter instruction is reversible error in a medical malpractice case where the injury suffered was a known complication of the procedure and occurred even in the absence of negligence.

Plaintiff asserted a medical malpractice claim against her doctor based on care she received relating to an ovarian cyst. In her notice of intent, Plaintiff stated her injuries and that her doctor's negligence caused those injuries, but failed to specifically articulate how the doctor's actions were negligent. The trial court denied the doctor's motion for a directed verdict and JNOV, and a jury subsequently found for Plaintiff. The Court of Appeals reversed, holding that Plaintiff's failure to state how the doctor was negligent constituted deficient notice of intent. The Supreme Court vacated the decision, remanding the case to the Court of Appeals for reconsideration in light of *Bush v. Shabahang*, 484 Mich. 156 (2009).

In *Bush*, the Supreme Court held among other things that a court may allow a party to cure a defective notice when (1) failure to permit the cure would impact a substantial right of the affected party and (2) the cure would be in the furtherance of justice. The Supreme Court in *Bush* also stated that when a defect does not impact any substantial rights and the party providing the notice of intent makes a good faith attempt to comply with the notice requirements, the defect should be disregarded and the action should be allowed to proceed.

Applying *Bush*, the Court of Appeals determined that the doctor that received the notice of intent was defective but the doctor's substantive rights were not implicated by the particular defect. Moreover, the Court concluded that Plaintiff made a good faith attempt to comply with the notice requirements and dismissal would be improper.

The Court nonetheless reversed the trial court on the ground that the jury had been improperly instructed. The court provided the jury with a res ipsa loquiter jury instruction. The Court held that Plaintiff's injury was a known complication of the procedure and could occur absent negligence, and the res ipsa instruction therefore was improper.