RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs-Appellants,

-vs-

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,

Defendants-Appellees.

Supreme Court No. 163216

Court of Appeals No. 350767

Ingham County Circuit Court Case No. 19-266-NH

_____/

PLAINTIFFS-APPELLANTS' APPENDIX

MARK GRANZOTTO, P.C.

MARK GRANZOTTO (P31492)
Attorney for Plaintiffs-Appellants
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

THE NICHOLS LAW FIRM, PLLC

JAMES T. HEOS (P26210)
MATTHEW J. HEOS (P73786)
Attorneys for Plaintiffs-Appellants
3452 East Lake Lansing Road
East Lansing, Michigan 48823
(517) 432-9000

RECEIVED by MSC 2/18/2022 11:57:49 AM

INDEX TO PLAINTIFFS-APPELLANTS' APPENDIX

Document	Page No.
Circuit Court Docket Sheet	1a
Court of Appeals Docket Sheet	6a
Complaint	24a
Defendants' Motion for Summary Disposition	31a
First Amended Complaint	44a
Dr. Martin Boyer Affidavit of Merit	51a
Plaintiffs' Emergency Motion To File Late Affidavit Of Merit	54a
Defendants' Response to Emergency Motion to File Late Affidavit of Merit	56a
Defendants' Motion to Dismiss First Amended Complaint	64a
Plaintiffs' Response To Motion For Summary Disposition	73a
Affidavit of Kelly Thomison	88a
Plaintiffs' Response To Motion To Dismiss First Amended Complaint	91a
Transcript Of August 7, 2019 Hearing	106a
Order Denying Defendants' Motion For Summary Disposition	129a
Court of Appeals Order Granting Leave	131a
Court of Appeals Opinion	132a
Supreme Court Order	141a

RECEIVED by MSC 2/18/2022 11:57:49 AM

Ingham County, Michigan - Court Record Search

Navigation

New Search
Return to ROA Results
Logout

Case Summary

Case Title:	OTTGEN, CANDI vs , OTTGEN, PATRICK KATRANJI, ABDALMAIJID et al et al
Case Number:	19-000266-NH
Judge:	CLINTON CANADY
PLAINTIFF:	CANDI OTTGEN
DEFENDANT:	ABDALMAIJID KATRANJI
PLAINTIFF:	PATRICK OTTGEN
DEFENDANT:	KATRANJI RECONSTRUCTIVE SURGICIAL INSTITUTE
DEFENDANT:	THE KATRANJI FAMILY FOUNDATION
DEFENDANT:	KATRANJI HAND CENTER
DEFENDANT:	KATRANJI INSTITUTE, ET AL
Case Status:	OPEN
Disposition:	UNDISPOSED
File Date:	04/11/2019

Case Events

71 07/09/2021	APPEARANCE OF COUNSEL BY ATTY ROBERT G. KAMENEC OF PLUNKETT COONEY ON BEHALF OF DEFS DR. ABDALMAIJID KATRANJI, KRSI, KATRANKI RECONSTURCTIVE SURGICAL INSTITUTE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, PLLC, THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER AND KATRANJI INSTITUTE
70 07/07/2021	HEARING HELD ON THE RECORD. STAY CONTINUES, PENDING OUTCOME AT SUPREME COURT THE FOLLOWING EVENT: STATUS CONFERENCE SCHEDULED FOR 07/06/2021 AT 2:00 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: HEARING HELD ON THE RECORD JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
69 06/02/2021	NOTICE OF HEARING RE STATUS CONFERENCE ON JULY 6, 2021 AT 2PM
68 05/26/2021	HEARING SET: EVENT: STATUS CONFERENCE DATE: 07/06/2021 TIME: 2:00 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: HEARING HELD ON THE RECORD
67 05/20/2021	DECISION FROM COURT OF APPEALS
66 10/13/2020	NOTICE OF RECORD RECEIVED FROM COA ON 101220
65 02/21/2020	DECISION FROM COURT OF APPEALS RE APPLICATION FOR LEAVE TO APPEAL IS GRANTED - MOTION TO FILE LATE REPLY GRANTED AND THE REPLY FILED ON NOVEMBER 11, 2019 IS ACCEPTED
64 10/17/2019	STAYED THE FOLLOWING EVENT: SCHEDULING CONFERENCE SCHEDULED FOR 11/14/2019 AT 3:15 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: STAY JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445

63 10/07/2019	ORDER REFERRING CASE TO FACILITATIVE MEDIATION
62 10/07/2019	NOTICE OF SCHEDULING CONFERENCE SET FOR THURSDAY, NOVEMBER 14, 2019 AT 3:15 PM
61 10/07/2019	HEARING SET: EVENT: SCHEDULING CONFERENCE DATE: 11/14/2019 TIME: 3:15 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: STAY
60 09/30/2019	APPEARANCE BY JAMES T. HEOS FROM NICHOLS LAW FIRM ON BEHALF OF PL CANDI AND PATRICK OTTGEN
59 09/26/2019	APPLICATION FOR LEAVE TO APPEAL AUGUST 7, 2019 TRANSCRIPT ON APPLICATION - LOWER COURT DOCKET ENTRIES - INDEX OF EXHIBITS/EXHIBITS A-I - PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE
58 09/26/2019	APPEALS TO HIGHER COURT RECEIPT: 455627 DATE: 09/27/2019
57 09/09/2019	NOTICE OF INTERROGATORIES TO DEF W/ PS
56 09/03/2019	ORDER DENYING DEF'S MOTION FOR SUMMARY DISPOSITION BASED ON PL'S FAILURE TO FILE AN AFFIDAVIT OF MERIT, DENYING DEF'S MOTION TO DISMISS PL'S FIRST AMENDED COMPLAINT; AND GRANTING STAY OF PROCEEDINGS PENDING APPEAL
55 08/28/2019	RECORDER/REPORTER'S NOTICE OF FILING OF TRANSCRIPT
54 08/28/2019	TRANSCRIPT OF PROCEEDINGS - MOTION FOR SUMMARY DISPOSTION - BEFORE HON. CLINTON CANADY III ON WEDNESDAY AUGUST 7, 2019 - REPORTED BY TERESA J. ABRAHAM
53 08/27/2019	REPLY TO DEF'S AFFIRMATIVE DEFENSES
52 08/26/2019	RESPONSE TO REQUEST FOR BILL OF PARTICULARS W/ PS
51 08/19/2019	DEF'S ANSWER TO PL'S FIRST AMENDED COMPLAINT, BILL OF PARTICULARS, AFFIRMATIVE DEFENSES, AND RELIANCE ON JURY DEMAND
50 08/19/2019	ANSWER TO COMPLAINT
49 08/15/2019	NOTICE OF SUBMISSION 7-DAY ORDER
48 08/12/2019	AFFIDAVIT OF MERITORIOUS DEFENSE ON BEHALF OF DEFENDANTS W/ PS
47 08/07/2019	HEARING SET: EVENT: MOTION (MISC) DATE: 08/07/2019 TIME: 1:30 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: GRANTED
46 08/07/2019	DENIED ON THE RECORD THE FOLLOWING EVENT: MOTION TO DISMISS SCHEDULED FOR 08/07/2019 AT 1:30 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: DENIED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
45 08/07/2019	GRANTED ON THE RECORD THE FOLLOWING EVENT: MOTION (MISC) SCHEDULED FOR 08/07/2019 AT 1:30 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: GRANTED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
44 08/07/2019	DENIED ON THE RECORD THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 08/07/2019 AT 1:30 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: DENIED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
43 08/07/2019	GRANTED ON THE RECORD THE FOLLOWING EVENT: MOTION (MISC) SCHEDULED FOR 08/07/2019 AT 1:30 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: GRANTED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MSC 2/18/2022 11:57:49 AM

42 06/28/2019	RE-NOTICE OF HEARING FOR DEF'S MOTION FOR SUMMARY DISPOSITION SET FOR 8/7/2019 AT 1:15PM W/ PS
41 06/28/2019	RE-NOTICE OF HEARING SET FOR 8/7/2019 AT 1:15PM
40 06/28/2019	RE-NOTICE OF HEARING FOR DEF'S MOTION TO DISMISS PL'S FIRST AMENDED COMPLAINT TO BE HELD 8/7/2019 AT 1:15PM W/ PS
39 06/17/2019	RE-NOTICE OF HEARING (PL'S MOTION TO FILE A LATE AFFIDAVIT OF MERIT) HRG ON 8-7-19 @ 1:30 PM W/PS
38 06/10/2019	HEARING ADJOURNED THE FOLLOWING EVENT: MOTION (MISC) SCHEDULED FOR 06/12/2019 AT 3:15 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
37 06/10/2019	HEARING ADJOURNED THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 06/12/2019 AT 3:15 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
36 06/10/2019	HEARING SET: THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 06/12/2019 AT 3:15 PM HAS BEEN RESCHEDULED AS FOLLOWS: EVENT: MOTION FOR SUMMARY DISPOSITION DATE: 08/07/2019 TIME: 1:30 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: DENIED
35 06/10/2019	HEARING SET: THE FOLLOWING EVENT: MOTION TO DISMISS SCHEDULED FOR 06/12/2019 AT 3:15 PM HAS BEEN RESCHEDULED AS FOLLOWS: EVENT: MOTION TO DISMISS DATE: 08/07/2019 TIME: 1:30 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: DENIED
34 06/10/2019	HEARING SET: THE FOLLOWING EVENT: MOTION (MISC) SCHEDULED FOR 06/12/2019 AT 3:15 PM HAS BEEN RESCHEDULED AS FOLLOWS: EVENT: MOTION (MISC) DATE: 08/07/2019 TIME: 1:30 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: GRANTED
33 06/10/2019	HEARING ADJOURNED THE FOLLOWING EVENT: MOTION TO DISMISS SCHEDULED FOR 06/12/2019 AT 3:15 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
32 06/07/2019	PROOF OF SERVICE ON 060319 A COPY OF PL'S RESPONSE TO DF'S MOTION FOR SUMMARY DISPOSITION AND BRIEF BY MAIL UPON PARTIES OF RECORD
31 06/04/2019	PL'S RESPONSE TO DFS MOTION TO DISMISS PLS FIRST AMENDED COMPLAINT - BRIEF IN SUPPORT
30 06/04/2019	HEARING SET: THE FOLLOWING EVENT: MOTION (MISC) SCHEDULED FOR 06/12/2019 AT 10:00 AM HAS BEEN RESCHEDULED AS FOLLOWS: EVENT: MOTION (MISC) DATE: 06/12/2019 TIME: 3:15 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: C30 ADJOURNED
29 06/04/2019	HEARING ADJOURNED THE FOLLOWING EVENT: MOTION (MISC) SCHEDULED FOR 06/12/2019 AT 10:00 AM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
28 06/03/2019	PLS' RESPONSE TO DFS MOTION FOR SUMMARY DISPOSITION
27 05/29/2019	HEARING SET: EVENT: MOTION TO DISMISS DATE: 06/12/2019 TIME: 3:15 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 -

		VETERANS MEMORIAL RESULT: C30 ADJOURNED
26	05/28/2019	MOTION FEE RECEIPT: 449213 DATE: 05/29/2019
25	05/28/2019	DFS'S MOTION TO DISMISS PL FIRST AMENDED COMPLAINT - NOTICE OF HEARING (HRG ON 6-12-19 @ 3:15 PM) W/PS
24	05/24/2019	DF THE KATRANJI FAMILY FOUNDATIONS AFFIDAVIT OF NON INVOLVEMENT
23	05/16/2019	HEARING ADJOURNED THE FOLLOWING EVENT: MOTION (MISC) SCHEDULED FOR 05/17/2019 AT 10:00 AM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
22	05/16/2019	PLS' BRIEF IN SUPPORT OF THEIR RESPONSE TO DFS MOTION FOR SUMMARY DISPOSITION W/PS
21	05/16/2019	HEARING SET: THE FOLLOWING EVENT: MOTION (MISC) SCHEDULED FOR 05/17/2019 AT 10:00 AM HAS BEEN RESCHEDULED AS FOLLOWS: EVENT: MOTION (MISC) DATE: 06/12/2019 TIME: 10:00 AM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: C30 ADJOURNED
20	05/16/2019	PL'S AMENDED BRIEF IN SUPPORT OF THEIR EMERGENCY MOTION TO FILE LATE AFFIDAVIT OF MERIT W/PS
19	05/15/2019	PL'S MOTION TO FILE A LATE AFFIDAVIT OF MERIT - NOTICE OF HEARING (HRG ON 5-17-19 @ 10:00 AM) W/PS
18	05/15/2019	DF'S RESPONSE IN OPPOSIITON TO PLS EMERGENCY MOTION TO FILE A LATE AFFIDAVIT OF MERIT
17	05/15/2019	MOTION FEE RECEIPT: 448538 DATE: 05/15/2019
16	05/14/2019	HEARING SET: EVENT: MOTION (MISC) DATE: 05/17/2019 TIME: 10:00 AM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: C30 ADJOURNED
15	05/13/2019	FIRST AMENDED COMPLAINT AND JURY DEMAND
14	05/13/2019	HEARING SET: EVENT: MOTION TO AMEND DATE: 06/12/2019 TIME: 3:15 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: CANCELLED
13	05/13/2019	EVENT CANCELLED THE FOLLOWING EVENT: MOTION TO AMEND SCHEDULED FOR 06/12/2019 AT 3:15 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: CANCELLED JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT STAFF: STAFF: COURT REPORTER: ABRAHAM, TERESA CERTIFICATION NUMBER: 3445
12	05/09/2019	MOTION FEE RECEIPT: 448350 DATE: 05/10/2019
11	05/09/2019	MOTION FOR SUMMARY DISPOSITION AS TO DF KRSI, KATRANJI RECONSTRUCTIVE, SURGICAL INSTITUTE, KATRANJI HAND CENTER AND KATRANJII - DFS MOTION FOR SUMMARY DISPOSITION BASED ON PL'S FAILURE TO FILE AN AFFIDAVIT OF MERIT - BRIEF IN SUPPORT - NOTICE OF HEARING (6-12-19 @ 3:15 PM) W/PS
10	05/09/2019	DF KATRANJI FAMILY FOUNDATIONS AFFIDAVIT OF NON INVOLVEMENT
9	05/08/2019	HEARING SET: EVENT: MOTION FOR SUMMARY DISPOSITION DATE: 06/12/2019 TIME: 3:15 PM JUDGE: CANADY III, CLINTON LOCATION: COURTROOM 6 - VETERANS MEMORIAL RESULT: C30 ADJOURNED
8	05/07/2019	ORDER OF DISQUALIFICATION. THE JUDGE WAS CHANGED FROM JAMES S. JAMO TO CLINTON CANADY III. COPY OF ORDER MAILED TO ATTORNEY OF RECORD ON 5/8/2019.
7	05/03/2019	PROOF OF SERVICE ON 042419 A COPY OF SUMMONS & COMPLAINT PERSONALLY SERVED UPON SANDRA LAKE C/O KATRANJI, DR ABDALMAIJID
6	04/25/2019	PROOF OF SERVICE ON 041819 A COPY OF SUMMONS & COMPLAINT SERVED UPON ADIL DAUDI C/O DR ABDALMAIJID KATRANJI; KRSL;

RECEIVED by MSC 2/18/2022 11:57:49 AM

		KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE; VIA PERSONAL SERVICE
5	04/11/2019	COMPLAINT FILED RECEIPT: 446826 DATE: 04/11/2019
4	04/11/2019	SUMMONS ISSUED
3	04/11/2019	JURY FEE PAID RECEIPT: 446826 DATE: 04/11/2019
2	04/11/2019	DEMAND FOR JURY TRIAL
1	04/11/2019	C30 ELECTRONIC SYSTEM FEE RECEIPT: 446826 DATE: 04/11/2019

Return to Case Summary

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

RECEIVED by MSC 2/18/2022 11:57:49 AM

COA 350767
MSC 163216

CANDI OTTGEN V ABDALMAIJID KATRANJI MD

Lower Court/Tribunal
INGHAM CIRCUIT COURT
Judge(s)
CANADY CLINTON III

Docket Case Documents

Case Information

Case Header

Case Number

COA #350767 MSC #163216

Case Status

MSC	Pending on Application
COA	Case Concluded; File Open

Parties & Attorneys to the Case – Court of Appeals

Court of Appeals Docket Sheet

RECEIVED by MSC 2/18/2022 11:57:49 AM

1

OTTGEN CANDI

Plaintiff - Appellee

Attorney(s)

HEOS JAMES
#26210, Retained
GRANZOTTO MARK
#31492, Co-Counsel

2

OTTGEN PATRICK

Plaintiff - Appellee

Attorney(s)

Same

3

KATRANJI ABDALMAIJID MD

Defendant - Appellant

Attorney(s)

KAMENEC ROBERT G
#35283, Retained

4

KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE

Defendant - Appellant

Attorney(s)

Same

Court of Appeals Docket Sheet

RECEIVED by MSC 2/18/2022 11:57:49 AM

5

KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE PLLC
Defendant - Appellant

Attorney(s)

Same

SHOW 3 MORE PARTIES +

Parties & Attorneys to the Case - Supreme Court

1

OTTGEN CANDI
Plaintiff

Attorney(s)

James T. Heos
#26210
Mark R. Granzotto
#31492

2

OTTGEN PATRICK
Plaintiff

3

KATRANJI ABDALMAIJID MD
Defendant

Attorney(s)

Jeffrey C. Gerish
#51338

Court of Appeals Docket Sheet

RECEIVED by MSC 2/18/2022 11:57:49 AM

4

KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE
Defendant

5

KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE PLLC
Defendant

SHOW 6 MORE PARTIES +

COLLAPSE ALL EXPAND ALL

09/24/2019 1 App For Leave to Appeal - Civil

Service Date
09/24/2019

Answer Due
10/15/2019

Fee Code
Electronic Payment

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

09/03/2019 2 Order Appealed From

Trial Court
INGHAM CIRCUIT COURT

Case Number
19-000266-NH

Trial Court Judge
CANADY CLINTON III
#23262

Nature Of Case
Summary Disposition Denied

09/30/2019 3 Appearance - Appellee

Party
1. OTTGEN CANDI

Attorney
HEOS JAMES
#26210

Service Date
09/30/2019

10/14/2019 4 Appearance - Of Counsel

Party
1. OTTGEN CANDI

Attorney
GRANZOTTO MARK
#31492

Service Date
10/14/2019

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

10/15/2019 5 Answer - Application

Party
1. OTTGEN CANDI

Attorney
HEOS JAMES
#26210

Service Date
10/15/2019

Related Event
1. App For Leave to Appeal - Civil

11/05/2019 7 Motion: Late Answer

Party
3. KATRANJI ABDALMAIJID MD

Attorney
KAMENEC ROBERT G
#35283

Service Date
11/05/2019

Answer Due
11/12/2019

Fee Code
Electronic Payment

Requested Extension
11/19/2019

Comments
motion to file late reply.

11/19/2019 6 Reply to Answer - Application

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

Party

3. KATRANJI ABDALMAIJID MD

Attorney

KAMENEC ROBERT G
#35283

Service Date

11/19/2019

Related Event

5. Answer - Application

02/11/2020 10 Submitted on Motion Docket

Submitted Events

1. App For Leave to Appeal - Civil
7. Motion: Late Answer

02/19/2020 11 Order: Application - Grant

Related Events

1. App For Leave to Appeal - Civil
7. Motion: Late Answer

Panel

Borrello Stephen L
Meter Patrick M
Kelly Michael J

Attorney

KAMENEC ROBERT G
#35283

Amount

$0.00

Comments

limited to issues raised. Motion to file late reply is granted, reply accepted.

VIEW ORDER →

Court of Appeals Docket Sheet

RECEIVED by MSC 2/18/2022 11:57:49 AM

03/04/2020 12 Docketing Statement MCR 7.204H

Party
3. KATRANJI ABDALMAIJID MD

Attorney
KAMENEC ROBERT G
#35283

Service Date
03/04/2020

Joint Parties

03/10/2020 13 Transcript Complete Per COA Atty

Document Date
09/24/2019

03/27/2020 14 Other

Party
1. OTTGEN CANDI

Attorney
HEOS JAMES
#26210

Service Date
03/27/2020

Comments
Returned mail, address updated and order sent to Atty Heos.

05/15/2020 15 Invol Dismissal Warning - No Appellant Brief

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

Attorney
KAMENEC ROBERT G
#35283

Due Date
06/05/2020

05/15/2020 16 Telephone Contact

Party
3. KATRANJI ABDALMAIJID MD

Attorney
KAMENEC ROBERT G
#35283

Comments
Advised attorney not to take Clerk's Office letter regarding outstanding AT's brief sent today literally. Recognized administrative order extends filing deadline. Treat as reminder that brief is outstanding and e-filings can be made at this point.

06/30/2020 19 Stipulation: Extend Time - AT Brief

Party
3. KATRANJI ABDALMAIJID MD

Attorney
KAMENEC ROBERT G
#35283

Service Date
07/30/2020

Extend To
07/28/2020

07/29/2020 20 Motion: Extend Time - Appellant

Party
3. KATRANJI ABDALMAIJID MD

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

Attorney
KAMENEC ROBERT G
#35283

Service Date
07/28/2020

Answer Due
08/04/2020

Fee Code
Electronic Payment

Requested Extension
08/25/2020

08/11/2020 24 Submitted on Administrative Motion Docket ×

Submitted Events
20. Motion: Extend Time - Appellant

08/12/2020 25 Order: Extend Time - Appellant Brief - Grant ×

Related Events
20. Motion: Extend Time - Appellant

Panel
Gadola Michael F

Attorney
KAMENEC ROBERT G
#35283

Amount
$0.00

Extend To
08/25/2020

VIEW ORDER →

Court of Appeals Docket Sheet

08/25/2020 26 Brief: Appellant

Party
3. KATRANJI ABDALMAIJID MD

Attorney
KAMENEC ROBERT G
#35283

Service Date
08/25/2020

Oral Argument Requested
Yes

Joint Parties

Timely
Yes

09/30/2020 27 Noticed

Date Sent
10/01/2020

10/12/2020 28 Record Filed

Comments
lcf;tr--ingham circ

10/20/2020 30 Electronic Record Filed

10/23/2020 31 Motion: Extend Time - Appellee

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

Party
1. OTTGEN CANDI

Attorney
HEOS JAMES
#26210

Service Date
10/22/2020

Answer Due
10/29/2020

Fee Code
Electronic Payment

Requested Extension
11/24/2020

11/03/2020 33 Submitted on Administrative Motion Docket

Submitted Events
31. Motion: Extend Time - Appellee

11/09/2020 34 Order: Extend Time - Appellee Brief - Grant

Related Events
31. Motion: Extend Time - Appellee

Panel
Gadola Michael F

Attorney
HEOS JAMES
#26210

Amount
$0.00

Extend To
11/24/2020

VIEW ORDER →

Court of Appeals Docket Sheet

12/15/2020 35 Brief: Appellee

Party
1. OTTGEN CANDI

Attorney
HEOS JAMES
#26210

Service Date
12/15/2020

Oral Argument Requested
Yes

Joint Parties

Timely
Yes

Comments
AE granted 10 minutes of OA per order issued 4/21/21

12/16/2020 36 Oral Arg Advise Ltr Sent

Party
1. OTTGEN CANDI

Attorney
HEOS JAMES
#26210

01/05/2021 37 Brief: Reply

Party
3. KATRANJI ABDALMAIJID MD

Attorney

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

KAMENEC ROBERT G
#35283

Service Date
01/05/2021

Joint Parties

Timely
Yes

04/20/2021 43 Motion: Oral Argument on Case Call

Party
1. OTTGEN CANDI

Attorney
HEOS JAMES
#26210

Service Date
04/20/2021

Answer Due
04/27/2021

Fee Code
Electronic Payment

04/21/2021 44 Submitted on Motion Docket Affecting Call

Submitted Events
43. Motion: Oral Argument on Case Call

04/21/2021 45 Order: Oral Argument - Grant

Related Events
43. Motion: Oral Argument on Case Call

Panel

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

Panel
Cameron Thomas C
Borrello Stephen L
Redford James R

Attorney
GRANZOTTO MARK
#31492

Amount
$0.00

Comments
Counsel for Appellee shall be entitled to 10 minutes of oral argument

VIEW ORDER →

04/21/2021 46 Case Call Update For Panel ×

Service Date
04/21/2021

Comments
Counsel for Appellee shall be entitled to 10 minutes of oral argument

05/11/2021 42 Submitted on Case Call ×

05/11/2021 47 Oral Argument Audio ×

LISTEN TO ORAL ARGUMENT →

05/20/2021 48 Opinion - Per Curiam - Unpublished ×

Result
Affirmed In Part; Reversed In Part

Panel
Cameron Thomas C

RECEIVED by MSC 2/18/2022 11:57:49 AM

Cameron Thomas C
Borrello Stephen L
Redford James R

Court of Appeals Docket Sheet

Pages
9

READ OPINION →

05/20/2021 49 Order: Costs - Assessed

Panel
Cameron Thomas C
Borrello Stephen L
Redford James R

Amount
$3,000.00

Comments
see order

VIEW ORDER →

06/01/2021 50 Costs Paid - Miscellaneous

Party
1. OTTGEN CANDI

Attorney
HEOS JAMES
#26210

Related Event
49. Order: Costs - Assessed

Comments
Payment for costs assessed per COA 5/20/2021 order.

07/01/2021 51 Application for Leave to SCt

RECEIVED by MSC 2/18/2022 11:57:49 AM

Supreme Court Number
163216

Court of Appeals Docket Sheet

Answer Due
07/29/2021

Party
1. OTTGEN CANDI

Attorney
GRANZOTTO MARK
#31492

07/01/2021 52 Supreme Court: SCt Case Caption

07/27/2021 53 Supreme Court Motion: Housekeeping

Party
3. KATRANJI ABDALMAIJID MD

Attorney
KAMENEC ROBERT G
#35283

Payment Type
E-Pay

Comments
Motion to extend time to 08-19-2021 to answer

07/30/2021 54 Supreme Court Order: Chief Justice - Grant

Comments
Grant DFAEs motion to extend time for filing answer to 8-19-2021.

VIEW ORDER →

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals Docket Sheet

08/19/2021 55 Supreme Court: Answer - SCt Application/Complaint

Party
3

Attorney
KAMENEC ROBERT G
#35283

10/01/2021 56 Supreme Court: Appearance of Attorney

Party
3

Attorney
GERISH JEFFREY C
#51338

Comments
Atty J Gerish for R Kamenec

12/22/2021 57 Supreme Court Order: Application - Grant

Comments
20-min OA per side. Invited AC=MI Assn for Justice, MI Defense Trial Counsel, Negligence Law Section of SBM.

VIEW ORDER →

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CANDI OTTGEN and
PATRICK OTTEGEN,

Plaintiffs,

v

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITURE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE,

Defendants.

COMPLAINT AND JURY DEMAND

File No. 19-2010-NH
HON.
JUDGE JAMES S. JAMO

James T. Heos (P26210)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

THERE IS NO OTHER PENDING OR RESOLVED CIVIL ACTION ARISING OUT OF THE TRANSACTION OR OCCURRENCE ALLEGED IN THE COMPLAINT

GENERAL ALLEGATIONS

NOW COMES Plaintiffs, CANDI OTTGEN and PATRICK OTTGEN, by and through their attorneys, THE NICHOLS LAW FIRM, PLLC, by James T. Heos, and states as follows:

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

COUNT I – MEDICAL MALPRACTICE AGAINST DR. KATRANJI

1. That Candi Ottgen is a resident of County of Ionia, State of Michigan and lives there with her husband, Patrick Ottgen.

2. That Dr. Abdalmajid Katranji is a principal and/or employee of KRSI, Katranji Reconstructive Surgical Institute Katranji Reconstructive Surgery Institute, PLLC, The Katranji Family Foundation, Katranji Hand Center, and Katranji Institute.

3. That Dr. Abdalmajid Katranji and KRSI, Katranji Reconstructive Surgical Institute, Katranji Reconstructive Surgery Institute, PLLC, The Katranji Family Foundation, Katranji Hand Center, and Katranji Institute, all entities hereinafter referred as "Katranji Hand Center", do business in the County of Ingham, State of Michigan.

4. That Plaintiff Candi Ottgen was a 43 year old right hand dominant female who reported the onset of bilateral thumb pain as well as numbness and tingling in her fingers in mid-2016.

5. Candi Ottgen reported that both the thumb pain and the numbness and tingling started at nearly the same time.

6. Eventually when Candi Ottgen could not manage the symptoms at home she saw a Dr. Kantore in December 2016 at Plant Medical, General Motors.

7. Candi Ottgen was prescribed splints, therapy and corticosteroid injections in her wrist that did not help the numbness and tingling or thumb pain.

8. Candi Ottgen was then sent to McLaren General Health, Pennsylvania Campus, and underwent a nerve study conduction test.

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

9. Candi Ottgen was subsequently referred to Defendant Dr. Abdalmajid Katranji.

10. When Candi Ottgen appeared for her initial consultation she saw a physician's assistant who performed an ultrasound evaluation, took radiographs, and was eventually scheduled for surgery.

11. Candi Ottgen was told by the physician's assistant that she needed a carpal tunnel release and a tendon release in her thumb but did not see Dr. Abdalmajid Katranji.

12. Candi Ottgen met Dr. Abdalmajid Katranji on May 1, 2017 and reports that he talked to her about thumb surgery and indicated that it was not that bad and he would just trim some osteophytes and perform a carpal tunnel release.

13. In fact Dr. Abdalmajid Katranji informed Candi Ottgen post-surgery that he performed an arthroplasty and was splinted in a routine fashion removing her trapezium bone.

14. Dr. Abdalmajid Katranji sent Candi Ottgen to physical therapy and then on July 23, 2017 he performed a carpel tunnel release.

15. Following both surgeries Candi Ottgen reports she developed the onset of numbness and tingling in the thumb and index finger which is constant with decreased range of motion in her thumb, decreased strength, and had difficulty doing activities of daily living including but not limited to getting dressed.

16. Candi Ottgen cannot do her old job at General Motors, which was working on the production Line.

COUNT II – MEDICAL MALPRACICE AGAINST KATRANJI RECONSTRUCTIVE SURGICAL INSTITURE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE

18. Plaintiffs incorporate the preceding paragraphs as though fully stated herein.

RECEIVED by MSC 2/18/2022 11:57:49 AM

19. Dr. Abdalmajid Katranji, and Katranji Hand Center had a duty to inform Candi Ottgen, the right-hand dominant patient, that when he performed the arthroplasty on her right thumb and removed the trapezium that this would affect her ability to lead a normal life, including but not limited to continuing her job at General Motors.

20. Dr. Abdalmajid Katranji and Katranji Hand Center had an obligation to ascertain whether she worked and what her work entailed.

21. Given Candi Ottgen's symptoms, age and the results of her diagnostic testing removing the trapezium was not within the standard of practice.

22. Katranji Hand Center and Dr. Abdalmajid Katranji are vicariously liable and actively liable for the acts of their principals and employees.

23. Dr. Abdalmajid Katranji did not procure the requisite informed consent required of him as a hand surgeon by not notifying his patient Candi Ottgen that her life would be drastically effected by the surgical procedure that caused him to remove her trapezium.

24. Dr. Abdalmajid Katranji had a duty to inform his patient, Candi Ottgen, of the catastrophic economic loss she would sustain as a result of the arthroplasty he performed on her on May 1, 2017.

25. Given Candi Ottgen's age, work and household responsibilities, Dr. Abdalmajid Katranji breached the standard of practice required of him as a hand surgeon by performing an arthroplasty, removing her right trapezium given the radiographic results and the economic loss.

26. Dr. Abdalmajid Katranji should have educated his patient Candi Ottgen on what she could expect from her condition if he were to perform an arthroplasty removing her trapezium.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

27. Dr. Abdalmajid Katranji should never had removed Candi Ottgen's trapezium and performed an arthroplasty given her age, work and household responsibilities given her presentation.

28. Katranji Hand Center is vicariously liable for the acts of their principals and employees.

29. Surgeries performed on Candi Ottgen on May 1, 2017 and July 23, 2017 caused her pain and suffering in the past, present and future and affected her ability to use her right hand and earn a living at General Motors. That the above noted surgeries aggravated and/or activated any pre-existing conditions.

COUNT III – LOSS OF CONSORTIUM

30. Plaintiffs incorporate the preceding paragraphs as though fully stated herein.

31. As a direct and proximate result of Plaintiff's injuries; Plaintiff Patrick Ottgen has suffered the following injuries:

A. An interference with the husband/wife relationship, including her right of marital conjugal fellowship which existed prior to the date of Plaintiff's collision;

B. An interference with the love, affection and society which existed prior to the date of Plaintiff's collision;

C. An interference with the enjoyment of Plaintiff's company and companionship in and about the household, including the loss of pleasurable enjoyment of recreational activities outside the household;

D. An interference with Plaintiff's services and financial support, and Plaintiff is fearful that these losses have and will affect their household and standard of living.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

E. Severe emotional distress, mental anguish and anxiety in the past, present and into the unknown future and permanently.

32. Plaintiff's injuries occurred in the past, present and continue into the unknown future and permanently.

WHEREFORE Plaintiffs **CANDI OTTGEN and PATRICK OTTGEN** makes claim for all non-economic losses and any economic losses in excess of No-Fault benefits, and the amount in controversy exceeds the sum of Twenty-five Thousand ($25,000) Dollars. Further, Plaintiffs **CANDI OTTGEN and PATRICK OTTGEN** makes claim for any amount that they may be entitled to, plus costs and interest and for whatever amount this Honorable Court may deem just and proper and the nature of this case may allow.

THE NICHOLS LAW FIRM

By_____

Dated: March 27, 2018

James T. Heos (P26210)
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
Telephone: (517) 432-9000

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

JURY DEMAND

NOW COMES the Plaintiffs, CANDI OTTGEN and PATRICK OTTGEN, by and through their attorneys, JAMES T. HEOS of THE NICHOLS LAW FIRM, and demands trial by jury in reference to the above-entitled matter.

Respectfully submitted,

THE NICHOLS LAW FIRM, PLLC

BY: _____

JAMES T. HEOS (P26210)
Attorney for Plaintiff
3452 East Lake Lansing Road
East Lansing, Michigan 48823
(517) 432-9000

Dated: April 5, 2019

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs,

Hon. Clinton Canady, III

v

Docket No. 19-266-NH

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRNAJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
THE NICHOLS LAW FIRM
Attorneys for Plaintiffs
3452 E. Lake Lansing Road
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
(517) 853-2929

HALL MATSON PLC

DEFENDANTS' MOTION FOR SUMMARY DISPOSITION BASED ON PLAINTIFFS' FAILURE TO FILE AN AFFIDAVIT OF MERIT

NOW COME the Defendants, by and through their attorneys, Hall Matson PLC, and in support of their Motion for Summary Disposition, state as follows:

RECEIVED by MSC 2/18/2022 11:57:49 AM

1. This motion is brought pursuant to MCR 2.116(C)(7) and (8).

2. This medical malpractice Complaint relates to care and treatment provided to Plaintiff, Candi Ottgen, by Defendant, Dr. Katranji. (**Exhibit 1**, Plaintiffs' Complaint). Plaintiff Patrick Ottgen has brought a derivative claim for loss of consortium. (**Exhibit 1**, Count III).

3. Candi Ottgen (hereafter referred to as "Plaintiff") alleges that she sought treatment for bilateral thumb pain, numbness, and tingling in her fingers in 2016. (**Exhibit 1**, ¶ 4).

4. Plaintiff was ultimately referred to hand surgeon, Defendant Dr. Katranji, who performed surgery on May 1, 2017 and July 23, 2017. (**Exhibit 1**, ¶ 29).

5. Plaintiff now contends that Dr. Katranji committed medical negligence in removing her trapezium,[1] which she contends has caused decreased range of motion in her thumb, decreased strength, and difficulties performing activities of her daily life. (**Exhibit 1**, Counts I and II).

6. In order to properly commence an action for medical malpractice, MCL 600.2912d(1) requires the plaintiff to file an Affidavit of Merit ("AOM") with the complaint, signed by an expert who is reasonably believed to meet the statutorily specified qualifications.

7. A complaint sounding in malpractice cannot be commenced absent the filing and serving of an AOM. Further, if the plaintiff fails to follow this requirement, the two-year statute of limitations is not tolled. *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 547 (2000).

8. Here, Plaintiff has failed to file an AOM with the Complaint.

9. Plaintiff's failure to comply with the specific statutory procedural requirement for filing a medical malpractice claim, including those set forth in MCL 600.2912d(1), necessitates dismissal. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999).

HALL MATSON PLC

[1] The trapezium is the bone below the based on the thumb. Removal of the trapezium is a known method of relieving nerve pressure.

RECEIVED by MSC 2/18/2022 11:57:49 AM

Assuming the statute of limitations has not expired, dismissal should be without prejudice. If, however, the statute of limitations has expired, dismissal should be with prejudice.

10. Here, the two-year statute of limitations has now expired as to Plaintiff's claim concerning her surgery on May 1, 2017. As such, this claim is time-barred and must be dismissed with prejudice. *Scarsella*, 461 Mich at 549-550.

11. The two-year statute of limitations as to Plaintiff's claim regarding her July 23, 2017 surgery has not expired. Therefore, this claim should be dismissed without prejudice.

12. Defendants are also requesting that this Court deemed this Complaint to be frivolous pursuant to MCR 2.625(A)(2) and MCL 600.2591 and/or filed in violation of the attorney signature rule as set forth in MCR 1.109(E). Accordingly, Defendants request that they be awarded costs and fees, including reasonable attorney fees, as permitted thereunder.

WHEREFORE, Defendants requests that this Honorable Court:

(1) Grant this Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (8),

(2) Dismiss the Complaint with respect to any and all allegations arising out of the May 1, 2017 surgery, including any all alleged injuries arising therewith, with prejudice,

(3) Dismiss the Complaint with respect to any and all allegations arising out of the July 23, 2017 surgery, including any all alleged injuries arising therewith, without prejudice, and

(4) Deem this Complaint frivolous pursuant to MCR 2.625(A)(2) and MCL 600.2591 and/or filed in violation of the signature rule set forth in MCR 1.109(E)(6), and award Defendants costs and fees, including reasonable attorney fees, as permitted by law.

HALL
MATSON
PLC

RECEIVED by MSC 2/18/2022 11:57:49 AM

Respectfully submitted,

HALL MATSON, PLC
Attorneys for Defendants

By: Sandra J Lake
Marcy R. Matson (P49758)
Sandra J. Lake (P45288)
Business address:
1550 Watertower Place, Suite 200
East Lansing, Michigan 48823
Telephone: (517) 853-2929

Dated: May 8, 2019

PROOF OF SERVICE

The undersigned certifies that a copy of the attached instruments were served on the attorney(s) for the parties hereto, by mailing the same to said attorney(s) at their appropriate business address(es) by first-class mail on the 8th day of May, 2019. I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge, and belief.

Darla J. Arnold

HALL MATSON PLC

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs,

v

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRNAJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,

Defendants.

Hon. Clinton Canady, III

Docket No. 19-266-NH

James T. Heos (P26210)
THE NICHOLS LAW FIRM
Attorneys for Plaintiffs
3452 E. Lake Lansing Road
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
(517) 853-2929

HALL MATSON PLC

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY DISPOSITION BASED ON PLAINTIFFS' FAILURE TO FILE AN AFFIDAVIT OF MERIT

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATEMENT OF FACTS

This Motion for Summary Disposition is brought pursuant to MCR 2.116(C)(7) and (8). As such, Defendant will rely on the allegations set forth in Plaintiff's Complaint.[2] This medical malpractice complaint relates to care and treatment provided to Plaintiff, Candi Ottgen, by Defendant, Dr. Katranji. (**Exhibit 1**, Plaintiffs' Complaint). Plaintiff Patrick Ottgen has brought a derivative claim for loss of consortium. (**Exhibit 1**, Count III). The three counts alleged in the Complaint are titled as follows:

> COUNT I – MEDICAL MALPRACTICE AGAINST DR. KATRANJI
>
> COUNT II - MEDICAL MALPRACTICE AGAINST KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER AND KATRANJI INSTITUTE
>
> COUNT III – LOSS OF CONSORTIUM

(**Exhibit 1**).

Candi Ottgen (hereafter referred to as "Plaintiff") alleges that she sought treatment for bilateral thumb pain, numbness, and tingling in her fingers in 2016. (**Exhibit 1**, ¶ 4). Plaintiff was ultimately referred to hand surgeon, Defendant Dr. Katranji, who performed surgery on May 1, 2017 and July 23, 2017. (**Exhibit 1**, ¶ 29). Plaintiff now contends that Dr. Katranji committed medical negligence in removing her trapezium,[3] which she contends has caused decreased range of motion in her thumb, decreased strength, and difficulties performing activities of her daily life. (**Exhibit 1**, Counts I and II).

HALL MATSON PLC

[2] Defendants do not concede that the recitation of facts as set forth in Plaintiff's Complaint is accurate. Defendants merely rely on those facts for purposes of this motion.

[3] The trapezium is the bone below the based on the thumb. Removal of the trapezium is a known method of relieving nerve pressure.

RECEIVED by MSC 2/18/2022 11:57:49 AM

As discussed below, in order to properly commence an action for medical malpractice, MCL 600.2912d(1) requires the plaintiff to file an Affidavit of Merit ("AOM") with the complaint, signed by an expert who is reasonably believed to meet the statutorily specified qualifications. Here, Plaintiff did not file an AOM with her Complaint. Nor did Plaintiff serve an AOM on Defendants. (**Exhibit 1**, a copy of the Complaint served upon Defendants). As such, and pursuant to MCL 600.2912d(1), Defendants are entitled to dismissal. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999).

Furthermore, because Plaintiff's counsel is well aware of the Affidavit of Merit requirement, the filing of a complaint alleging claims of medical malpractice without an AOM is frivolous and in violation of the attorney signature rule. Accordingly, for the reasons discussed below, Defendants are requesting an award of costs and fees, including reasonable attorney fees, in having to defend this frivolous action.

SUMMARY DISPOSITION STANDARDS OF REVIEW

"In determining whether the nature of a claim is ordinary negligence or medical malpractice. . . a court does so under MCR 2.116(C)(7)." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). For a motion brought pursuant to MCR 2.116(C)(7), the court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. A court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7)is a question of law for the court to decide. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008).

RECEIVED by MSC 2/18/2022 11:57:49 AM

A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Summary disposition under MCR 2.116(C)(8) is appropriate if the nonmoving party "has failed to state a claim on which relief can be granted." Such claims must be "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 118. In reviewing the outcome of a motion under MCR 2.116(C)(8), the trial court must consider the pleadings alone and accept the factual allegations in the complaint as true, construing them in a light most favorable to the nonmoving party. *Id.*

ARGUMENT

I. Dismissal is required where a plaintiff files a medical malpractice complaint without an Affidavit of Merit.

An action alleging medical malpractice must be dismissed unless it complies with the specific statutory procedural requirements. A plaintiff must provide the proposed defendant with a written Notice of Intent to file a claim 182 days before commencing the action. MCL 600.2912b(1); *Driver v Naini*, 287 Mich App 339, 345; 788 NW2d 848 (2010). Here, Plaintiff served a Notice of Intent upon the Defendants in October of 2018. (**Exhibit 2**, the Notice of Intent).

In addition, a plaintiff asserting a claim of medical malpractice must also file an AOM with the complaint, signed by an expert who is reasonably believed to meet the statutorily specified qualifications under MCL 600.2169. MCL 600.2912d(1); *Vanslembrouck v Halperin*, 277 Mich App 558, 561; 747 NW2d 311 (2008). MCL 600.2912d(1) provides:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney **shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.** The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him

RECEIVED by MSC 2/18/2022 11:57:49 AM

or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. (Emphasis added).

Use of the word "shall" indicates that an AOM accompanying the complaint is mandatory and imperative. *Oakland County v Michigan,* 456 Mich. 144, 154; 566 N.W.2d 616 (1997). The sanction for failing to file an AOM with the Complaint is dismissal. *Dorris*, 460 Mich at 47.

Here, Plaintiff has failed to file an AOM with her Complaint alleging medical malpractice. As a result, dismissal of this action is required. *Dorris* at 47.

II. Plaintiff's claim relating to the May 1, 2017 surgery is barred by the statute of limitations, and therefore, dismissal *with prejudice* is warranted.

The statute of limitations governing a medical malpractice action is two years. *Saffian v Simmons*, 267 Mich App 297, 302; 704 NW2d 722 (2005); MCL 600.5805(8). The period of limitations begins to run from the time the claim accrues. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 158; 626 NW2d 917 (2001). A medical malpractice claim accrues at the time of the act or omission regardless of when the plaintiff discovers the claim. *Driver v Naini*, 490 Mich 239, 249; 802 NW2d 311 (2011); MCL 600.5838a(1). MCL 600.5838a(1) specifies that:

> For purposes of this act, a claim based on the medical malpractice of a person or entity who is . . . a licensed health care professional . . . **accrues at the time of the act or omission that is the basis for the claim of medical malpractice,**

RECEIVED by MSC 2/18/2022 11:57:49 AM

> **regardless of the time the plaintiff discovers or otherwise has knowledge of the claim**. . . . (Emphasis added).

Generally, a civil action is commenced and the period of limitation is tolled when a complaint is filed. *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 547 (2000). However, in the context of medical malpractice, a plaintiff "shall" file with the complaint an AOM. MCL 600.2912d(1). Therefore, for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required AOM is insufficient to "commence" the lawsuit and does not toll the statute of limitations. *Scarsella*, 461 Mich at 549-550.

Plaintiff's claims accrued on the dates of the alleged malpractice: May 1, 2017 and July 23, 2017. Therefore, the statute of limitations related to each of these claims is **May 1, 2019** and **July 23, 2019**, respectively.[4]

Further, due to the fact that Plaintiff filed her Complaint without an AOM, the statute of limitations as to Plaintiff's claims has not been tolled. As a result, any and all claims and damages arising out of the May 1, 2017 surgery are now barred by the two-year statute of limitations. And

---

[4] Note that tolling pursuant to MCL 600.2192b does not apply to this case. MCL 600.5856(c) sets forth the tolling rule for medical malpractice claims. This stature provides in relevant part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

MCL 600.2192b, in turns, affords a 182-day tolling period. Here, Plaintiff's NOI was sent out in October of 2018. The 182-day notice period then expired in April of 2019. Accordingly, because the statute of limitations did not expire during the 182-day tolling period, the limitations period is not extended and the two year limitations period applies.

RECEIVED by MSC 2/18/2022 11:57:49 AM

because this claim is time-barred, it must be dismissed with prejudice. *Scarsella*, 461 Mich at 549-550.

III. Plaintiff's Complaint is frivolous and filed in violation of the attorney signature rule.

MCL 600.2591 sets forth the standards for determining if a complaint is frivolous:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

MCR 6.625(A)(2), relating to the taxation of costs for a frivolous claim, provides:

> (2) Frivolous Claims and Defenses. In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.

HALL MATSON PLC

Here, Plaintiff's counsel is well aware of the AOM requirement. By filing a medical malpractice Complaint without an AOM, Plaintiff failed to commence an action, making Plaintiff's Complaint devoid of arguable legal merit and necessitating the filing of this motion.

RECEIVED by MSC 2/18/2022 11:57:49 AM

For the same reason, Plaintiff's Complaint was filed in violation of the attorney signature rule, MCR 1.109(E), which provides in relevant part:

> (E) Signatures.
>
> * * *
>
> (5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
>
> (a) he or she has read the document;
>
> **(b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law**; and
>
> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (6) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
>
> (7) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages. (Emphasis added).

Plaintiff's Complaint cannot be considered well-grounded in fact or warranted under existing law where the existing law requires an AOM to be filed with the Complaint and where Plaintiff did not follow this requirement.[5]

HALL MATSON PLC

[5] In conjunction with this Motion, Defendants are also filing a Motion and an Affidavit of Non-Involvement concerning the many other named Defendants. One of the entities listed, KRSI, is a defunct corporation that has nothing to do with Defendants. Two "entities" are merely DBAs that cannot be sued. One "entity" does not exist at all. And finally, Plaintiffs have even gone so far as to sue The Katranji Family Foundation, a non-profit Michigan Corporation that has no involvement in this matter whatsoever. As to that entity, an Affidavit of Non-Involvement as

RECEIVED by MSC 2/18/2022 11:57:49 AM

CONCLUSION

Based on the foregoing, Defendants request that this Honorable Court:

(1) Grant this Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (8),

(2) Dismiss the Complaint with respect to any and all allegations arising out of the May 1, 2017 surgery, including any all alleged injuries arising therewith, with prejudice,

(3) Dismiss the Complaint with respect to any and all allegations arising out of the July 23, 2017 surgery, including any all alleged injuries arising therewith, without prejudice, and

(4) Deem this Complaint frivolous pursuant to MCR 2.625(A)(2) and MCL 600.2591 and/or filed in violation of the signature rule set forth in MCR 1.109(E)(6), and award Defendants costs and fees, including reasonable attorney fees, as permitted by law.

Respectfully submitted,

HALL MATSON, PLC
Attorneys for Defendants

By: Sandra J. Lake

Marcy R. Matson (P49758)
Sandra J. Lake (P45288)
Business address:
1550 Watertower Place, Suite 200
East Lansing, Michigan 48823
Telephone: (517) 853-2929

Dated: May 8, 2019

HALL MATSON PLC

permitted by MCL 600.2912c is being filed. Given the combination of invalid claims, as set forth in Defendants' two Motions for Summary Disposition, Defendants are seeking sanctions.

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

RECEIVED
MAY 13 2019
30th Circuit Court

CANDI OTTGEN and
PATRICK OTTEGEN,

Plaintiffs,

v

File No. 19-266-NH
HON.

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITURE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

FIRST AMENDED COMPLAINT AND JURY DEMAND

GENERAL ALLEGATIONS

NOW COMES Plaintiffs, CANDI OTTGEN and PATRICK OTTGEN, by and through their attorneys, THE NICHOLS LAW FIRM, PLLC, by James T. Heos, and states as follows:

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

COUNT I – MEDICAL MALPRACTICE AGAINST DR. KATRANJI

1. That Candi Ottgen is a resident of County of Ionia, State of Michigan and lives there with her husband, Patrick Ottgen.

2. That Dr. Abdalmajid Katranji is a principal and/or employee of KRSI, Katranji Reconstructive Surgical Institute Katranji Reconstructive Surgery Institute, PLLC, The Katranji Family Foundation, Katranji Hand Center, and Katranji Institute.

3. That Dr. Abdalmajid Katranji and KRSI, Katranji Reconstructive Surgical Institute, Katranji Reconstructive Surgery Institute, PLLC, The Katranji Family Foundation, Katranji Hand Center, and Katranji Institute, all entities hereinafter referred as "Katranji Hand Center", do business in the County of Ingham, State of Michigan.

4. That Plaintiff Candi Ottgen was a 43 year old right hand dominant female who reported the onset of bilateral thumb pain as well as numbness and tingling in her fingers in mid-2016.

5. Candi Ottgen reported that both the thumb pain and the numbness and tingling started at nearly the same time.

6. Eventually when Candi Ottgen could not manage the symptoms at home she saw a Dr. Kantore in December 2016 at Plant Medical, General Motors.

7. Candi Ottgen was prescribed splints, therapy and corticosteroid injections in her wrist that did not help the numbness and tingling or thumb pain.

8. Candi Ottgen was then sent to McLaren General Health, Pennsylvania Campus, and underwent a nerve study conduction test.

9. Candi Ottgen was subsequently referred to Defendant Dr. Abdalmajid Katranji.

RECEIVED by MSC 2/18/2022 11:57:49 AM

10. When Candi Ottgen appeared for her initial consultation she saw a physician's assistant who performed an ultrasound evaluation, took radiographs, and was eventually scheduled for surgery.

11. Candi Ottgen was told by the physician's assistant that she needed a carpal tunnel release and a tendon release in her thumb but did not see Dr. Abdalmajid Katranji.

12. Candi Ottgen met Dr. Abdalmajid Katranji on May 1, 2017 and reports that he talked to her about thumb surgery and indicated that it was not that bad and he would just trim some osteophytes and perform a carpal tunnel release.

13. In fact Dr. Abdalmajid Katranji informed Candi Ottgen post-surgery that he performed an arthroplasty and was splinted in a routine fashion removing her trapezium bone.

14. Dr. Abdalmajid Katranji sent Candi Ottgen to physical therapy and then on July 23, 2017 he performed a carpel tunnel release.

15. Following both surgeries Candi Ottgen reports she developed the onset of numbness and tingling in the thumb and index finger which is constant with decreased range of motion in her thumb, decreased strength, and had difficulty doing activities of daily living including but not limited to getting dressed.

16. Candi Ottgen cannot do her old job at General Motors, which was working on the production Line.

COUNT II – MEDICAL MALPRACICE AGAINST KATRANJI RECONSTRUCTIVE SURGICAL INSTITURE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE

18. Plaintiffs incorporate the preceding paragraphs as though fully stated herein.

19. Dr. Abdalmajid Katranji, and Katranji Hand Center had a duty to inform Candi

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

Ottgen, the right-hand dominant patient, that when he performed the arthroplasty on her right thumb and removed the trapezium that this would affect her ability to lead a normal life, including but not limited to continuing her job at General Motors.

20. Dr. Abdalmajid Katranji and Katranji Hand Center had an obligation to ascertain whether she worked and what her work entailed.

21. Given Candi Ottgen's symptoms, age and the results of her diagnostic testing removing the trapezium was not within the standard of practice.

22. Katranji Hand Center and Dr. Abdalmajid Katranji are vicariously liable and actively liable for the acts of their principals and employees.

23. Dr. Abdalmajid Katranji did not procure the requisite informed consent required of him as a hand surgeon by not notifying his patient Candi Ottgen that her life would be drastically effected by the surgical procedure that caused him to remove her trapezium.

24. Dr. Abdalmajid Katranji had a duty to inform his patient, Candi Ottgen, of the catastrophic economic loss she would sustain as a result of the arthroplasty he performed on her on May 1, 2017.

25. Given Candi Ottgen's age, work and household responsibilities, Dr. Abdalmajid Katranji breached the standard of practice required of him as a hand surgeon by performing an arthroplasty, removing her right trapezium given the radiographic results and the economic loss.

26. Dr. Abdalmajid Katranji should have educated his patient Candi Ottgen on what she could expect from her condition if he were to perform an arthroplasty removing her trapezium.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

27. Dr. Abdalmajid Katranji should never had removed Candi Ottgen's trapezium and performed an arthroplasty given her age, work and household responsibilities given her presentation.

28. Katranji Hand Center is vicariously liable for the acts of their principals and employees.

29. Surgeries performed on Candi Ottgen on May 1, 2017 and July 23, 2017 caused her pain and suffering in the past, present and future and affected her ability to use her right hand and earn a living at General Motors. That the above noted surgeries aggravated and/or activated any pre-existing conditions.

COUNT III – LOSS OF CONSORTIUM

30. Plaintiffs incorporate the preceding paragraphs as though fully stated herein.

31. As a direct and proximate result of Plaintiff's injuries; Plaintiff Patrick Ottgen has suffered the following injuries:

A. An interference with the husband/wife relationship, including her right of marital conjugal fellowship which existed prior to the date of Plaintiff's collision;

B. An interference with the love, affection and society which existed prior to the date of Plaintiff's collision;

C. An interference with the enjoyment of Plaintiff's company and companionship in and about the household, including the loss of pleasurable enjoyment of recreational activities outside the household;

D. An interference with Plaintiff's services and financial support, and Plaintiff is fearful that these losses have and will affect their household and standard of living.

E. Severe emotional distress, mental anguish and anxiety in the past, present and into the unknown future and permanently.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

32. Plaintiff's injuries occurred in the past, present and continue into the unknown future and permanently.

WHEREFORE Plaintiffs **CANDI OTTGEN** and **PATRICK OTTGEN** makes claim for all non-economic losses and any economic losses in excess of No-Fault benefits, and the amount in controversy exceeds the sum of Twenty-five Thousand ($25,000) Dollars. Further, Plaintiffs **CANDI OTTGEN and PATRICK OTTGEN** makes claim for any amount that they may be entitled to, plus costs and interest and for whatever amount this Honorable Court may deem just and proper and the nature of this case may allow.

THE NICHOLS LAW FIRM

Dated: May 13, 2018

By_____

James T. Heos (P26210)
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
Telephone: (517) 432-9000

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

JURY DEMAND

NOW COMES the Plaintiffs, CANDI OTTGEN and PATRICK OTTGEN, by and through their attorneys, JAMES T. HEOS of THE NICHOLS LAW FIRM, and demands trial by jury in reference to the above-entitled matter.

Respectfully submitted,

THE NICHOLS LAW FIRM, PLLC

BY: _____

JAMES T. HEOS (P26210)
Attorney for Plaintiff
3452 East Lake Lansing Road
East Lansing, Michigan 48823
(517) 432-9000

Dated: May 13, 2019

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 9/24/2019 8:31:30 PM

Re: Candi Ottgen

AFFIDAVIT OF MERITORIOUS CLAIM OF MARTIN I. BOYER, M.D.

STATE OF MISSOURI)
)ss.
COUNTY OF ST. LOUIS)

I, Martin I. Boyer, M.D., by this Affidavit, state that during the relevant time period at issue in this matter, I was a licensed and practicing physician specializing in, and devoting a majority of my professional time for the preceding year to, the clinical practice of orthopedic surgery, specializing in hand surgery, and I attest to the following:

1. I have read the Notice of Intent to file a claim in this action.

2. I have reviewed all of the medical records provided to me by Plaintiff's counsel.

3. I understand the basic facts to be:

   A. That Candi Ottgen, Plaintiff was a 43 year old right hand dominant female who reported the onset of bilateral thumb pain as well as numbness and tingling in her fingers in mid-2016. She reported that both the thumb and the numbness and tingling started at nearly the same time. Eventually when she could not manage the symptoms at home she saw a Dr. Cantore at Plant Medical at General Motors where she worked. This was in December of 2016. She was prescribed splints, therapy and corticosteroid injections in her wrist that did not help the numbness and tingling or the thumb pain.
   B. After a non-operative management she was sent to McLaren General Health, Penn Campus, and underwent a nerve study conduction test. She reports she was referred to Defendant Dr. Katranji's office where she saw a physician's assistant who performed an ultrasound, took radiographs, and was eventually scheduled for surgery. She was told by the physician's assistant that she needed a carpal tunnel surgery and a tendon release in her thumb. She did not see Dr. Katranji on that visit.
   C. She met Dr. Katranji on May 1, 2017 and reports he talked to her about the thumb surgery. He indicated that it was not that bad and he could just trim some osteophytes, and perform a carpal tunnel release. She reports after surgery he informed her that he had performed an arthroplasty and was splinted in a routine fashion removing her trapezium bone. He sent her for physical therapy and then on July 23, 2017 he performed a carpal tunnel release. Following both surgeries she reports she developed the onset of numbness, tingling in the thumb and index fingers which is constant to today's date. She currently has decreased range of motion in her thumb, decreased strength and has difficulty doing activities of daily living including

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 6/24/2019 8:31:30 PM

but not limited to getting dressed. She cannot do her job at General Motors which was working on the production line.

4. Abdalmajid Katranji, M.D., a licensed and practicing physician specializing in hand surgery, and an agent, and/or employee of KRSI, Katranji Reconstructive Surgical Institute, PLLC, the Katranji Family Foundation, Katranji Hand Center, and Katranji Institute, when presented with a patient exhibiting the history, signs and symptoms, such as those presented by Candi Ottgen had a duty to timely and properly:

   A. Take a thorough history and perform a thorough physical examination;
   B. Appreciate the significance of Candi Ottgen's radiographic and neurological findings and appreciate what she did for a living;
   C. Formulate a differential diagnosis which includes arthritis as a cause of Ms. Ottgen's presentation;
   D. Appreciate that when he performed the arthroplasty on her right thumb and removed the trapezium that this would affect her ability to lead a normal life, including but not limited to continuing her job at General Motors;
   E. Appreciate that Candi Ottgen worked and that Dr. Katranji had an obligation to ascertain what her work entailed;
   F. Appreciate that given her symptoms, and age, doing an arthroplasty and removing the trapezium was not within the standard of practice given her physical and radiographic presentation;
   G. That KRSI, Katranjri Reconstructive Surgical Institute, PLLC, the Katranji Family Foundation, Katranji Hand Center, and Katranji Institute, are vicariously liable for the acts of their principals and/or employees.

5. As a direct and proximate result of the joint and severally negligence and breaches of the standard of practice of those Defendants listed including but not limited to Dr. Abdalmajid Katranji, Candi Ottgen has sustained injuries and damages compensable under Michigan Law included but not limited to economic damages (e.g. lost wages and lost earnings, lost earning capacity, medical expenses, physical/occupational therapy expenses and prescription expenses) as well as non-economic damages (e.g. pain and suffering, disability, loss of consortium, loss of social pleasure and enjoyment, anxiety and depression).

6. This opinion is based upon a review of the information to date and may or may not change upon review of additional materials.

FURTHER AFFIANT SAYETH

Date: Jan 30/19

Dr. Martin I. Boyer

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MISSOURI)
) ss
COUNTY OF ST. LOUIS)

Subscribed and sworn to before me this 30th day of January, 2019.

Carrie Anne Heineman

Notary Public, St. Louis County
Acting in _____ County, _____
My Commission Expires: 2/25/2022

CARRIE ANNE HEINEMAN
MY COMMISSION EXPIRES
2-25-2022
NOTARY SEAL
#16297825
ST. LOUIS CITY
NOTARY PUBLIC, STATE OF MISSOURI

Prepared by:
James T. Heos (P26210)
THE NICHOLS LAW FIRM, PLLC
3452 E. Lake Lansing Road
East Lansing, Michigan 48823
(517) 432-9000

JTH/kat

RECEIVED by MCOA 9/24/2019 8:31:30 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CANDI OTTGEN and
PATRICK OTTGEN,

Plaintiffs,

v

File No. 19-266-NH
HON. Clinton Canady, III

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITURE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
517-853-2929

PLAINTIFFS'EMERGENCY MOTION TO FILE A LATE AFFIDAVIT OF MERIT

NOW COME Plaintiffs Candi Ottgen and Patrick Ottgen, by and through their attorneys, The Nichols Law Firm, PLLC, bring this motion pursuant to MCL 600.2912d and state the

RECEIVED by MSC 2/18/2022 11:57:49 AM

following in support:

1. Plaintiffs obtained an Affidavit of Merit ("AOM") on January 30, 2019 from Dr. Martin I. Boyer.
2. Dr. Boyer's AOM was omitted from Plaintiffs' April 11, 2019 Complaint and Jury Demand due to a clerical error.
3. Dr. Boyer's AOM was filed along with Plaintiffs' Amended Complaint on May 13, 2019 pursuant to MCR 2.118(A)(1) approximately 1 hour before Plaintiffs' attorneys were served with Defendants' motion for summary disposition.
4. Plaintiffs' Amended Complaint relates back to their original filing on April 11, 2019 pursuant to MCR 2.118(D).
5. Plaintiffs will suffer injustice if the Honorable Court does not grant this motion and allow them to file Dr. Boyer's AOM within 28 days after May 1, 2019 allegations of medical malpractice in the complaint.

WHEREFORE, Plaintiffs, by and through their attorneys, The Nichols Law Firm, PLLC, respectfully request the Honorable Court to GRANT their emergency motion to file a late affidavit of merit relative to the May 1, 2019 allegations of medical malpractice in the complaint.

Dated: May 14, 2019

Respectfully submitted,

By:_____

James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs,

Hon. Clinton Canady III

v

Docket No. 19-266-NH

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRNAJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
THE NICHOLS LAW FIRM
Attorneys for Plaintiffs
3452 E. Lake Lansing Road
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
(517) 853-2929

HALL MATSON PLC

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION TO FILE A LATE AFFIDAVIT OF MERIT

NOW COME the Defendants, by and through their attorneys, Hall Matson, PLC, and in response to Plaintiffs' Emergency Motion to File a Late Affidavit of Merit, state as follows:

1. Defendants are without sufficient information to admit or deny this allegation, but based on the date of the Affidavit of Merit, do not dispute this allegation.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

2. Admitted. As discussed below, because Plaintiffs' Complaint was not accompanied by an Affidavit of Merit, it cannot toll the statute of limitations. *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). As a result, one of Plaintiffs' two claims of malpractice is now time-barred. This very issue is the subject of Defendants' Motion for Summary Disposition pending before the Court.

3. Defendants are without sufficient information to admit or deny this allegation. It should be noted that the timing of the filing of the Amended Complaint is irrelevant to this issue, as Plaintiffs' claim concerning Mrs. Ottgen's May 1, 2017 hand surgery was already time-barred by May 13, 2019.

4. Denied for the reason that same is untrue. This very issue was addressed by the Michigan Supreme Court in *Scarsella v Pollak*, where the Court held that the filing of a Complaint without an Affidavit of Merit does not toll the stature of limitations. *Id.* at 552.

5. Denied for the reason that same is untrue. Plaintiffs admit that they possessed the signed Affidavit of Merit at the time of the filling of the Complaint. There is simply no justification for their failure to follow the required procedure for commencing a medical malpractice suit.

WHEREFORE, for the reasons more fully set forth in Defendants' brief accompanying this response, Defendants request that Plaintiffs' Emergency Motion be denied; that Plaintiffs' Complaint with respect to any and all allegations arising out of the May 1, 2017 surgery be dismissed with prejudice; and that Plaintiffs' Complaint with respect to any and all allegations arising out of the July 23, 2017 surgery be dismissed with without prejudice.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION TO FILE A LATE AFFIDAVIT OF MERIT

STATEMENT OF FACTS

This medical malpractice case relates to care and treatment provided to Plaintiff, Candi Ottgen, by Defendant, Dr. Katranji. (**Exhibit 1**, Plaintiffs' Complaint). Plaintiff Patrick Ottgen has brought a derivative claim for loss of consortium. (**Exhibit 1**, Count III). Candi Ottgen alleges that she sought treatment for bilateral thumb pain, numbness, and tingling in her fingers in 2016. (**Exhibit 1**, ¶ 4). Plaintiff was ultimately referred to hand surgeon, Defendant Dr. Katranji, who performed surgery on May 1, 2017 and July 23, 2017. (**Exhibit 1**, ¶ 29). Plaintiff now contends that Dr. Katranji committed medical negligence in removing her trapezium, which she contends has caused decreased range of motion in her thumb, decreased strength, and difficulties performing activities of her daily life. (**Exhibit 1**, Counts I and II).

As discussed below, in order to properly commence an action for medical malpractice, MCL 600.2912d(1) requires the plaintiff to file an Affidavit of Merit ("AOM") with the complaint, signed by an expert who is reasonably believed to meet the statutorily specified qualifications. Here, Plaintiffs did not file an AOM with the Complaint. Nor did Plaintiffs serve an AOM on Defendants. (**Exhibit 1**, a copy of the Complaint served upon Defendants). As such, the statute of limitations was not tolled upon the original filing of the Complaint. Consequently, Plaintiffs' claim alleging malpractice on May 1, 2017 is now barred by the statute of limitations. (Note that this very issue is the subject of Defendants' Motion for Summary Disposition pending before the Court). Plaintiffs' claim alleging malpractice on July 23, 2017 is not barred by the statute of limitations, and therefore, must be dismissed without prejudice.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

ARGUMENT

I. Dismissal is required where a plaintiff files a medical malpractice complaint without an Affidavit of Merit.

A plaintiff asserting a claim of medical malpractice must file an AOM with the complaint, signed by an expert who is reasonably believed to meet the statutorily specified qualifications under MCL 600.2169. MCL 600.2912d(1); *Vanslembrouck v Halperin*, 277 Mich App 558, 561; 747 NW2d 311 (2008). MCL 600.2912d(1) provides:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney **shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.** The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. (Emphasis added).

Use of the word "shall" indicates that an AOM accompanying the complaint is mandatory and imperative. *Oakland County v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997).

The sanction for failing to file an AOM with the Complaint is dismissal. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). If the statute of limitations has not expired, the dismissal shall be without prejudice. *Scarsella v Pollak*, 461 Mich 551-552, 550; 607 N.W.2d 711 (2000). If, however, the statute of limitations has expired, dismissal with prejudice is required. *Id.*

RECEIVED by MSC 2/18/2022 11:57:49 AM

II. The filing of a medical malpractice complaint without an Affidavit of Merit does not toll the statute of limitations.

Further, MCL 600.2912d(1) provides that an AOM has to be filed with the complaint in order to "commence" a medical malpractice action. Thus, both a complaint and an AOM have to be filed to toll the statute of limitations under MCL 600.5856(a). *Scarsella v Pollak*, 461 Mich 547, 550; 607 N.W.2d 711 (2000).

The issue raised in Plaintiffs' motion has already been decided by the Michigan Supreme Court, where the Court addressed the effect of filing a complaint for medical malpractice without an AOM. *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). In *Scarsella*, the plaintiff filed his medical malpractice complaint against the defendant approximately two to three weeks before his claim would be barred by the applicable two-year limitation period, but did not include an AOM. In response to the defendant's motion for summary disposition, the plaintiff argue that he should be permitted to amend the complaint to include an AOM. In rejecting this argument and adopting the holding of the Court of Appeals, the Michigan Supreme Court held:

> Plaintiff contends that he should have been allowed to amend his September 22, 1996, complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, see MCR 2.118(D), making timely the newly completed complaint. We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirement. Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1); MSA 27A.2912(4)(1), that the plaintiff "shall file with the complaint an affidavit of merit," as well as the legislative remedy of MCL 600.2912d(2); MSA 27A.2912(4)(2), allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint.

Id. at 550; see also *Holmes v Michigan Capital Med Crt*, 242 Mich App 703, 708; 620 NW2d 319 (2000) (holding that the trial court erred in holding that a later filed AOM relates back to the filing date of the complaint).

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

Here, just in *Scarsella*, the Plaintiffs filed their Complaint without an AOM in April of 2019. Plaintiffs raise two claims of malpractice, one occurring on May 1, 2019 and one occurring on July 23, 2019. As to the May 1, 2019 claim, the filing of the initial Complaint without an AOM failed to "commence" and action, and therefore, failed to toll the two-year statute of limitations as set forth in MCL 600.5805(8). As such, Plaintiffs' claim relating to care and treatment on May 1, 2019 is now barred by the statute of limitations and must be dismissed with prejudice. The statute of limitations has not yet expired as to Plaintiffs' claims relating to July 23, 2017. Therefore, this claim must be dismissed without prejudice. *Scarsella, supra.*

Moreover, as discussed above, Plaintiffs' claim that the filing of an AOM after the filing of the original complaint relates back to the date of the original complaint has been squarely rejected by the Court in *Scarsella*. The filing of the AOM at this time does not relate back to the original filing date and cannot toll the statute of limitations. *Id.* at 550. MCL 600.2912d(2) does not say anything about tolling the statute of limitations. Compare MCL 600.5856(c), which expressly states that the filing of a Notice of Intent tolls the statute of limitations. See also *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 581-582, 593; 702 NW2d 539 (2005), which held that the courts lack the authority to read into a statute a tolling rule that is not itself found in the statute. MCL 600.2912d(2) simply states that the trial court may grant the plaintiff "an additional 28 days in which to file the affidavit." In other words, with the trial court's permission, the plaintiff can file the complaint without the AOM and then file the AOM within 28 days of the complaint. However, this provision says nothing about tolling the statute of limitations. Therefore, it appears that the purpose of MCL 600.2912d(2) is not to toll the statute of limitations, but to allow a plaintiff to file an AOM within 28 days of the complaint even though MCL 600.2912d(1) ordinarily requires that the AOM be filed with the complaint.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

Stated differently, even if this Court grants the motion for an extension, it cannot toll the running of the already-expired period of limitations. There is simply no authority for the proposition that a belated grant of an extension of time can retroactively resurrect an expired cause of action. Rather, MCL 600.5805(1) provides, "A person *shall not* bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." (Emphasis added.) There is no dispute that the action at issue here accrued on May 1, 2017, and that Plaintiffs did not file the AOM until May 13, 2019, which was *after* the two-year period of limitations expired.

III. Plaintiffs lack good cause to file the Affidavit of Merit after the filing of the original complaint.

MCL 600.2912d(2) does permit a motion to extend the time to file an AOM, but only for good cause and only where it is shown that the AOM could not have been filed with the original complaint. The Michigan Supreme Court has held that an extension is only permitted ***"where an affidavit cannot accompany the complaint."*** *Scarsella* at 550 (emphasis added). Here, Plaintiffs readily admit that they had the AOM at least three months prior to filing the Complaint. Therefore, Plaintiffs could have filed the AOM with the Complaint, but simply failed to do so. An extension of time to file an AOM under such circumstances is not permitted. *Id.*

HALL
MATSON
PLC

IV. The statute does not allow for an extension exceeding 28 days from the filing of the complaint.

Finally, Plaintiffs' motion should also be denied because MCL 600.2912d(2) only allows for a 28 day extension from the date the complaint is filed. This statute provides:

> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney **an additional 28 days** in which to file the affidavit required under subsection (1). (Emphasis added).

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

Here, Plaintiffs' Complaint was filed on April 11, 2017. (See **Exhibit 2**, a copy of the Summons). The First Amended Complaint was not filed until May 13, 2019 – 32 days after the original Complaint was filed. (**Exhibit 3**, Plaintiffs' First Amended Complaint). Therefore, because the statute only permits an extension of 28 days after the filing of the Complaint, Plaintiffs' motion must be denied, as an extension in excess of 28 days is not permitted.

CONCLUSION

Based on the foregoing, Defendants request that Plaintiffs' Emergency Motion be denied; that Plaintiffs' Complaint with respect to any and all allegations arising out of the May 1, 2017 surgery be dismissed with prejudice; and that Plaintiffs' Complaint with respect to any and all allegations arising out of the July 23, 2017 surgery be dismissed with without prejudice.

Respectfully submitted,

HALL MATSON, PLC
Attorneys for Defendants

By: Sandra J Lake

Marcy R. Matson (P49758)
Sandra J. Lake (P45288)
Business address:
1550 Watertower Place, Suite 200
East Lansing, Michigan 48823
Telephone: (517) 853-2929

Dated: May 15, 2019

HALL MATSON PLC

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs,

v

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,

Defendants.

Hon. Clinton Canady, III

Docket No. 19-266-NH

James T. Heos (P26210)
THE NICHOLS LAW FIRM
Attorneys for Plaintiffs
3452 E. Lake Lansing Road
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
(517) 853-2929

HALL MATSON PLC

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COME the Defendants, by and through their attorneys, Hall Matson PLC, and for their first responsive pleading to Plaintiffs' First Amended Complaint, bring this Motion to Dismiss, and in support, state as follows:

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

1. This medical malpractice case relates to care and treatment provided to Plaintiff, Candi Ottgen, by Defendant, Dr. Katranji. (**Exhibit 1**, Plaintiffs' First Amended Complaint). Plaintiff Patrick Ottgen has brought a derivative claim for loss of consortium. (**Exhibit 1**, Count III).

2. Candi Ottgen alleges that she sought treatment for bilateral thumb pain, numbness, and tingling in her fingers in 2016. (**Exhibit 1**, ¶ 4).

3. She was ultimately referred to surgeon, Defendant Dr. Katranji, who performed surgery on May 1, 2017 and July 23, 2017. (**Exhibit 1**, ¶ 29).

4. Plaintiff now contends that Dr. Katranji committed medical negligence in removing her trapezium, which she contends has caused decreased range of motion in her thumb, decreased strength, and difficulties performing activities of her daily life. (**Exhibit 1**, Counts I and II).

5. On April 11, 2019, Plaintiffs filed their original Complaint for medical malpractice, but failed to file an Affidavit of Merit with the Complaint as required by MCL 600.2912d(1). (**Exhibit 2**, Plaintiff's original Summons and Complaint).

6. The sanction for failing to file an Affidavit of Merit with the Complaint is dismissal. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). This is because without the filing of an Affidavit of Merit, the action has not been "commenced" and the statute of limitations has not been tolled. *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000).

HALL MATSON PLC

7. Accordingly, in response to the original Complaint, Defendants filed a Motion for Summary Disposition, which is set to be heard by this Court on June 12, 2019.

8. Thereafter, Plaintiffs filed a First Amended Complaint, including an Affidavit of Merit.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

9. Ordinarily, a party may file an amended *pleading* within 14 days of being served a responsive pleading by an adverse party. MCR 2.118(A)(1). However, an Affidavit of Merit is not a pleading. See *Ligons v Crittenton Hosp*, 490 Mich 61, 81-82; 803 NW2d 271 (2011). Thus, this rule does not allow for the filing of an Affidavit of Merit as an amendment of right. Indeed, it could not where the filing of a medical malpractice complaint without an Affidavit of Merit does not "commence" the action.

10. Here, because Plaintiffs' failed to "commence" an action for medical malpractice upon the filing of the original Complaint, there is no action to amend. As stated by the Supreme Court in *Scarsella*, the filing of a medical malpractice complaint without an Affidavit of Merit is "ineffective." *Scarsella*, at 553. Therefore, a medical malpractice complaint filed without an Affidavit of Merit must be dismissed. *Scarsella* at 550; *Ligons* at 90.

11. Further, as stated in Defendants' Motion for Summary Disposition and Defendants' Response to Plaintiffs' Emergency Motion to File an Affidavit of Merit (both previously filed with this Court and set for hearing on June 12, 2019), the later filing of an Affidavit of Merit does not relate back to the date the original complaint was filed. Thus, to the extent any claims have since become barred by the statute of limitations, those claims cannot be revived by amendment. *Scarsella, supra.*

WHEREFORE, Defendants, request that this Court grant this motion and dismiss Plaintiff's First Amended Complaint, and as requested in Defendants' Motion for Summary Disposition based on Plaintiffs' failure to file an Affidavit of Merit, dismiss the Complaint with respect to any and all allegations arising out of the May 1, 2017 surgery with prejudice and dismiss the Complaint with respect to any and all allegations arising out of the July 23, 2017 surgery without prejudice.

HALL
MATSON
PLC

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

Respectfully submitted,

Hall Matson, PLC
Attorneys for Defendants

By: Sandra J Lake

Marcy R. Matson (P49758)
Sandra J. Lake (P45288)
Business address:
1550 Watertower Place, Suite 200
East Lansing, Michigan 48823
Telephone: (517) 853-2929

Dated: May 22, 2019

PROOF OF SERVICE

The undersigned certifies that a copy of the attached instruments were served on the attorney(s) for the parties hereto, by mailing the same to said attorney(s) at their appropriate business address(es) by first-class mail on the 23rd day of May, 2019.

Darla J. Arnold

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs,

v

Hon. Clinton Canady III

Docket No. 19-266-NH

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
THE NICHOLS LAW FIRM
Attorneys for Plaintiffs
3452 E. Lake Lansing Road
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
(517) 853-2929

HALL MATSON PLC

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

STATEMENT OF FACTS

This medical malpractice case relates to care and treatment provided to Plaintiff, Candi Ottgen, by Defendant, Dr. Katranji. (**Exhibit 1**, Plaintiffs' First Amended Complaint). Candi Ottgen alleges that she sought treatment for bilateral thumb pain, numbness, and tingling in her fingers in

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

2016. (**Exhibit 1,** ¶ 4). She was ultimately referred to surgeon, Defendant Dr. Katranji, who performed surgery on May 1, 2017 and July 23, 2017. (**Exhibit 1,** ¶ 29). Plaintiff now contends that Dr. Katranji committed medical negligence in removing her trapezium, which she contends has caused decreased range of motion in her thumb, decreased strength, and difficulties performing activities of her daily life. (**Exhibit 1,** Counts I and II). Plaintiff Patrick Ottgen has brought a derivative claim for loss of consortium. (**Exhibit 1,** Count III).

On April 11, 2019, Plaintiffs filed their original Complaint for medical malpractice. (**Exhibit 2,** Plaintiffs' original Summons and Complaint). But, Plaintiffs failed to file an Affidavit of Merit with the Complaint as required by MCL 600.2912d(1). The sanction for failing to file an Affidavit of Merit with the Complaint is dismissal. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). This is because without the filing of an Affidavit of Merit, the action has not been "commenced" and the statute of limitations has not been tolled. *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000). Accordingly, in response to the original Complaint, Defendants filed a Motion for Summary Disposition, which is set to be heard by this Court on June 12, 2019. Thereafter, Plaintiffs filed a First Amended Complaint, including an Affidavit of Merit. (**Exhibit 1**).

As discussed more fully below, ordinarily a party may file an amended *pleading* within 14 days of being served a responsive pleading by an adverse party. However, an Affidavit of Merit is not a pleading. Thus, this rule does not allow for the filing of an Affidavit of Merit as an amendment of right. Further, a medical malpractice complaint filed without an Affidavit of Merit does not "commence" the action and the filing is considered "ineffective" and "null and void." Thus, because the action has not been commenced, there is no action to amend. And finally, the filing of the First Amended Complaint with an Affidavit of Merit does not "relate back" to the date the original complaint was filed. As a result, the statute of limitations as to Plaintiffs' claims have not been tolled

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

and Plaintiffs' claim relating to her May 1, 2017 surgery is now barred by the two-year statute of limitations.

ARGUMENT

MCL 600.2912d(1) requires a plaintiff asserting a claim of medical malpractice to file an Affidavit of Merit with the complaint, signed by an expert who is reasonably believed to meet the statutorily specified qualifications under MCL 600.2169. MCL 600.2912d(1); *Vanslembrouck v Halperin*, 277 Mich App 558, 561; 747 NW2d 311 (2008).

MCL 600.2912d(1) provides in relevant part:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney **shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.** (Emphasis added).

The Michigan Supreme Court in *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000) specifically addressed the effect of failing to file an Affidavit of Merit with the complaint in a medical malpractice case. The trial court in *Scarsella* granted defendant's motion for summary disposition, finding that the filing of the complaint without an Affidavit of Merit was "null and void." *Id.* at 549. The Michigan Supreme Court agreed, stating, "[w]e find no error in the trial court's analysis." *Id.* The Supreme Court's went on to hold:

> Generally, a civil action is commenced and the period of limitation is tolled when a complaint is filed. See MCR 2.101(B) and MCL 600.5856. However, medical malpractice plaintiffs must file more than a complaint; they "shall file with the complaint an affidavit of merit . . . ." MCL 600.2912d(1). See also MCR 2.112(L). Use of the word "shall" indicates that an affidavit accompanying the complaint is mandatory and imperative. *Oakland County v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997). We therefore conclude that, for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit.
>
> Because plaintiff's complaint without an affidavit of merit was insufficient to commence his action, the period of limitation expired in October 1995.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

> Accordingly, the trial court correctly concluded that plaintiff's claim, as completed in April 1996, was time-barred. Furthermore, because the complaint without an affidavit was insufficient to commence plaintiff's malpractice action, it did not toll the period of limitation. (Citations and footnote omitted).

Id. at 549-550. Based on this holding, Plaintiffs' original Complaint, filed without an Affidavit of Merit, is "null and void." Plaintiffs failed to "commence" the action. As such, the First Amended Complaint is improper because there simply is no original complaint to amend. Rather, the required course of action is dismissal.

Furthermore, although a party may file an amended *pleading* within 14 days of being served a responsive pleading by an adverse party, MCR 2.118(A)(1), an Affidavit of Merit is not a pleading. See *Ligons v Crittenton Hosp*, 490 Mich 61, 81-82; 803 NW2d 271 (2011). Thus, this rule does not allow for the filing of an Affidavit of Merit as an amendment of right. Indeed, it could not where the filing of a medical malpractice complaint without an Affidavit of Merit does not "commence" the action.

It is also telling that MCR 2.118(D) provides that the amendment of an Affidavit of Merit relates back to the "the date of ***the original filing of the affidavit,***" but contains no language allowing the relation back doctrine to apply where no Affidavit of Merit is filed with the original complaint. Nor could the Court Rules so provide given that the Supreme Court has held as a matter of substantive law that the filing of a complaint without an Affidavit of Merit is considered "null and void." See Defendants' Motion for Summary Disposition and Defendants' Response to Plaintiffs' Emergency Motion to File an Affidavit of Merit (both previously filed with this Court and set for hearing on June 12, 2019), discussing that the later filing of an Affidavit of Merit does not relate back to the date the original complaint was filed. To the extent any claims have since become barred by the statute of limitations, those claims cannot be revived by amendment. *Scarsella, supra.*

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

CONCLUSION

Based on the foregoing, Defendants request that this Court grant this motion and dismiss Plaintiff's First Amended Complaint, and as requested in Defendants' Motion for Summary Disposition based on Plaintiffs' failure to file an Affidavit of Merit, dismiss the Complaint with respect to any and all allegations arising out of the May 1, 2017 surgery with prejudice and dismiss the Complaint with respect to any and all allegations arising out of the July 23, 2017 surgery without prejudice.

Respectfully submitted,

Hall Matson, PLC
Attorneys for Defendants

By: Sandra J Lake

Marcy R. Matson (P49758)
Sandra J. Lake (P45288)
Business address:
1550 Watertower Place, Suite 200
East Lansing, Michigan 48823
Telephone: (517) 853-2929

Dated: May 22, 2019

PROOF OF SERVICE

The undersigned certifies that a copy of the attached instruments were served on the attorney(s) for the parties hereto, by mailing the same to said attorney(s) at their appropriate business address(es) by first-class mail on the 23rd day of May, 2019.

Darla J. Arnold

HALL MATSON PLC

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CANDI OTTGEN and
PATRICK OTTGEN,

Plaintiffs,

v

File No. 19-266-NH
HON. Clinton Canady, III

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITURE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
517-853-2929

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

NOW COME Plaintiffs Candi Ottgen and Patrick Ottgen, by and through their attorneys, The Nichols Law Firm, PLLC state the following in response to Defendants' motion for summary

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

disposition:

1. In response to Defendants' paragraph 1, no response is required.
2. In response to Defendants' paragraph 2, Plaintiffs admit.
3. In response to Defendants' paragraph 3, Plaintiffs admit.
4. In response to Defendants' paragraph 4, Plaintiffs admit.
5. In response to Defendants' paragraph 5, Plaintiffs admit.
6. In response to Defendants' paragraph 6, Plaintiffs admit.
7. In response to Defendants' paragraph 7, Plaintiffs admit.
8. In response to Defendants' paragraph 8, Plaintiffs deny as untrue. Plaintiffs obtained an Affidavit of Merit ("AOM") on January 30, 2019 from Dr. Martin I. Boyer. Dr. Boyer's AOM was omitted from Plaintiffs' April 11, 2019 Complaint and Jury Demand due to a clerical error. Dr. Boyer's AOM was filed along with Plaintiffs' Amended Complaint on May 13, 2019 pursuant to MCR 2.118(A)(1) approximately 1 hour before Plaintiffs' attorneys were served with Defendants' motion for summary disposition. Plaintiffs' Amended Complaint relates back to their original filing on April 11, 2019 pursuant to MCR 2.118(D).
9. In response to Defendants' paragraph 9, Plaintiffs deny as untrue.
10. In response to Defendants' paragraph 11, Plaintiffs deny as untrue.
11. In response to Defendants' paragraph 12, Plaintiffs deny as untrue for the reasons stated in Dr. Boyer's AOM.

WHEREFORE, Plaintiffs, by and through their attorneys, The Nichols Law Firm, PLLC, respectfully request the Honorable Court to deny Defendants' motion for summary disposition for the reasons stated in their Brief in Support of their Response to Defendants' motion for summary

disposition.

Dated: June 3, 2019

Respectfully submitted,

By:_____

James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CANDI OTTGEN and
PATRICK OTTGEN,

Plaintiffs,

v

File No. 19-266-NH
HON. Clinton Canady, III

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITURE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
517-853-2929

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

TABLE OF CONENTS

STATEMENT OF FACTS.....5

STANDARD OF REVIEW.....6

LAW AND ARGUMENT.....7

A. ***Scarsella v Pollack*** **was erroneously decided and should be overturned**.....7

B. Plaintiff's complaint is not frivolous for the reasons stated in Dr. Boyer's AOM..10

RECEIVED by MSC 2/18/2022 11:57:49 AM

TABLE OF AUTHORITIES

MCR 2.116(C)(7).....6

MCR 2.116(C)(8).....7

MCR 2.118).....7

MCL 600.1901.....7

MCL 600.5856.....7

MCL 600.2912d.....8

MCL 600.5838.....9

MCL 600.2912d.....8

Petiprem v Jaskowski, 494 Mich 190, 201, 833 NW2d 247, 253 (2013).....6

Maiden v Rozwood, 461 Mich 109, 119 – 120, 597 NW2d 817, 823 (1999).....7

Scarsella v Pollak, 461 Mich 547, 607 NW2d 711 (2000).....7

Castro v Goulet, 501 Mich 844, 901 NW2d 614 (2017).....7

McCormick v Carrier, 487 Mich 180, 210; 795 NW2d 517, 535 (2010) 7

Petersen v Magna Corp, 484 Mich 300, 314–315, 773 NW2d 564 (2009).....8

Pittsfield Charter Township v Washtenaw County, 468 Mich 702 712, 664 NW2d 193 (2003)...9

Ligons v Crittenton Hospital, 490 Mich 61, 82, 803 NW2d 271, 284 (2011).....9

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

INDEX OF EXHIBITS

Exhibit 1 – NOI

Exhibit 2 – Correspondence between counsel

Exhibit 3 – Dr. Boyer's Affidavit of Merit of claims against Dr. Katranji

Exhibit 4 – Complaint and Jury Demand

Exhibit 5 – Affidavit of Kelly A. Thomison

Exhibit 6 – Plaintiffs First Amended Complaint

Exhibit 7 – Opinion of the Court in *Castro v Goulet*, 501 Mich 844, 901 NW2d 614 (2017)

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

STATEMENT OF FACTS

Plaintiff Candi Ottgen ("Plaintiff") was a 43-year-old right hand dominant female who reported the onset of bilateral thumb pain as well as numbness and tingling in her fingers in mid-2016. She reported that both the thumb pain and the numbness and tingling started at nearly the same time. Eventually, when Plaintiff could not manage the symptoms at home, she saw a Dr. Kantore at Plant Medical at General Motors. This was in December of 2016. Plaintiff was prescribed splints, therapy and corticosteroids injections in her wrist that did not help the numbness and tingling or thumb pain.

After non-operative management, Plaintiff was sent to McLaren General Health, Pennsylvania Campus and underwent a nerve study conduction test. She reports that she was then referred to Dr. Katranji's office where she saw a physician's assistant who performed and ultrasound evaluation, took radiographs, and was eventually scheduled for surgery. Plaintiff was told by the physician's assistant that she needed a carpal tunnel surgery and a tendon release in her thumb. She did not see Dr. Katranji on that visit.

Plaintiff met Dr. Katranji on May 1, 2017 and reports that he talked to her about thumb surgery. Dr. Katranji indicated that it was not that bad, and he would just trim some osteophytes, and not perform a carpal tunnel release. Plaintiff reports that after surgery Dr. Katranji informed her that he had performed an arthroplasty and was splinted in a routine fashion removing her trapezium bone. Dr. Katranji sent her for physical therapy and then on July 23, 2017 he performed a carpal tunnel release. Following both surgeries, Plaintiff reported that she developed the onset of numbness and tingling in the thumb and index fingers which is constant. Plaintiff currently has a decreased range of motion in her thumb, decreased strength, and has difficulty doing activities of daily living including but not limited to, getting dressed. She cannot do her old job at General

RECEIVED by MSC 2/18/2022 11:57:49 AM

Motors, which was working on the production line.

Plaintiff served a Notice of Intent ("NOI") on Defendants on or about September 27, 2018. See Exhibit 1 – NOI. Defense counsel informed Plaintiff's counsel that she would provide Plaintiff's medical records and radiographic films. See Exhibit 2 – Correspondence between counsel. Those records were never produced. Plaintiff obtained an Affidavit of Merit relative to this case from Dr. Martin Boyer, M.D. on or about January 30, 2019. See Exhibit 3 – Dr. Boyer's Affidavit of Merit of claims against Dr. Katranji. Plaintiffs' attorneys filed the complaint and jury demand on April 11, 2019. See Exhibit 4 – Complaint and Jury Demand; See Exhibit 5 – Affidavit of Kelly A. Thomison. Dr. Boyer's AOM was not attached to the filed Complaint due to a scrivener's error. Exhibit 5. Defense counsel received the complaint on April 24, 2019. *Id.* Defense counsel did not inform Plaintiff's counsel the AOM did not accompany the complaint but waited until after May 1, 2019 to inform Plaintiff's counsel of that fact with Defendants' motion for summary disposition.

Plaintiffs' attorney obtained a copy of Defendants' motion for summary disposition via the Court Clerk 9:33am. Plaintiffs' counsel filed their First Amended Complaint at approximately 10:15am on May 13, 2019 and served the same via personal service on Defense Counsel. See Exhibit 6 – Plaintiffs First Amended Complaint. Plaintiffs had not been served with Defendants' motion for summary disposition via US mail at approximately 11am on May 13, 2019.

STANDARD OF REVIEW

In a motion brought pursuant MCR 2.116(C)(7), the court must accept all well-pleaded allegations as true and construe them in favor of the non-moving party. *Petiprem v Jaskowski*, 494 Mich 190, 201, 833 NW2d 247, 253 (2013). When material facts are not in dispute, a court may rule on whether Plaintiff's claim is barred by the statute of limitations. *Id.*

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

A motion brought pursuant to "... MCR 2.116(C)(8) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119 – 120, 597 NW2d 817, 823 (1999). Under (C)(8), the allegations in the complaint are accepted as true and any evidence considered by the court must be admissible pursuant to the Michigan Rules of Evidence. *Id.*

LAW AND ARGUMENT

A. *Scarsella v Pollack* was erroneously decided and should be overturned.

The Michigan Supreme Court's ruling *Scarsella v Pollak*, 461 Mich 547, 607 NW2d 711 (2000) was erroneously decided, and Defendants' motion for summary disposition should be denied for the reasons stated in Justice Viviano's concurring opinion in *Castro v Goulet*, 501 Mich 844, 901 NW2d 614 (2017) which is incorporated here by reference. See Exhibit 7 – Opinion of the Court in *Castro v Goulet*, 501 Mich 844, 901 NW2d 614 (2017). The procedural history in bringing this case highlights why *Scarcella* decision imposes the most severe sanction denying Plaintiffs with meritorious claims access to justice. Plaintiff's counsel obtained Dr. Boyer's AOM on January 30, 2019 and the same was omitted from Plaintiff's timely filed complaint by a scrivener's error. Plaintiff filed an amended complaint on May 13, 2019 with Dr. Boyer's AOM and served the same on Defendants via personal service by and through their attorneys on the same day pursuant to MCR 2.118(A). That filing relates back to the April 11, 2019 filing of the original Complaint and Jury Demand pursuant to MCR 2.118(D).

The Doctrine of stare decisis is important but it is not an "inexorable command." *McCormick v Carrier*, 487 Mich 180, 210; 795 NW2d 517, 535 (2010)(citing *Lawrence v Texas*, 539 US 558, 577; 123 S Ct 2472 (2003). Under that doctrine, principles of law are deliberately examined by the court but should not be disregarded on a whim. *Id* at 210. Courts are bound by strict rules and precedent to properly focus the court on the case at bar in order to avoid arbitrary

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

discretion and ad hoc rulings. *Id.*

The Michigan Supreme Court has applied certain criteria in overturning a case should be overturned. *McCormick,* at 211 – 212. The first is "whether the rule has proven to be intolerable because it defies practical workability;" Second is "whether reliance on the rule is such that overruling it would cause a special hardship and inequity;" third is "whether upholding the rule is likely to result in serious detriment prejudicial to public interests;" and fourth is "whether the prior decision was an abrupt and largely unexplained departure from precedent." *Id* citing *Petersen v Magna Corp,* 484 Mich 300, 314–315, 773 NW2d 564 (2009).

The first criterion weighs in favor of overruling *Scarsella* because the *Scarsella* majority failed to apply the plain language of MCL 600.1901, MCL 600.5856, and MCL 600.2912d. *Castro v Goulet,* 501 Mich 844, 901 NW2d 614 (2017).

MCL 600.1901 states:

A civil action is commenced by **filing a complaint with the court.**

The Michigan Legislature's intent relative to the filing of a civil complaint was point at which the action begins. MCL 600.5856 states that:

> **The statues of limitations or repose are tolled** in any of the following circumstances:
> (a) **At the time the complaint is filed,** if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
> (b) At the time jurisdiction over the defendant is otherwise acquired.
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Here, the Legislature's intent is that the statute of limitations for a medical malpractice claim is tolled upon the filing of the complaint which is consistent with MCL 600.1901.

MCL 600.2912d states:

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

(1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney **shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.** The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
(a) The applicable standard of practice or care.
(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.
(2) **Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).**
(3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

The Legislature's intent relative to the filing a medical malpractice complaint is that an AOM should be filed along with it, however, the statute recognizes and grants the trial court the power to extend the time for filing the AOM pursuant to MCL 600.2912d(2). MCL 600.2912d exemplifies the axiom that "...the expression of one thing suggests the exclusion of all others ...." *Castro,* 501 Mich 884, 887 (2017) citing *Pittsfield Charter Township v Washtenaw County,* 468 Mich 702 712, 664 NW2d 193 (2003). MCL 600.2912d(1) treats the complaint and AOM as separate documents, and the AOM is not part and parcel of the complaint. *Ligons v Crittenton Hospital*, 490 Mich 61, 82, 803 NW2d 271, 284 (2011).

MCL 600.5838 states:

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

> (1) Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
> (2) Except as otherwise provided in section 5838a or 5838b, **an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.** The plaintiff has the burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim. A malpractice action that is not commenced within the time prescribed by this subsection is barred.

This section provides additional support to the notion that MCL 600.2912d does not control whether the statute of limitations is tolled only upon the filing of an AOM rather than the complaint. §5838 specifically refers to "…sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim…." The Legislature could have included section 2912d in section 5838 but did not and we must adhere to the plain meaning of the statutory language.

The Legislature recognized there would be occasions where a claimant could not file an AOM with the complaint. MCL 600.2912d(2). We must presume the Legislature intended that filing a complaint, and the complaint alone, was the vehicle for tolling the statute of limitations. MCL 600.5856(a). MCL 600.5856 and MCL 600.2912d do not conflict, and therefore, the latter is not nullified if the general tolling rules applied to medical malpractice claims. *Castro* at 886. If the Legislature wanted to tether the statute of limitations to the filing of an AOM it would have enacted language to that effect in MCL 600.5856 or MCL 600.2912d. It did not and therefore, the Supreme Court's ruling in *Scarsella* was erroneously decided and should be overturned. Plaintiff

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

filed an AOM albeit 30 days after the complaint was filed due to a scrivener's error – but filed it in conformance with MCL 600.2912d nonetheless. Exhibit 4. Accordingly, Defendants' motion for summary disposition should be denied.

The second criterion again favors overruling *Scarsella* because following the plain statutory language would not present an undue hardship to reliance interests. *McCormick* at 213 – 214. The question turns on whether the *Scarsella* "... decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-work dislocations" ... such that chaos would result by overturning erroneously decided case. *Id. Scarsella* is not so embedded, accepted, or fundamental to expectations that chaos will result from overruling it. *Scarsella* was decided in 2000 and overruling it would correct a miscarriage of justice. Indeed, the procedural trap created by *Scarcella* would not change anyone's reliance interests because the duty of care and expectations imposed upon medical professionals are not at issue in this case. Overruling *Scarcella* would bring the public's expectations, as expressed by the plain language of the statutes supra, back into proper focus.

The third criterion, effect the public interest, cannot be understated and weighs in favor of overruling *Scarsella. Id.* Reasonable minds can disagree but Justice Viviano's analysis in *Castro* supra is truer to the statutory text than the *Scarsella* majority. Should plaintiffs be denied access to justice because of a slight delay in filing an AOM? If the answer is yes, then the bar is an undue burden and one generally outside of a plaintiff's control and contrary to the plain language of MCL 600.2912d. Medical malpractice cases should be decided on the merits rather than by procedural traps that only one side can benefit from. The fourth criterion is neutral in that *Scarsella* majority erroneously interpreted the statutory language supra. If the Legislature wanted the filing of an AOM as a trigger for tolling the statute of limitations, it would have said so.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

B. Plaintiff's complaint is not frivolous for the reasons stated in Dr. Boyer's AOM.

Defendants' claim that Plaintiff's complaint is frivolous is without merit. As stated above, the AOM existed and would have been filed along with the complaint on April 11, 2019 but for a scrivener's error. Exhibit 4. Dr. Boyer's has opined that Dr. Katranji et al committed medical malpractice on May 1, 2017 and July 23, 2017 relative to surgeries on Plaintiff's right hand. Exhibit 5. Therefore, Plaintiff's claims against Defendants are meritorious and Defendants' motion for summary disposition should be denied.

WHEREFORE, Plaintiffs, by and through their attorneys, The Nichols Law Firm, PLLC, respectfully request the Honorable Court to deny Defendants' motion for summary disposition for the reasons stated above.

Respectfully submitted,

Dated: June 3, 2019

By:_____
James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

AFFIDAVIT OF KELLY THOMISON

STATE OF MICHIGAN }ss

COUNTY OF INGHAM

Affiant Kelly Thomison, first being duly sworn, states as follows:

1. I am Kelly Thomison and I make this Affidavit with personal knowledge.
2. On or about September 27, 2018 I sent out the Notice of Intent to Dr. Katranji, KRSI, Katranji Reconstructive Surgery Institute, Katranji Hand Center, The Katranji Family Foundation and the Katranji Institute via certified mail.
3. On or about January 30, 2019 Dr. Boyer signed the Affidavit of Merit in front of a notary public in St. Louis, Missouri.
4. On or about February 4, 2019 the executed Affidavit of Merit was received by our office via first class mail.
5. On or about February 25, 2019, Marcy Matson sent correspondence acknowledging the Notice of Intent. Ms. Matson asked for authorizations to be signed by our client and indicated she would provide medical records if needed.
6. On or about March 12, 2019 James Heos dictated a letter to Marcy Matson asking for the pre-operative films and indicated that Ms. Matson did not provide any authorizations in her previous correspondence.
7. On or about March 20, 2019 Ms. Matson sent medical authorizations to be signed by our client.
8. On or about March 26, 2019 correspondence was sent to Ms. Matson asking for the informed consents signed by our client.

RECEIVED by MCOA 9/21/2022 8:31:30 AM

RECEIVED by MSC 2/18/2022 11:57:49 AM

9. On or about April 9, 2019 the executed authorization was returned to Ms. Matson's office.

10. On or about April 11, 2019 I prepared the Complaint for filing. When making copies of the Complaint for the Court, I believed the executed Affidavit of Merit was attached to the back of the Complaint. The Complaint was filed with the Court.

11. On or about April 18, 2019 process server Dan Duncan served the Complaint on the entities via the resident agent.

12. On or about April 22, 2019 I received an email from Sandra Lake asking for the Complaint to be emailed to her. Ms. Lake indicated in the email she was working on getting the requested films and asked if there were any other documents not provided to us.

13. On or about April 22, 2019 an email was sent to Ms. Lake again asking for the informed consents signed by our client.

14. On or about April 23, 2019 our office received the informed consents via email.

15. On or about April 24, 2019 process server Dan Duncan received permission to serve Dr. Katranji via attorney Sandra Lake. The Complaint was served on Sandra Lake.

16. On or about April 25, 2019 a disc with films were received by Legal Copy Services. These films were forwarded to our expert, Dr. Boyer.

17. On or about May 7, 2019 an email was received from our expert indicated the disc with the films were of breast imaging not of client's hand.

18. On or about May 13, 2019 it came to my attention that the Affidavit of Merit was not attached to the original Complaint filed with the Ingham County Circuit Court.

RECEIVED by MCOA 9/24/2019 8:31:20 PM

19. On or about May 13, 2019 an Amended Complaint with the Affidavit of Merit was filed with the Ingham County Circuit Court.

20. On or about May 13, 2019 Process Server Dan Duncan served the Amended Complaint on Sandra Lake.

21. Further your affiant sayeth not.

Kelly Thomison, Affiant

Subscribed and sworn to before me this 15th day of May, 2019

Notary Public, Oakland County
Acting in Ingham County, Michigan
My Commission Expires: 7/19/2022

AARON MARTINEZ
Notary Public, State of Michigan
County Of Oakland
My Commission Expires 07-19-2022
Acting In the County of Ingham

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 7/24/2019 8:31:30 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CANDI OTTGEN and
PATRICK OTTGEN,

Plaintiffs,

v

File No. 19-266-NH
HON. Clinton Canady, III

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITURE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
517-853-2929

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COME Plaintiffs, by and through their attorneys, The Nichols Law Firm, PLLC, state the following in response to Defendants' Motion to Dismiss Plaintiffs' First Amended

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

Complaint:

1. In response to Defendants' paragraph 1, Plaintiffs admit.
2. In response to Defendants' paragraph 2, Plaintiffs admit.
3. In response to Defendants' paragraph 3, Plaintiffs admit.
4. In response to Defendants' paragraph 4, Plaintiffs admit.
5. In response to Defendants' paragraph 5, Plaintiffs admit.
6. In response to Defendants' paragraph 6, Plaintiffs deny as untrue. By way of further response, Justice Viviano's concurring opinion in *Castro v Goulet*, 501 Mich 844, 901 NW2d 614 (2017) is the correct interpretation of the law misapplied in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000).
7. In response to Defendants' paragraph 7, Plaintiffs admit.
8. In response to Defendants' paragraph 8, Plaintiffs admit.
9. In response to Defendants' paragraph 9, Plaintiffs deny as untrue.
10. In response to Defendants' paragraph 10, Plaintiffs deny as untrue.
11. In response to Defendants' paragraph 11, Plaintiffs deny as untrue.

WHEREFORE, Plaintiffs, by and through their attorneys, The Nichols Law Firm, PLLC, respectfully request this Honorable Court deny Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint.

Respectfully submitted,

Dated: June 3, 2019

By:_____
James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

PROOF OF SERVICE

I hereby certify that on June 4, 2019, I mailed from East Lansing, Michigan, a copy of the foregoing document to all attorneys for said parties and all parties appearing without counsel to their respective addresses, by first class mail, postage prepaid thereon.

Kelly Thomison

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CANDI OTTGEN and
PATRICK OTTGEN,

Plaintiffs,

v

File No. 19-266-NH
HON. Clinton Canady, III

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITURE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
517-853-2929

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

TABLE OF CONENTS

STATEMENT OF FACTS.....5

STANDARD OF REVIEW.....6

LAW AND ARGUMENT.....7

A. *Scarsella v Pollack* was erroneously decided and should be overturned.....7

B. Plaintiffs' first amended complaint relates back to the time of filing.....12

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

TABLE OF AUTHORITIES

MCR 2.116(C)(7).....6

MCR 2.116(C)(8).....7

MCR 2.118(D).....7, 12

MCL 600.1901.....7

MCL 600.5856.....7, 12

MCL 600.2912d.....8

MCL 600.5838.....9

MCL 600.2912d.....8

Petiprem v Jaskowski, 494 Mich 190, 201, 833 NW2d 247, 253 (2013).....6

Maiden v Rozwood, 461 Mich 109, 119 – 120, 597 NW2d 817, 823 (1999).....7

Scarsella v Pollak, 461 Mich 547, 607 NW2d 711 (2000).....7

Castro v Goulet, 501 Mich 844, 901 NW2d 614 (2017).....7

McCormick v Carrier, 487 Mich 180, 210; 795 NW2d 517, 535 (2010).....7

Petersen v Magna Corp, 484 Mich 300, 314–315, 773 NW2d 564 (2009).....8

Pittsfield Charter Township v Washtenaw County, 468 Mich 702 712, 664 NW2d 193 (2003)...9

Ligons v Crittenton Hospital, 490 Mich 61, 82, 803 NW2d 271, 284 (2011).....9

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

INDEX OF EXHIBITS

Exhibit 1 – NOI

Exhibit 2 – Correspondence between counsel

Exhibit 3 – Dr. Boyer's Affidavit of Merit of claims against Dr. Katranji

Exhibit 4 – Complaint and Jury Demand

Exhibit 5 – Affidavit of Kelly A. Thomison

Exhibit 6 – Plaintiffs First Amended Complaint

Exhibit 7 – Opinion of the Court in *Castro v Goulet*, 501 Mich 844, 901 NW2d 614 (2017)

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

STATEMENT OF FACTS

Plaintiff Candi Ottgen ("Plaintiff") was a 43-year-old right hand dominant female who reported the onset of bilateral thumb pain as well as numbness and tingling in her fingers in mid-2016. She reported that both the thumb pain and the numbness and tingling started at nearly the same time. Eventually, when Plaintiff could not manage the symptoms at home, she saw a Dr. Kantore at Plant Medical at General Motors. This was in December of 2016. Plaintiff was prescribed splints, therapy and corticosteroids injections in her wrist that did not help the numbness and tingling or thumb pain.

After non-operative management, Plaintiff was sent to McLaren General Health, Pennsylvania Campus and underwent a nerve study conduction test. She reports that she was then referred to Dr. Katranji's office where she saw a physician's assistant who performed and ultrasound evaluation, took radiographs, and was eventually scheduled for surgery. Plaintiff was told by the physician's assistant that she needed a carpal tunnel surgery and a tendon release in her thumb. She did not see Dr. Katranji on that visit.

Plaintiff met Dr. Katranji on May 1, 2017 and reports that he talked to her about thumb surgery. Dr. Katranji indicated that it was not that bad, and he would just trim some osteophytes, and not perform a carpal tunnel release. Plaintiff reports that after surgery Dr. Katranji informed her that he had performed an arthroplasty and was splinted in a routine fashion removing her trapezium bone. Dr. Katranji sent her for physical therapy and then on July 23, 2017 he performed a carpal tunnel release. Following both surgeries, Plaintiff reported that she developed the onset of numbness and tingling in the thumb and index fingers which is constant. Plaintiff currently has a decreased range of motion in her thumb, decreased strength, and has difficulty doing activities of daily living including but not limited to, getting dressed. She cannot do her old job at General

RECEIVED by MSC 2/18/2022 11:57:49 AM

Motors, which was working on the production line.

Plaintiff served a Notice of Intent ("NOI") on Defendants on or about September 27, 2018. See Exhibit 1 – NOI. Defense counsel informed Plaintiff's counsel that she would provide Plaintiff's medical records and radiographic films. See Exhibit 2 – Correspondence between counsel. Those records were never produced. Plaintiff obtained an Affidavit of Merit relative to this case from Dr. Martin Boyer, M.D. on or about January 30, 2019. See Exhibit 3 – Dr. Boyer's Affidavit of Merit of claims against Dr. Katranji. Plaintiffs' attorneys filed the complaint and jury demand on April 11, 2019. See Exhibit 4 – Complaint and Jury Demand; See Exhibit 5 – Affidavit of Kelly A. Thomison. Dr. Boyer's AOM was not attached to the filed Complaint due to a scrivener's error. Exhibit 5. Defense counsel received the complaint on April 24, 2019. *Id.* Defense counsel did not inform Plaintiff's counsel the AOM did not accompany the complaint but waited until after May 1, 2019 to inform Plaintiff's counsel of that fact with Defendants' motion for summary disposition.

Plaintiffs' attorney obtained a copy of Defendants' motion for summary disposition via the Court Clerk 9:33am. Plaintiffs' counsel filed their First Amended Complaint at approximately 10:15am on May 13, 2019 and served the same via personal service on Defense Counsel. See Exhibit 6 – Plaintiffs First Amended Complaint. Plaintiffs had not been served with Defendants' motion for summary disposition via US mail at approximately 11am on May 13, 2019.

STANDARD OF REVIEW

In a motion brought pursuant MCR 2.116(C)(7), the court must accept all well-pleaded allegations as true and construe them in favor of the non-moving party. *Petiprem v Jaskowski*, 494 Mich 190, 201, 833 NW2d 247, 253 (2013). When material facts are not in dispute, a court may rule on whether Plaintiff's claim is barred by the statute of limitations. *Id.*

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

A motion brought pursuant to "... MCR 2.116(C)(8) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119 – 120, 597 NW2d 817, 823 (1999). Under (C)(8), the allegations in the complaint are accepted as true and any evidence considered by the court must be admissible pursuant to the Michigan Rules of Evidence. *Id.*

LAW AND ARGUMENT

A. *Scarsella v Pollack* was erroneously decided and should be overturned.

The Michigan Supreme Court's ruling *Scarsella v Pollak*, 461 Mich 547, 607 NW2d 711 (2000) was erroneously decided, and Defendants' motion for summary disposition should be denied for the reasons stated in Justice Viviano's concurring opinion in *Castro v Goulet*, 501 Mich 844, 901 NW2d 614 (2017) which is incorporated here by reference. See Exhibit 7 – Opinion of the Court in *Castro v Goulet*, 501 Mich 844, 901 NW2d 614 (2017). The procedural history in bringing this case highlights why *Scarcella* decision imposes the most severe sanction denying Plaintiffs with meritorious claims access to justice. Plaintiff's counsel obtained Dr. Boyer's AOM on January 30, 2019 and the same was omitted from Plaintiff's timely filed complaint by a scrivener's error. Plaintiff filed an amended complaint on May 13, 2019 with Dr. Boyer's AOM and served the same on Defendants via personal service by and through their attorneys on the same day pursuant to MCR 2.118(A). That filing relates back to the April 11, 2019 filing of the original Complaint and Jury Demand pursuant to MCR 2.118(D).

The Doctrine of stare decisis is important but it is not an "inexorable command." *McCormick v Carrier,* 487 Mich 180, 210; 795 NW2d 517, 535 (2010)(citing *Lawrence v Texas,* 539 US 558, 577; 123 S Ct 2472 (2003). Under that doctrine, principles of law are deliberately examined by the court but should not be disregarded on a whim. *Id* at 210. Courts are bound by strict rules and precedent to properly focus the court on the case at bar in order to avoid arbitrary

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

discretion and ad hoc rulings. *Id.*

The Michigan Supreme Court has applied certain criteria in overturning a case should be overturned. *McCormick,* at 211 – 212. The first is "whether the rule has proven to be intolerable because it defies practical workability;" Second is "whether reliance on the rule is such that overruling it would cause a special hardship and inequity;" third is "whether upholding the rule is likely to result in serious detriment prejudicial to public interests;" and fourth is "whether the prior decision was an abrupt and largely unexplained departure from precedent." *Id* citing *Petersen v Magna Corp,* 484 Mich 300, 314–315, 773 NW2d 564 (2009).

The first criterion weighs in favor of overruling *Scarsella* because the *Scarsella* majority failed to apply the plain language of MCL 600.1901, MCL 600.5856, and MCL 600.2912d. *Castro v Goulet*, 501 Mich 844, 901 NW2d 614 (2017).

MCL 600.1901 states:

> A civil action is commenced by **filing a complaint with the court.**

The Michigan Legislature's intent relative to the filing of a civil complaint was point at which the action begins. MCL 600.5856 states that:

> **The statues of limitations or repose are tolled** in any of the following circumstances:
> (a) **At the time the complaint is filed,** if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
> (b) At the time jurisdiction over the defendant is otherwise acquired.
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Here, the Legislature's intent is that the statute of limitations for a medical malpractice claim is tolled upon the filing of the complaint which is consistent with MCL 600.1901.

MCL 600.2912d states:

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

(1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney **shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.** The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
(a) The applicable standard of practice or care.
(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.
(2) **Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).**
(3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

The Legislature's intent relative to the filing a medical malpractice complaint is that an AOM should be filed along with it, however, the statute recognizes and grants the trial court the power to extend the time for filing the AOM pursuant to MCL 600.2912d(2). MCL 600.2912d exemplifies the axiom that "...the expression of one thing suggests the exclusion of all others ...." *Castro,* 501 Mich 884; 887 (2017) citing *Pittsfield Charter Township v Washtenaw County,* 468 Mich 702 712, 664 NW2d 193 (2003). MCL 600.2912d(1) treats the complaint and AOM as separate documents, and the AOM is not part and parcel of the complaint. *Ligons v Crittenton Hospital,* 490 Mich 61, 82, 803 NW2d 271, 284 (2011).

MCL 600.5838 states:

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

> (1) Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
> (2) Except as otherwise provided in section 5838a or 5838b, **an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.** The plaintiff has the burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim. A malpractice action that is not commenced within the time prescribed by this subsection is barred.

This section provides additional support to the notion that MCL 600.2912d does not control whether the statute of limitations is tolled only upon the filing of an AOM rather than the complaint. §5838 specifically refers to "…sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim…." The Legislature could have included section 2912d in section 5838 but did not and we must adhere to the plain meaning of the statutory language.

The Legislature recognized there would be occasions where a claimant could not file an AOM with the complaint. MCL 600.2912d(2). We must presume the Legislature intended that filing a complaint, and the complaint alone, was the vehicle for tolling the statute of limitations. MCL 600.5856(a). MCL 600.5856 and MCL 600.2912d do not conflict, and therefore, the latter is not nullified if the general tolling rules applied to medical malpractice claims. *Castro* at 886. If the Legislature wanted to tether the statute of limitations to the filing of an AOM it would have enacted language to that effect in MCL 600.5856 or MCL 600.2912d. It did not and therefore, the Supreme Court's ruling in *Scarsella* was erroneously decided and should be overturned. Plaintiff

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

filed an AOM albeit 30 days after the complaint was filed due to a scrivener's error – but filed it in conformance with MCL 600.2912d nonetheless. Exhibit 4. Accordingly, Defendants' motion for summary disposition should be denied.

The second criterion again favors overruling *Scarsella* because following the plain statutory language would not present an undue hardship to reliance interests. *McCormick* at 213 – 214. The question turns on whether the *Scarsella* "... decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-work dislocations" ... such that chaos would result by overturning erroneously decided case. *Id. Scarsella* is not so embedded, accepted, or fundamental to expectations that chaos will result from overruling it. *Scarsella* was decided in 2000 and overruling it would correct a miscarriage of justice. Indeed, the procedural trap created by *Scarcella* would not change anyone's reliance interests because the duty of care and expectations imposed upon medical professionals are not at issue in this case. Overruling *Scarcella* would bring the public's expectations, as expressed by the plain language of the statutes supra, back into proper focus.

The third criterion, effect the public interest, cannot be understated and weighs in favor of overruling *Scarsella. Id.* Reasonable minds can disagree but Justice Viviano's analysis in *Castro* supra is truer to the statutory text than the *Scarsella* majority. Should plaintiffs be denied access to justice because of a slight delay in filing an AOM? If the answer is yes, then the bar is an undue burden and one generally outside of a plaintiff's control and contrary to the plain language of MCL 600.2912d. Medical malpractice cases should be decided on the merits rather than by procedural traps that only one side can benefit from. The fourth criterion is neutral in that *Scarsella* majority erroneously interpreted the statutory language supra. If the Legislature wanted the filing of an AOM as a trigger for tolling the statute of limitations, it would have said so.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

B. Plaintiffs' first amended complaint relates back to the time of filing.

Defendants' claim that Plaintiffs' first amended complaint does not relate back to their initial filing because the AOM is not a pleading. In making this argument, Defendants' endorse the notion that the filing of a complaint, not the AOM, and therefore, the statute of limitations tolls upon the filing of a complaint – not an AOM. MCL 600.5856. Therefore, Plaintiffs' first amended complaint relates back to the date it was filed and may be amended pursuant to MCR 2.118(D).

WHEREFORE, Plaintiffs, by and through their attorneys, The Nichols Law Firm, PLLC, respectfully request the Honorable Court to deny Defendants' motion for summary disposition for the reasons stated above.

Respectfully submitted,

Dated: June 3, 2019

By:_____
James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorney for Plaintiff
3452 E. Lake Lansing Rd.
East Lansing, MI 48823
(517) 432-9000

PROOF OF SERVICE

I hereby certify that on June 4, 2019, I mailed from East Lansing, Michigan, a copy of the foregoing document to all attorneys for said parties and all parties appearing without counsel to their respective addresses, by first class mail, postage prepaid thereon.

_____
Kelly Thomison

RECEIVED by MCOA 8/25/2020 6:25:54 PM

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs,

vs. CASE NO: 19-266-NI

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRNAJI RECONSTRUCTIVE SURGERY INSTITUTE, PLLC, THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER and KATRANJI INSTITUTE,

Defendants.
_____/

HONORABLE CLINTON CANADY, III, CIRCUIT JUDGE
LANSING, MICHIGAN -- WEDNESDAY, AUGUST 7, 2019

MOTION FOR SUMMARY DISPOSTION

APPEARANCES:

FOR THE PLAINTIFFS:

JAMES T. HEOS, JD
MATT J. HEOS, JD
THE NICHOLS LAW FIRM
3452 E. Lake Lansing Road
East Lansing, MI 48823

FOR THE DEFENDANTS:

MARCY R. MATSON, JD
HALL MATSON, PLC
1550 Watertower Place, Ste. 200
East Lansing, MI 48823

Reported by: Teresa J. Abraham, CSR-3445
Phone: (517)483-6404 e-Mail: tjabraham@msn.com

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

I N D E X

WITNESSES:

None.

EXHIBITS:

Exhibit #	Description	Received

None.

Lansing, Michigan

August 7, 2019

at about 3:36 a.m.

****

THE COURT: Ottgen versus Katranji, file 19-266-NH. We have the Heos family and Ms. Matson. All right. What are we doing today?

MR. JHEOS: There is two motions. What do we want to do first?

MS. MATSON: Actually, at least four motions.

THE COURT: I have a motion to file late affidavit. Motion to dismiss first amended complaint, and summary disposition for failing to file the affidavit of merit.

So probably we should take that first. Because if I deny that, we can go to filing the late affidavit. All right?

MR. JHEOS: Okay.

MS. MATSON: Thank you, Your Honor.

And for all the paper that's before you, these are actually a relatively straight-forward procedural issues. Because we actually agree on most of the basic facts.

Everyone agrees that the underlying

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

complaint that was filed on April 11th sounds as alleged medical negligence. Everyone agrees that under 600.2912d that the statute requires that an affidavit of merit be filed with the complaint. Can't file it later unless you get permission in advance. But it has to be filed with the complaint.

THE COURT: I mean, it's couched in terms of a clerical error. So, I mean, that distinguishes a little bit from the other cases, if it was in fact a clerical error. Not like there wasn't an affidavit of merit. But that for whatever reason, it didn't get attached to the complaint. Isn't that the real issue?

MS. MATSON: Well, the real issue is there is no such case law that would allow for a later filing, even in the case of a clerical error. The Supreme Court was very clear in *Dorris*, that if you don't file your affidavit with your complaint, that the appropriate remedy is dismissal.

Now, if the statute of limitations hasn't run, it could be dismissal without prejudice. But there was no exception or carve-out in clerical error.

And in the *Scarsella* case pointed out that

filing it without the attached affidavit, simply does not toll the statute of limitations. And there was some case or a suggestion in *Scarsella*. They wanted to argue we can just file our affidavit later. Then it will amend back around, it will all be good.

In the *Scarsella* Court specifically declined to follow that line of reasoning. And they said: Doing that would, in effect, nullify the statute. That if you could simply file your affidavit of merit late, and then say: Well, this all relates back, that that's the same as having no statute at all.

And so the remedy for failing to file the affidavit of merit with the complaint is dismissal. And really the question is, should it be with prejudice or without prejudice. And that depends on the running of the statute of limitations.

There were two surgeries in the underlying complaint. One was in May of 2019. There is no dispute that the statute of limitations expired as of May 1st, 2019. And as of May 1st, 2019, no affidavit had been filed with the Court. And under *Scarsella* and *Dorris*, there is no exception.

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

There is no clerical error exception. And the statute is wrong. And those claims should be barred.

The bigger question should be July 23rd, '17, because the statute of limitations didn't run until July 23rd, 2019.

And what I don't know, I haven't been served with a new complaint accompanied by an affidavit of merit, a new filing that could cure that defect. It may have been filed. And I am sure Mr. Heos and Mr. Heos will let us know if it was. Because at this point that statute of limitations has also expired. But there was certainly a way for the Plaintiffs to cure this defect, which is to refile, file a new complaint altogether, attach the affidavit of merit. And that certainly would have preserved the July 23rd allegations.

Plaintiffs argued in a separate motion, which is related to this, that they ought to be allowed a 28-day extension under 2912d(2). However, a couple of problems with that. Again, *Scarsella* gets in the way. *Scarsella* says the Court can give him a 28-day extension, but only if they can show good cause, and that the affidavit

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

could not have been filed with the complaint.

And here the Plaintiffs are suggesting that it could have been filed with the complaint, that, in fact, it was a clerical error. That's different than saying it could have been filed with the complaint. In fact, to the contrary. That's our argument, it could have been.

The other problem with Plaintiffs' argument in that respect, that statute would have allowed for a 28-day extension. And Plaintiffs didn't file that affidavit until May 13th, which would be 32 days, which would still be outside the window. By 32 days, at least as to the May 1st allegations, the statute of limitations have already expired.

So it's really a fairly straightforward issue, which, if nothing is evidenced by Plaintiffs' response to our motion, which I am sure you've had a chance to review, essentially Plaintiffs' response says: Judge Canady, you should overrule the Supreme Court in *Scarsella*, that it was wrong in deciding.

Much as I respect your power and authority, I would respectfully suggest that a trial Court doesn't have the authority to simply overrule *Scarsella*, and fail to follow *Scarsella*. *Scarsella*

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

is a Supreme Court published opinion which has to be followed by all of us.

It would be our contention that, at this point, summary disposition would be appropriate.

THE COURT: All right. Thank you.

Mr. Heos?

MR. JHEOS: The Court is absolutely right that this is different than in *Scarsella* and other cases. We would point you to *Castro, Castro v Goulet* at 501 Michigan 884, and ask you, as we've cited, to look at Justice Viviano's concurring opinion where he is almost on the throws of reversing *Scarsella*. And that is for reasons unlike this. I mean, he is talking about reverting back to the filing of the complaint, that the amendment should go back to the filing of the original complaint. Ours is much different than that.

The reason why we even found out about this, we thought all along the affidavit that had been executed by Dr. Boyer, three months before we filed the complaint, was attached. There was no reason not to attach it. We had been in communication with Ms. Matson's office back and forth, relative to getting more medical and more

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

imaging from Doctor Katranji just in case there was more.

It's not like there wasn't communication going on. They received our complaint. Their client received our complaint. We were in communication with them before their answer was due. Never once did anybody say, hey, you know, you didn't attach your affidavit of merit. Instead, we looked into possibly defaulting them.

And what happened was that Monday, after the time that the Answer was due, we sent somebody down here at 8:00 in the morning to check to see if something had been done on the file. Only then did we see a motion to dismiss based on no affidavit of merit.

Before we got the mail that day, we came down here with the affidavit of merit and filed it. In the mail that day we got their motion.

It's our position that this is distinguished from the other cases. And that our client, Cindy Ottgen, should be given her day in court.

I don't want to say people were laying in wait, waiting for the statute to run in this case. But if you look at all the communication that

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

transpired leading up to the statute of limitations running, how after the complaint had been filed, it appears that they were waiting until the statute ran to raise anything, and to give us the courtesy of telling us: Hey, by the way, was this an error? Did you not have an affidavit of merit? No, of course not. We had an affidavit of merit. This was a clerical mistake.

How it got out of the office, we're still trying to figure out. We have asked our process server if he saw one. Of course, he's not trained to look for one. But clearly it was not attached.

As I said, there is no prejudice to anybody here in this instance. And based on the facts in this case, it appears that *Scarsella* is going to be overturned if it gets up there. Because, if you read Viviano's concurring, the Justice is right on the edge of looking for a case very similar to this.

We ask this Court to use your power and let us defeat this motion and amend the complaint to merely add the affidavit of merit by Doctor Boyer that was executed January 30th, 2019.

Thank you, Judge.

THE COURT: Ms. Matson?

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

MS. MATSON: Thank you, Your Honor.

The *Castro* case wasn't cited in Plaintiffs' Response, so I don't have a thought regarding that in this moment because I don't have that case memorialized. What I can tell you is this: What I hear Mr. Heos say is, he is hoping or optimistic that *Scarsella* will be overturned in the future. It may or may not be. I don't know. But as we sit here today, *Scarcella* is the law. It is a Supreme Court case which we are all duty bound to follow.

And we cited on page five of our response to Plaintiffs' motion to file a late affidavit of merit, a quote directly from *Scarsella*, where the Supreme Court said:

Plaintiff contends he should have been allowed to amend his complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, making timely the newly completed complaint.

We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirements.

Were we to accept Plaintiffs' contention, medical malpractice claimants could routinely file

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

complaints without an affidavit of merit in contravention of the Court Rule that is a statutory requirement, and, quote, amend, end quote, by supplementing the file with an affidavit at some later date. This, of course, completely subverts the requirements of MCL 600.2912d(1) that the Plaintiffs shall file, with the complaint, an affidavit of merit, as well as the legislative remedy under MCL 600.2912d(2).

THE COURT: Okay.

So, in the case, *Scarsella* -- so was there no affidavit at the time of filing or was it procured after the filing date?

MS. MATSON: Correct. Well, I don't know when it was actually procured.

MR. JHEOS: It was procured after.

THE COURT: I would think it's important if no affidavit was in existence after they filed the complaint, and they got it later versus there being an affidavit and it was inadvertently not filed.

MS. MATSON: And if that's the issue that this Court would like additional briefing on, we would be happy to do some additional research into that and submit a brief to you on that.

Because, to the best of my knowledge, there

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

is no case law that would allow for, even if clerical error, later filing of the affidavit of merits.

THE COURT: Right. But if *Scarsella* is concerning no affidavit of merit in existence at the time of the filing, I would think that's distinguishable from this case where there was an affidavit of merit in existence, and inadvertently was not followed. It would seem to me that's the key point.

MS. MATSON: We would be happy to do some additional briefing.

THE COURT: Anybody know where that affidavit was?

MR. MHEOS: In *Scarsella*, I am reading the case right here, Your Honor, the Plaintiffs' attorney filed that case without existence of an affidavit of merit. And then, subsequent, a while later, tried to, I think six months, tried to file that, which, in our case, is distinguishable. And I want to note for the Court --

THE COURT: Distinguishable, but I think a major distinction.

MR. MHEOS: I think it is, because, really, we knew we had the affidavit. We knew we were on

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

good ground going into this case before we filed the complaint, or we wouldn't have done it.

And I would note that the tolling statute, 600.5856 -- may I approach, and show Your Honor the statute? I'm happy to show counsel.

(Counsel hands the Court a form.)

MR. JHEOS: By the way, while you're looking --

THE COURT: Don't confuse me. I have too much going on.

MR. JHEOS: Parens (6) in our response and in the first paragraph in our brief, we cite the *Castro* case.

MR. MHEOS: The only reason I show Your Honor that is because it only relates to the underpinnings of Justice Viviano's opinion in *Castro*.

The tolling statute relates to the filing of the complaint only. And if the legislature wanted to affidavit of merit, then they would have, or cited to the medical malpractice statute.

We've been going through on the numbers, with respect to the affidavit of merit. Tolling only statute applies only to the tolling with respect to the filing of a complaint. Not to both

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

documents.

And so I think that gives us a window through that statute to cure the defect and proceed. Because, really, Ms. Ottgen shouldn't be denied her day in court by such a technical, minor error that was meant --

THE COURT: Not minor.

MR. MHEOS: It's not a minor error, Judge. It's a big error. Strike that, Judge. It's a big error. But it's not one that would have prejudiced the Defendants. It's not one that would have abused the Court system, which I think is the point in *Scarsella*. If I came in and just filed a complaint, and said: Oh, Judge, I will get back to you in six months if I could find an expert to draft an affidavit of merit. No, we haven't. And it's just an error, somehow between my father's desk and the Court, and lost it, and didn't get it filed. But we had it. And I think that Your Honor should not --

THE COURT: So your position under 600.5856 is only concerning the summons and complaint; is that what you're saying?

MR. MHEOS: Yes, Your Honor. That would toll the statute. Because, clearly, counsel is

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

making a point that we can't amend because the statute has run. Well, that statute says that the statute should be tolled on the filing of the complaint, not the complaint and the affidavit of merit.

MS. MATSON: Actually, we're arguing that it can't be amended because it doesn't exist.

THE COURT: Right.

MS. MATSON: When you file a complaint without an affidavit of merit, under *Dorris* and *Scarsella*, it's null and void. And you can't amend a complaint that was never filed.

THE COURT: Okay. All right. Got it. Anything else?

MS. MATSON: And I think it's a pretty straightforward issue in terms of -- and I don't know, we would have to take a look at *Scarsella* and see if there is any case that's decided specifically as to the issue that this Court has raised in terms of was there an affidavit in existence or not.

But what I can tell you is, is that *Scarsella* didn't carve out any such exception. And, as we sit here, the Plaintiff hasn't raised any case that would carve out such an exception

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

where you can say this is just a clerical error.

THE COURT: I don't like getting in new territories.

MS. MATSON: Well, that's Okay. Thank you very much.

THE COURT: All right.

So in this matter we have a very interesting situation. We have two complaints that were filed, apparently -- two dates, rather. May 1st is an operative date of 2017. July 23rd, 2017. And that Plaintiffs have asserted that they prepared and filed a complaint on/or about April 11th. And that there was, in fact, in existence, an affidavit of merit by a Doctor Boyer. B-O-Y-E-R. That was in possession of Plaintiffs' attorney. But for some reason, being a clerical error, or inadvertence on the part of the staff to attach it, did not attach it.

So the issue becomes, does *Scarsella* apply. The Defense's position is there are no exceptions. If you didn't file it, you can't file it later.

The Court interprets the statute to avoid frivolous actions by requiring one to have an affidavit of merit before proceeding.

And so in *Scarsella*, the Court sort of

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

agrees with the Defense, that if I file your complaint and you don't have an affidavit of merit in existence, that you could not file one later. But we don't have that situation here. We have a situation where an affidavit of merit was in existence, and was inadvertently not attached.

So, I don't think this really is even on point with *Scarsella*. And, in fact, if no affidavit of merit was in existence at the time of filing, I probably would have agreed with you. But we don't have that situation here.

So the issue becomes: Should Plaintiff be barred her day in court because of a clerical error on the part of her attorneys? And we've had other statutes concerning that. And historically, other areas, the Court of Appeals, especially in even the Supreme Court has been liberal when there are clerical errors, so that a litigant is not denied their opportunity to have their case heard, due to an inadvertent error.

The Court's going to find -- I believe that's what we have in this situation, that *Scarsella* is not on point with this case, because there was an affidavit of merit in existence, and in the possession of Plaintiffs' attorney.

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

Indicated that that affidavit was dated January 30, 2019, approximately two and a half months before the complaint was filed. It was in Plaintiffs' attorney's possession, and inadvertently was not attached.

So the Court's going to find in this particular matter that there was an inadvertent error, that the affidavit of merit was, in fact, in existence at the time of the filing. And, as such, I'm going to allow it to be filed.

MS. MATSON: Thank you, Your Honor. I'll submit an order, if that's okay, under the seven-day rule?

THE COURT: All right.

MS. MATSON: And if you require us to come back with a written motion, that's fine. But, as you might imagine, we're going to want to appeal that so we get this issue decided. We would ask that this case be stayed while we make that attempt in the appellate courts. We can come back with a written motion, if you prefer. But I thought maybe this was --

THE COURT: Well, a written motion is better. When they look at it, it's better.

Mr. Heos?

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

MR. JHEOS: Your Honor, I anticipated that there was going to be an appeal either way.

MS. MATSON: Either way.

MR. HEOS: Either way. And rather than waste your time on something like that, I've got no problem staying this pending an appeal.

THE COURT: All right. It's up to you guys.

MR. MHEOS: But I don't think we have served our amended complaint yet, have we?

MS. MATSON: (Nods.)

MHEOS: We have. So you got this?

THE COURT: What are you saying?

MHEOS: No, no. I think we are good. We got confirmation we did file it.

THE COURT: Okay. So that the record is clear, I find that the affidavit of merit was in existence at the time of the filing of the original complaint. That distinguishes from *Scarsella* that there wasn't one. And certainly the reason for that is you don't want to be in any frivolous actions without someone being able to support it. That it was due to the inadvertent clerical error of Plaintiffs' attorney. The affidavit of merit is dated January, a couple two and a half months prior to filing.

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

And so the Court feels in the interest of justice and for the Plaintiff, herself, to have an opportunity to have her case determined, that it would allow the affidavit to be filed late.

MS. MATSON: Thank you very much, Your Honor.

MR. MHEOS: Thank you, Your Honor.

MR. JHEOS: I don't think any of the other motions need to be briefed.

THE COURT: Maybe for the Court of Appeals. Let me run down my checklist.

MS. MATSON: Oh. No. I take that back. There was one motion that we filed in May. If you give us one second, we might be able to work this one out.

THE COURT: Let me put this on the record.

So in order to file the late affidavits, I find there is no undue delay. There was no bad faith or dilatory motive on the part of the movant. This is the only way to have corrected. There's no undue prejudice to the Defendants since they already had all the information available in this matter. And that the motion or the complaint is not non-futile. Okay?

Also, just for the record, the parties

have, in light of the *Scarsella* case, felt that they needed guidance from the Court of Appeals. They want to stay the proceedings and the Court has agreed to stay.

MR. JHEOS: Very satisfied with your guidance, your ruling, Your Honor.

THE COURT: Stay the proceedings so they can file a request for appeal.

MS. MATSON: Thank you, Your Honor.

So we have worked out -- we had another motion pending to dismiss some defendants that are named on the caption, some of which aren't legal entities, some of which are assumed names of a different legal entity. So we're going to dismiss those entities without prejudice. If there should be some determination that they should have been in the case, we will take that issue up again.

THE COURT: I saw Mr. Katranji.

MR. JHEOS: Katranji.

MS. MATSON: Dr. Katranji.

THE COURT: Katranji. Had an awful lot of entities going on there.

MS. MATSON: Most of them don't exist. One is his family foundation.

THE COURT: At one time he had a lot. A

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

true entrepreneur. Okay.

MR. MHEOS: Thank you, Judge.

MS. MATSON: Thank you very much. And I will submit both of those orders.

THE COURT: All right.

(Proceedings concluded at 2:08 p.m.)

RECEIVED by MSC 2/18/2022 11:57:49 AM

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs,

Hon. Clinton Canady III

v

Docket No. 19-266-NH

DR. ABDALMAIJID KATRANJI, KRSI, KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,

Defendants.

James T. Heos (P26210)
Matthew J. Heos (P73786)
THE NICHOLS LAW FIRM
Attorneys for Plaintiffs
3452 E. Lake Lansing Road
East Lansing, MI 48823
(517) 432-9000

Marcy R. Matson (P49758)
Sandra J. Lake (P54288)
HALL MATSON, PLC
Attorneys for Defendants
1550 Watertower Place, Suite 200
East Lansing, MI 48823
(517) 853-2929

HALL MATSON PLC

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION BASED ON PLAINTIFFS' FAILURE TO FILE AN AFFIDAVIT OF MERIT, DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; AND GRANTING A STAY OF PROCEEDINGS PENDING APPEAL

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan, this 3 day of Sept, 2019

PRESENT: HON. CLINTON CANADY III
CIRCUIT COURT JUDGE

This matter having come before the Court on Defendants' Motion for Summary Disposition Based on Plaintiff's Failure to File an Affidavit of Merit and Motion to Dismiss Plaintiff's First Amended Complaint, the Court having reviewed the motions and responses thereto, having heard oral argument, otherwise being fully advised in the premise;

IT IS HEREBY ORDERED that Defendants' Motion for Summary Disposition Based on Plaintiff's Failure to File an Affidavit of Merit is DENIED for the reasons stated on the record.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Plaintiff's First Amended Complaint is DENIED for the reasons stated on the record.

IT IS FURTHER ORDERED that all trial court proceedings in this matter shall be stayed pending completion of appellate proceedings relating the denial of the above-mentioned motions.

CLINTON CANADY III

Hon. Clinton Canady III
Circuit Court Judge

RECEIVED by MCOA 8/25/2020 6:25:54 PM

RECEIVED by MSC 2/18/2022 11:57:49 AM

Court of Appeals, State of Michigan

ORDER

Candi Ottgen v Abdalmaijid Katranji MD

Docket No. 350767

LC No. 19-000266-NH

Stephen L. Borrello
Presiding Judge

Patrick M. Meter

Michael J. Kelly
Judges

The Court orders that the application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).

The motion to file a late reply is GRANTED, and the reply filed on November 11, 2019 is accepted.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

FEB 19 2020
Date

Chief Clerk

Court of Appeals Opinion

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 2/18/2022 11:57:49 AM

STATE OF MICHIGAN

COURT OF APPEALS

CANDI OTTGEN, and PATRICK OTTGEN,

Plaintiffs-Appellees,

v

ABDALMAIJID KATRANJI, M.D., KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, PLLC, KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,

Defendants-Appellants.

UNPUBLISHED
May 20, 2021

No. 350767
Ingham Circuit Court
LC No. 19-000266-NH

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM.

Defendants, Abdalmaijid Katranji, M.D., Katranji Reconstructive Surgical Institute, Katranji Reconstructive Surgery Institute, PLLC, Katranji Family Foundation, Katranji Hand Center, and Katranji Institute, appeal by leave granted[1] the trial court's order denying their motion for summary disposition. We affirm in part and reverse in part.

I. FACTUAL BACKGROUND

Plaintiff, Candi Ottgen, received two separate thumb surgeries from defendant Dr. Katranji; her first surgery was performed on May 1, 2017, and her second surgery was performed on July 23, 2017. After the surgeries, Candi reported numbness and tingling in her thumb and index finger, a decreased range of motion, decreased strength, and had difficulty performing daily tasks. Candi and her husband, Patrick, also reported an interference with their marital relationship as a result of the thumb surgeries. Consequently, plaintiffs filed a medical malpractice claim

[1] *Ottgen v Katranji*, unpublished order of the Court of Appeals, entered February 19, 2020 (Docket No. 350767).

RECEIVED by MSC 2/18/2022 11:57:49 AM

against defendants on April 11, 2019. Plaintiffs did not, however, file an affidavit of merit with their complaint. On May 9, 2019, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), asserting a statute-of-limitations defense. Defendants asserted that plaintiffs' failure to file with the complaint the affidavit of merit did not commence the lawsuit nor toll the applicable statute of limitations. Defendants relied exclusively on our Supreme Court's holding in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000).

On May 13, 2019, plaintiffs filed their first amended complaint, this time attaching the required affidavit of merit. Plaintiffs noted that the affidavit of merit was created on January 30, 2019, and that it was not attached to the original complaint because of a clerical error. Two days later, plaintiffs filed an emergency motion to file a late affidavit of merit, asserting that their amended complaint related back to their original complaint. Defendants responded, contending that *Scarsella* controlled and that no action had been commenced by the filing of the original complaint because such complaint was unaccompanied by the affidavit of merit. Defendants also challenged the untimely filed motion to attach the affidavit of merit because it was filed outside the 28-day period enumerated in MCL 600.2912d(2). Defendants further argued that plaintiffs could not establish good cause for the late filing because, not only did plaintiffs move to file the late affidavit of merit outside the 28-day period, plaintiffs had the affidavit of merit in their possession at the time of filing the original complaint and simply neglected to attach it to the complaint.

After hearing oral arguments on the competing motions, the trial court denied defendants' motion for summary disposition. The trial court reasoned that this case differed from *Scarsella* because, in this case, there was an affidavit of merit in existence at the time plaintiffs filed their complaint; whereas, in *Scarsella*, there did not appear to be an affidavit of merit in existence at the time the complaint was filed and was instead later created. In other words, there was an affidavit of merit in existence that was inadvertently not filed in this case, but there was no affidavit of merit in existence at the time of filing in *Scarsella*. The trial court concluded there was an inadvertent error not to attach the affidavit of merit, this case differed from *Scarsella*, and plaintiffs could file their late affidavit of merit so to save their claims. The trial court reasoned the interest of justice should allow for the late filing of the affidavit of merit and that there was no undue delay, bad faith, or dilatory motive on the part of plaintiffs. Defendants now appeal.

II. STANDARDS OF REVIEW

This Court reviews de novo a circuit court's summary disposition decision. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). Summary disposition under MCR 2.116(C)(7) is permitted "because of release, payment, prior judgment, [or] statute of limitations." MCR 2.116(C)(7). "When it grants a motion under MCR 2.116(C)(7), a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015) (quotation marks omitted), lv den 499 Mich 882 (2016). "Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), reh den 461 Mich 1205 (1999). If the facts are in contention, "the court may not resolve factual disputes or determine credibility in ruling on a summary disposition motion." *Burkhardt v Bailey*,

RECEIVED by MSC 2/18/2022 11:57:49 AM

260 Mich App 636, 647; 680 NW2d 453 (2004), lv den 471 Mich 920 (2004). However, [i]f no facts are in dispute, whether the claim is statutorily barred is a question of law." *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997).

"A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted." *Dalley*, 287 Mich App at 304 (quotation marks and brackets omitted). "A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Id.* (citation omitted). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. *Id.* at 304-305. "Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id.* at 305 (quotation marks and citation omitted).

III. ANALYSIS

Defendants argue the trial court erred by distinguishing this case from *Scarsella*, that summary disposition in their favor was appropriate, and that plaintiffs' claims should be dismissed with prejudice. We agree in part and disagree in part.

MCL 600.2912d(1) provides the plaintiff in a medical malpractice action "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness." The substance of the affidavit of merit is that a plaintiff has a valid malpractice claim. See MCL 600.2912d(1)(a)-(d) (describing the requirements of the affidavit, such as the applicable standard of care, whether there was a breach of that standard, and whether the breach was the proximate cause of the alleged injury). In crafting MCL 600.2912d, the Legislature provided a measure of relief when an affidavit of merit cannot be filed with the complaint. See MCL 600.2912d(2). "Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff . . . an additional 28 days in which to file the affidavit of merit." *Id.*

Our Supreme Court adopted this Court's opinion in *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998), aff'd as mod 461 Mich 547 (2000), and merely added two points of clarification. *Scarsella*, 461 Mich at 548. *Scarsella* involved a medical malpractice action in which the plaintiff failed to file an affidavit of merit with his complaint before the statutory period of limitations expired. *Scarsella*, 232 Mich App at 63. The plaintiff filed a complaint "approximately two to three weeks before" the applicable two-year statutory period of limitations would have barred the plaintiff's claim. *Id.* However, similar to this case, the plaintiff did not file an affidavit of merit with the complaint, and the plaintiff did not move for a 28-day extension in which to file an affidavit of merit under MCL 600.2912d(2). *Id.* Subsequently, the defendant moved for summary disposition on the basis of the plaintiff's failure to comply with MCL 600.2912d(1). *Id.* Thereafter, the plaintiff filed an affidavit of merit, but by the time the plaintiff filed the affidavit of merit, the statutory period of limitations had expired. *Id.* The trial court concluded that the "plaintiff's failure to file an affidavit of merit with his complaint rendered the complaint null and void," and "because the filing was a nullity, it did not toll the period of limitation and therefore plaintiff's claim was time-barred months before the affidavit of merit was finally furnished." *Id.*

RECEIVED by MSC 2/18/2022 11:57:49 AM

This Court affirmed the trial court's decision, which our Supreme Court subsequently affirmed. *Scarsella*, 461 Mich at 553; see also *Scarsella*, 232 Mich App at 65. This Court reasoned that the commencement of a medical malpractice claim differed from the general commencement requirements of a civil action. *Scarsella*, 232 Mich App at 63. Relying on MCL 600.2912d(1) and the use of the term "shall," this Court concluded that the requirement of the affidavit of merit accompanying the complaint was mandatory and imperative. *Id.* at 64. Therefore, "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Id.* This Court further concluded that, "because the complaint without an affidavit was insufficient to commence plaintiff's malpractice action, it did not toll the period of limitation." *Id.* Our Supreme Court clarified that "the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation" under MCL 600.5856(a) when a plaintiff "wholly omits to file the affidavit required by MCL 600.2912d(1)." *Scarsella*, 461 Mich at 553.

In this case, plaintiffs alleged injuries arising from two separate surgeries: the first one on May 1, 2017, and the second surgery on July 23, 2017. Accordingly, under MCL 600.5805(8), plaintiffs had two years from the date of each surgery to bring their cause of action. Plaintiffs filed their complaint on April 11, 2019, which was within the two-year statutory period of limitations under MCL 600.5805(8). However, plaintiffs did not accompany their complaint with an affidavit of merit, as required by MCL 600.2912d(1). Pursuant to *Scarsella*, 461 Mich at 553, the filing of this complaint did not toll the applicable two-year statutory period of limitations. Consequently, plaintiffs' claims with respect to the May 1, 2017 surgery were set to expire on May 1, 2019. It was not until May 13, 2019, that plaintiffs filed their amended complaint, this time attaching the affidavit of merit. Thereafter, plaintiffs filed an emergency motion on May 15, 2019, to allow for the late filing of the affidavit of merit, arguing the filing of the affidavit of merit with the amended complaint related back to the April 11, 2019 complaint under MCR 2.118(D).

Scarsella, 461 Mich at 550, specifically addressed this very issue:

> Plaintiff contends that he should have been allowed to amend his September 22, 1996, complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, see MCR 2.118(D), making timely the newly completed complaint. We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirement. Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1), that the plaintiff "shall file with the complaint an affidavit of merit," as well as the legislative remedy of MCL 600.2912d(2), allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint. [Quoting *Scarsella*, 232 Mich App at 64-65.]

Furthermore, as explained earlier, our Supreme Court clarified that "the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation" under MCL 600.5856(a) when a plaintiff "wholly omits to file the affidavit required by MCL 600.2912d(1)." *Scarsella*, 461 Mich at 553. Consequently, because the April 11, 2019 complaint was ineffective,

RECEIVED by MSC 2/18/2022 11:57:49 AM

there was nothing for the subsequently filed May 13, 2019 amended complaint to relate back to. The *Scarsella* Court's mandate is clear: when a complaint is filed without an affidavit of merit, the lawsuit is not commenced and the statute of limitations is not tolled. We do not find that an exception to this mandate exists, such as a plaintiff being in possession of an affidavit of merit but erroneously does not file the affidavit of merit with the original complaint.

With regard to the emergency motion to file a late affidavit of merit, MCL 600.2912d(2) provides a measure of relief when an affidavit of merit cannot be filed with the original complaint. This provision provides: "Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff . . . an additional 28 days in which to file the affidavit of merit." MCL 600.2912d(2). In this case, plaintiffs filed their emergency motion to permit the late filing of the affidavit of merit on May 15, 2019. They filed their amended complaint, with the attached affidavit of merit, on May 13, 2019. Either day, plaintiffs' filings were six days and four days, respectively, outside the 28-day period enumerated in MCL 600.2912d(2).[2] Accordingly, plaintiffs' attempt to cure the procedural defect of not filing the affidavit of merit with the April 11, 2019 complaint was untimely, and, therefore, improper.

Plaintiffs raise additional challenges on appeal that were not raised before the trial court. We are under no obligation to review an unpreserved claim of error in a civil case, see *Napier v Jacobs*, 429 Mich 222, 232-233; 414 NW2d 862 (1987), but we "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). For sake of this appeal, we overlook the preservation requirement and address the newly raised challenges.

MCL 600.2912d(3) states:

> If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in [MCL 600.2912b(5)], the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

MCL 600.2912b(5) provides that "within 56 days after" receiving a notice of intent, "the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility."

In this case, plaintiffs sent their notice of intent on September 27, 2018. On January 30, 2019, plaintiffs had in their possession a signed affidavit of merit from their medical expert. Plaintiffs rely on one piece of evidence in regard to defendants' alleged failure to comply with

---

[2] See *Castro v Goulet*, 312 Mich App 1, 6; 877 NW2d 161 (2015), in which this Court addressed whether the 28-day period enumerated in MCL 600.2912d(2) started to run from the time of filing the complaint or entry of the order granting the motion under MCL 600.2912d(2). This Court stated that the "28-day period must run from the date the complaint is filed, irrespective of when the motion [under MCL 600.2912d(2)] is granted." *Id.*

RECEIVED by MSC 2/18/2022 11:57:49 AM

MCL 600.2912b(5). Plaintiffs assert that defendants did not comply with MCL 600.2912b(5) because, months after the affidavit of merit was signed and weeks after plaintiffs filed their initial complaint, plaintiffs realized that the "pre-operative films" that they requested on March 8, 2019, were of breast imaging and not of Candi's hand. However, plaintiffs do not claim that, had they received the imaging of Candi's hand, their expert's opinion would have changed. Rather, they merely assert that receipt of the wrong films was sufficient to allow the 91-day extension under MCL 600.2912d(3). Yet, the evidence on the record suggests that defendants "allow[ed] the claimant access to all medical records related to the claim." See MCL 600.2912b(5). There was e-mail correspondence between plaintiffs' and defendants' counsel that reflect defendants' attempts to provide plaintiffs with the relevant records. There is simply no evidence in this record to suggest that defendants "fail[ed] to allow access to medical records." See MCL 600.2912d(3). Accordingly, we reject plaintiffs' claim.

Plaintiffs also argue that there are equitable exceptions to the rule of law expressed in *Scarsella*. They cite *Bryant v Oakpointe Villa Nursing Centre, Inc.*, 471 Mich 411; 684 NW2d 864 (2004), and *VandenBerg v VandenBerg (VandenBerg I)*, 231 Mich App 497; 586 NW2d 570 (1998).

Bryant, 471 Mich at 414, involved our Supreme Court's analysis of whether certain claims sounded in medical malpractice or ordinary negligence. The plaintiff brought claims alleging ordinary negligence. *Id.* at 417. The defendant moved for summary disposition on the basis the plaintiff's claims sounded in medical malpractice as opposed to ordinary negligence. *Id.* at 418. Thereafter, the plaintiff filed a second amended complaint alleging medical malpractice. *Id.* The defendant again moved for summary disposition, this time on the basis the two-year medical malpractice period of limitations had expired. *Id.* Ultimately, our Supreme Court concluded that, ordinarily, the applicable statute of limitations would bar the plaintiff's medical malpractice complaint. *Id.* at 432. However, the Michigan Supreme Court stated the equities of the case compelled a different result because the "distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan." *Id.* Our Supreme Court reasoned:

> Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. Accordingly, for this case and others now pending—that involve similar procedural circumstances, we conclude that plaintiff's medical malpractice claims may proceed to trial along with plaintiff's ordinary negligence claim. [*Id.*]

In this case, no such confusion existed nor was there a similar procedural circumstance. *Scarsella* made it clear that a plaintiff bringing a medical malpractice claim must file a complaint accompanied by an affidavit of merit. If the complaint is filed without the affidavit of merit, the complaint is considered a nullity for purposes of tolling the applicable statute of limitations. Moreover, an amended complaint does not relate back to an original complaint because the original complaint was ineffective. Further, *Scarsella* provides that MCL 600.2912d(2) is the remedy for a plaintiff who cannot file an affidavit of merit with the original complaint. In this case, plaintiffs failed to attach an affidavit of merit with their April 11, 2019 complaint and failed to file a timely motion seeking a 28-day extension under MCL 600.2912d(2). Accordingly, the equities of this

RECEIVED by MSC 2/18/2022 11:57:49 AM

case do not warrant equitable relief, especially considering that plaintiffs had the affidavit of merit in their possession at the time of filing the complaint, as well as at the time of filing their amended complaint. Plaintiffs provide no reasonable excuse for why the affidavit of merit was not filed other than that such failure was due to "clerical error."

VandenBerg I, 231 Mich App at 498, involved a plaintiff who failed to file an affidavit of merit with her complaint. This Court reversed the trial court's grant of summary disposition in favor of the defendants, concluding dismissal was inappropriate because, although the affidavit of merit was not filed with the complaint, the defendants received the affidavit of merit at the time they were served with the complaint. *Id.* at 502. Accordingly, the "purpose of the statute was served in this case when defendants received service of the affidavit of merit along with the complaint," with such purpose "to deter frivolous medical malpractice claims." *Id.* at 502-503. *VandenBerg I* preceded the Michigan Supreme Court's decision in *Scarsella*, and unlike *VandenBerg I*, defendants in this case did not receive the affidavit of merit with the original complaint. Therefore, plaintiffs' reliance on *VandenBerg I* is misplaced.[3]

Plaintiffs further rely on MCL 600.2301 in support of their contention that the trial court did not err by denying defendants' motion for summary disposition. Specifically, plaintiffs suggest that the second sentence of the statute charges Michigan courts "with the responsibility of disregarding *any* error or defect in the proceedings that does not affect the substantial rights of the parties." MCL 600.2301 provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

Plaintiffs contend their inadvertent failure to attach the affidavit of merit "was quickly corrected" and "defendants suffered no prejudice in the minimal delay before receiving" the affidavit of merit. This argument however does not properly consider the 28-day extension provided in MCL 600.2912d(2). That legislatively created 28-day extension already provides a medical malpractice plaintiff a remedy for not being able to file the affidavit of merit with the complaint. If plaintiffs' failure was "quickly corrected," the affidavit of merit would have been filed within that 28-day

---

[3] After this Court's reversal and remand in *VandenBerg I*, the trial court granted summary disposition again in favor of defendant on the basis that the plaintiff's medical malpractice claim expired. *VandenBerg v VandenBerg (VandenBerg II)*, 253 Mich App 658, 659; 660 NW2d 341 (2002). This Court noted *Scarsella* and concluded that the plaintiff "filed the affidavit of merit beyond the period set by the applicable statute of limitations, but failed to move for an extension. Accordingly, plaintiff's suit was not timely commenced and the trial court properly granted summary disposition in favor of defendants." *Id.* at 662. Similar to *VandenBerg II*, plaintiffs filed their affidavit of merit beyond the applicable statutory period of limitations and did not request an extension within the 28-day period set forth in MCL 600.2912d(2).

RECEIVED by MSC 2/18/2022 11:57:49 AM

period. Plaintiffs reliance on the second sentence of MCL 600.2301 ignores the remedy that was already provided via MCL 600.2912d(2). Moreover, MCL 600.2301 "only applies to pending actions or proceedings," and because the original complaint did not commence plaintiffs' action or toll the running of the limitations period, *Scarsella*, 232 Mich App at 64, MCL 600.2301 does not save their claims, see *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 91-92; 869 NW2d 213 (2015).

Further, ignoring the defects would affect defendants' substantial rights. Applying MCL 600.2301 would deprive defendants of their statutory right to a timely filed complaint accompanied by an affidavit of merit, and they "would also be denied [their] right to a statute-of-limitations defense." *Id.* at 92 (quotation marks and citation omitted; alteration in original).[4]

Turning now to whether dismissal of plaintiffs' claims with prejudice is appropriate, we conclude that dismissal with prejudice is only appropriate with respect to plaintiffs' injuries arising from the May 1, 2017 surgery.

The statute of limitations is not tolled when a complaint is filed without the accompanied affidavit of merit. *Scarsella*, 232 Mich App at 64. This is because a medical malpractice action is not commenced when the complaint is filed without an affidavit of merit. *Id.* After *Scarsella*, our Supreme Court later held that "a plaintiff's failure to file a timely [affidavit of merit] *or* to file a timely [affidavit of merit] that satisfies the requirements of MCL 600.2912d(1) generally results in the dismissal of the case." *Ligons v Crittenton Hosp*, 490 Mich 61, 75; 803 NW2d 271 (2011). The *Ligons* Court further held that "dismissal must be without prejudice *unless other grounds for the dismissal exist, such as the expiration of the limitations period.*" *Id.* (emphasis added).

In this case, Candi's first surgery was on May 1, 2017. Therefore, she had until May 1, 2019, to properly file her cause of action. See MCL 600.5805(8). Plaintiffs' April 11, 2019 complaint was insufficient to commence the cause of action, which was also insufficient to toll the statutory period of limitations, for the reasons discussed earlier. Further, because the April 11, 2019 complaint was insufficient, there was nothing for the May 13, 2019 amended complaint to relate back to. See MCR 2.118(D); *Scarsella*, 461 Mich at 550. Consequently, plaintiffs' claims arising from the May 1, 2017 surgery are barred by the two-year period of limitations enumerated under MCL 600.5805(8). Therefore, dismissal with prejudice with regard to the May 1, 2017 surgery is appropriate. See *Ligons*, 490 Mich at 75.

However, with respect to the surgery performed on July 23, 2017, we conclude the statutory period of limitations was tolled by the filing of the amended complaint with the accompanying affidavit of merit. We reach this result because we conclude it is appropriate to treat the amended complaint as an originally filed complaint. The amended complaint standing alone met the requirements of MCL 600.2912d(1). This allows plaintiffs' claims concerning the July 23, 2017 surgery to move forward because the amended complaint and affidavit of merit were filed before

---

[4] We need not address plaintiffs' argument with regard to their belief that *Scarsella* was wrongly decided as they present this challenge to preserve it for review by our Supreme Court. Plaintiffs acknowledge that we are bound by *Scarsella*. *Maier v Maier*, 311 Mich App 218, 222-223; 874 NW2d 725 (2015); *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009).

RECEIVED by MSC 2/18/2022 11:57:49 AM

expiration of the two-year period of limitations, which expired on July 23, 2019. The purpose of MCL 600.2912d is "to deter frivolous medical malpractice claims." *VandenBerg I*, 231 Mich App at 502-503. Such purpose is served by concluding that defendants received a timely complaint and affidavit of merit with respect to the July 23, 2017 surgery. *Id.*

As related to the July 23, 2017 surgery, the amended complaint was timely filed, i.e., was filed before July 23, 2019. The amended complaint was also filed with the required affidavit of merit pursuant to MCL 600.2912d(1).

Affirmed in part, reversed in part.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ James Robert Redford

Order

RECEIVED by MSC 2/18/2022 11:57:49 AM

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

December 22, 2021

163216

CANDI OTTGEN and PATRICK OTTGEN,
Plaintiffs-Appellants,

v

SC: 163216
COA: 350767
Ingham CC: 19-000266-NH

ABDALMAIJID KATRANJI, M.D., KATRANJI RECONSTRUCTIVE SURGICAL INSTITUTE, KATRANJI RECONSTRUCTIVE SURGERY INSTITUTE, PLLC, KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,
Defendants-Appellees.

_____/

On order of the Court, the application for leave to appeal the May 20, 2021 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address whether *Scarsella v Pollack*, 461 Mich 547 (2000), was correctly decided and whether the plaintiffs' complaint, which was filed without an affidavit of merit contrary to MCL 600.2912d(1), should have been dismissed without prejudice. The appellants' brief and appendix shall be filed by February 28, 2022, with no extensions except upon a showing of good cause. The time for filing the remaining briefs shall be as set forth in MCR 7.312(E). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 22, 2021

Clerk

a1215