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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' BRIEF ON APPEAL

***** ORAL ARGUMENT REQUESTED *****

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STATEMENT OF QUESTIONS PRESENTED

I. WAS *SCARSELLA V POLLAK*, 461 Mich 547; 607 NW2d 711 (2000), WRONGLY DECIDED?

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In mid-2016, Candi Ottgen began experiencing bilateral thumb pain as well as numbness and tingling in her fingers. Ms. Ottgen first saw a doctor for her symptoms in December 2016. That doctor recommended conservative treatments. When non-operative management proved ineffective, Ms. Ottgen was referred to Dr. Abdalmaijid Katranji, an orthopedic surgeon. Dr. Katranji performed two surgeries on Ms. Ottgen. The first of these surgeries occurred on May 1, 2017. Complaint, ¶24. (App. 27a).

Prior to the May 1, 2017 surgery, Dr. Katranji told Ms. Ottgen that the surgery would only involve removal of some osteophytes and a carpal tunnel release. *Id.*, ¶12. (App. 26a). Instead, during this surgery, Dr. Katranji performed a different procedure, an arthroplasty, in which he removed her trapezium bone. *Id.,* ¶13. (App. 26a).

Slightly over two months later, on July 23, 2017, Dr. Katranji performed a second surgery on Ms. Ottgen, the carpal tunnel release. *Id.*, ¶14. (App. 26a).

Following both these surgeries, Ms. Ottgen reported the onset of persistent numbness and tingling in the thumb and index fingers. *Id.*, ¶15. (App. 26a). Ms. Ottgen currently has a decreased range of motion in her thumb, decreased strength, and, as a result, has difficulty performing activities of daily living. *Id.*

Ms. Ottgen retained the Nichols Law Firm, PLLC, an East Lansing firm, to investigate a potential medical malpractice claim against Dr. Katranji. As part of that investigation into a potential malpractice suit, Ms. Ottgen's counsel consulted with a Missouri orthopedic surgeon, Dr. Martin Boyer.

After performing an investigation, Ms. Ottgen's attorney mailed a Notice of Intent to Dr. Katranji and several related parties on September 27, 2018. In January 2019, several months

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before filing suit, Ms. Ottgen's counsel obtained an Affidavit of Merit that was signed by Dr. Boyer. (App. 51a-53a).

Ms. Ottgen and her husband, Patrick (hereinafter: "plaintiffs"), filed a complaint in the Ingham County Circuit Court on April 11, 2019 against Dr. Katranji and a number of related parties. (App. 24a-30a). In their complaint, plaintiffs mentioned both the May 1, 2017 and July 23, 2017 surgeries that Dr. Katranji performed on Ms. Ottgen. Complaint, ¶¶12, 14. (App. 26a). But, the principal claims asserted by the plaintiffs were associated with the first of these two surgeries, in which Dr. Katranji, without previously informing Ms. Ottgen, removed her trapezium bone. *Id*., ¶¶23-27. (App. 27a-28a).

Due to a clerical error, Dr. Boyer's affidavit of merit, which had been signed three months before, was not attached to plaintiffs' complaint when it was filed. Affidavit of Kelly Thomison, ¶10 (App. 89a).

On May 9, 2019, the defendants filed a motion for summary disposition in which they argued that the Ottgens' cause of action should be dismissed with prejudice because of the failure to file an affidavit of merit with their complaint. (App. 31a-43a). In their motion, defendants contended that, based on this Court's decision in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 547 (2000), the case was subject to dismissal because their original filing did not toll the statute of limitations. And, because the limitations period had since expired, defendants asserted on the basis of *Scarsella* that plaintiffs' cause of action had to be dismissed with prejudice.

Within days of the filing of defendants' motion for summary disposition, plaintiffs took several steps. On May 13, 2019, plaintiffs filed a First Amended Complaint. (App. 44a-50a). Attached to that amended complaint was a copy of the affidavit of merit that Dr. Boyer had

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executed in January 2019. (App. 51a-53a). Two days later, plaintiffs filed an Emergency Motion to File a Late Affidavit of Merit. (App. 54a-63a).

The circuit court held a hearing on the parties' pending motions on August 7, 2019. (App. 106a-128a). At that hearing, the circuit court expressed the view that plaintiffs should not be deprived of their right to pursue their claim on the basis of an inadvertent error on the part of their attorney's office that did not result in any prejudice to defendants:

> 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.
>
> Tr. 8/7/19, at 18. (App. 123a).

The circuit court concluded that this case was to be distinguished from *Scarsella* because in that case, the plaintiff had not secured an affidavit of merit when he filed his complaint. Here, as the circuit court pointed out, plaintiffs' counsel obtained an affidavit of merit months before the complaint was filed, but by mistake did not attach it to the complaint when it was filed. *Id*., at 20-21. (App. 125a-126a).

On September 3, 2019, the circuit court signed an order denying defendants' motion for summary disposition based on the plaintiffs' failure to file an affidavit of merit with their original complaint. (App. 129a-130a).

The defendants filed an application for leave to appeal in the Court of Appeals, seeking interlocutory review of the circuit court's September 3, 2019 order. On February 19, 2020, a panel of the Court of Appeals granted defendants' application. (App. 131a).

Following briefing and oral argument, a panel of the Court of Appeals issued its decision in the case on May 20, 2021. (App. 132a-140a). Based on this Court's decision in *Scarsella*, the

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panel rejected the circuit court's rationale for distinguishing that ruling:

> 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.
>
> Opinion, at 5. (App. 136a).

Thus, on the basis of *Scarsella*, the Court of Appeals concluded that dismissal with prejudice was appropriate as to the plaintiffs' claims of malpractice associated with Ms. Ottgen's May 1, 2017 surgery.[1]

Plaintiffs applied for leave to appeal in this Court in July 2021. The Court, in an order dated December 22, 2021, granted plaintiffs' application for leave. *Ottgen v Katranji*, ___ Mich ___; 967 NW2d 223 (2021). (App. 141a). In its order granting leave, the Court asked the parties to address, "whether *Scarsella v Pollak*, 461 Mich 547 (2000), was correctly decided and whether the plaintiffs' complaint should have been dismissed without prejudice."

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[1]The Court of Appeals further ruled that, because plaintiffs filed an amended complaint on May 13, 2019 that *was* accompanied by Dr. Boyer's affidavit of merit, the limitations period was effectively tolled as of that date. Opinion at 8. (App. 139a). The panel ruled, therefore, that any claim of malpractice that plaintiffs may have alleged based on the second surgery that Dr. Katranji performed on Ms. Ottgen in July 2017, would not be barred by the statute of limitations. *Id.*, at 8-9. (App. 139a-140a). But, as noted previously, the primary thrust of plaintiffs' claim of malpractice in this case is associated with the May 1, 2017 surgery in which Dr. Katranji removed Ms. Ottgen's trapezium bone, the portion of the case that the Court of Appeals ruled was subject to dismissal with prejudice under *Scarsella*.

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ARGUMENT

I. *SCARSELLA*'S HOLDING WITH RESPECT TO THE TOLLING OF THE STATUTE OF LIMITATIONS WAS ERRONEOUS.

The Court has granted leave to appeal in this case to determine if its 2000 decision in *Scarsella* was correctly decided. The Court has also asked the parties to address the question of whether the plaintiffs' cause of action should have been dismissed without prejudice. For reasons that will be explained in this brief, *Scarsella* was poorly reasoned and reached an incorrect result. This Court should restore the law to what it was before *Scarsella* - the failure of a plaintiff in a medical malpractice case to file an affidavit of merit with the complaint is to result in the dismissal of the case without prejudice to the plaintiffs' right to refile the claim. *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 47-48; 594 NW2d 455 (1999). Moreover, in that refiled action, the time period in which the original case was in suit is not to count against the applicable limitations period because, by operation of MCL 600.5856(a), the statute of limitations was tolled during that period of time.

Scarsella was a medical malpractice action in which the plaintiff's complaint was not accompanied by an affidavit of merit as required by MCL 600.2912d. The defendant moved for summary disposition on that basis. Shortly before a hearing on defendant's motion for summary disposition, plaintiff filed an affidavit of merit. The circuit court found that filing to be unavailing, concluding that the failure to file an affidavit of merit rendered the plaintiff's complaint null and void.

The Court of Appeals in *Scarsella* affirmed that determination based on the following reasoning:

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> 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; MSA 27A.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); MSA 27A.2912(4)(1). See also MCR 2.112(L). Use of the word "shall" indicates that an affidavit accompanying the complaint is mandatory and imperative. *Oakland Co 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.
>
> *Scarsella v Pollak*, 232 Mich App 61, 63-64; 591 NW2d 257 (1998).

Thus, like the circuit court, the Court of Appeals concluded that the filing of a medical malpractice complaint without the affidavit called for by §2912d was a nullity; the complaint without an affidavit of merit was, in the view of the Court of Appeals, "insufficient to commence the lawsuit." 232 Mich App at 64.

Without granting leave to appeal or requiring further briefing from the parties[2], this Court

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[2]There is much to lament about this Court's decision in *Scarsella*, including the procedure that led to the Court's ruling. This Court would have been better served if it had granted leave to appeal in that case, obtained further briefing, and conducted oral argument prior to addressing the significant issues presented in that case. There is one other procedural point to be made about the ruling announced in *Scarsella.* The erroneous holding in that case with respect to the tolling of the statute of limitations was not actually necessary to the disposition of the case that was before this Court in *Scarsella*.

The reason for this lies in the fact that the Court had previously held in *Dorris*, that the appropriate disposition of a case in which a plaintiff fails to file an affidavit of merit with a medical malpractice complaint is the dismissal of that case *without* prejudice. *Dorris*, 460 Mich at 47-48. That is all that the *Scarsella* Court was required to rule to dispose of the issue presented to it. The plaintiff in *Scarsella* did not file an affidavit with his complaint and, under the dictates of the Court's prior decision in *Dorris*, the appropriate judicial response was to dismiss the plaintiff's case *without* prejudice.

A dismissal without prejudice, as the Court had already decided in *Dorris*, is obviously a dismissal that does not prohibit the plaintiff from refiling a later case. It is in such a subsequently filed case that the question of whether the plaintiff could claim tolling under MCL 600.5856(a)

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in *Scarsella* adopted as its own the decision of the Court of Appeals, 461 Mich at 548-550, including its determination that the filing of plaintiff's complaint was a nullity. *Id*. To the Court of Appeals determination that plaintiff's complaint was a nullity, this Court in *Scarsella* added that, as a nullity, the complaint was not sufficient to toll the statute of limitations. For that

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during the pendency of his originally filed case would have been relevant. This is because any *subsequently filed* case in *Scarsella*, following dismissal of his original action, would be timely for limitations purposes only if the plaintiff could claim the benefit of §5856(a)'s tolling effect. Thus, under the facts in *Scarsella*, it is only in a later-filed case, following the dismissal without prejudice of plaintiff's original cause of action, that tolling under §5856(a) would come into play. But, notably, the *Scarsella* case itself had not reached the stage where tolling under §5856(a) was relevant. The plaintiff in *Scarsella* did not have his case dismissed without prejudice for filing his complaint without an affidavit of merit and then refiled the case. Rather, the plaintiff had filed only a single complaint (without an affidavit of merit) and it is that cause of action that worked its way to this Court in *Scarsella*.

Thus, what the Court's majority was doing in *Scarsella* when it (erroneously) addressed the issue of tolling under §5856(a) was *anticipating* the rule of law that it believed would apply *if* the plaintiff in that case, following the dismissal without prejudice of his original action, had refiled his cause of action. What the *Scarsella* Court did in reaching out to take up an issue that was not even presented to it must be contrasted with what this Court did in *Dorris*. The malpractice in that case occurred in June 1993 and plaintiff instituted her case in March 1994, but did not include an affidavit of merit with the complaint. And, when the *Dorris* case got to this Court six years later, the plaintiff still had not filed an affidavit of merit. The *Dorris* Court stuck to the issue that was presented to it and ruled only that the appropriate response to a malpractice complaint filed without an affidavit of merit would be an order dismissing without prejudice. 460 Mich at 47-48. The *Dorris* court did not address a tolling question that was not presented in that appeal and would not come into play unless the plaintiff chose to file a later action.

In anticipating an issue that was not germane to the case that was actually before it, the *Scarsella* majority's holding with respect to tolling could properly be classified as dictum. This Court has recognized that "any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case at hand are, however, illuminating, but obiter dictum, and lack the force of an adjudication." *McNally v Board of Convassers of Wayne County*, 316 Mich 551, 558; 25 NW2d 613 (1997); *Wold Architects & Engineers v Strat*, 474 Mich 223, 232, n. 3; 713 NW2d 750 (2006). The tolling ruling announced in *Scarsella* might have been relevant in a *potential* case that Mr. Scarsella might later file, but it was not relevant to the case that was actually in front of this Court in *Scarsella.*

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reason, even though the Court had previously recognized in *Dorris*, that the appropriate judicial response to the filing of a medical malpractice action without an affidavit of merit was dismissal of the case *without* prejudice, the *Scarsella* Court determined that the plaintiff in that case could not refile his cause of action because the statute of limitations, which was not tolled because of the complaint's "nullity", had now expired. *Id.*, at 552.

There were two main components to this Court's ruling in *Scarsella*. First, the Court held that a medical malpractice action filed without the affidavit of merit required by §2912d is subject to dismissal. Plaintiffs have no disagreement with this aspect of *Scarsella*. On this point, *Scarsella* broke no new ground since the Court had held the year before in *Dorris* that dismissal without prejudice was the appropriate result where no affidavit of merit was filed with a medical malpractice complaint.[3]

It is on the second aspect of its ruling, addressing the tolling of the statute of limitations, that the *Scarsella* Court went seriously wrong. The Court ruled in *Scarsella* that the plaintiff's malpractice complaint, filed without an affidavit of merit, was a nullity, it was effectively never filed. And, because that filing was a nullity, the Court in *Scarsella* held that plaintiff's complaint did not act to toll the statute of limitations.

The fundamental error in this Court's ruling in *Scarsella* is that the Court was presented

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[3]This Court's decision in *Dorris* was rendered in June 1999, approximately eight months *after* the Court of Appeals rendered its decision in *Scarsella*. It is very difficult to believe that the Court of Appeals decision in *Scarsella*, a decision that this Court decided to adopt as its own, would have been the same had the *Dorris* opinion been rendered *before* the Court of Appeals ruled in that case. Since this Court unequivocally held in *Dorris* that the appropriate judicial response to a medical malpractice compliant filed without an affidavit of merit would be to order the dismissal of the case without prejudice, it is hard to imagine that the Court of Appeals would have come to a contrary conclusion if that Court's opinion in *Scarsella* had been issued post-*Dorris*.

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with two questions – whether a case had, in fact, been filed and whether the statute of limitations has been tolled – and it managed to decide these two questions without reference to the two Michigan statutes that expressly govern when and how a cause of action is filed and when and how statutes of limitations are tolled. In other words, the *Scarsella* Court failed to consider the two Michigan statutes that actually cover the central legal issues that were presented in that case.

Michigan has a statute that provides when and how a cause of action is commenced. That statute is MCL 600.1901, which states in simple English: "A civil action is commenced by filing a complaint with the court." *See also* MCR 2.101(B). What MCL 600.1901 unequivocally provides is that what is necessary to initiate a case is the filing of *a complaint*. All that is needed to make a case a reality (as opposed to a nullity) is the filing of *a complaint*. Even though it was not accompanied by an affidavit of merit, the medical malpractice action that Mr. Scarsella filed in September 1995 was unquestionably "commenced" for purposes of §1901.

Michigan also has a statute that governs when and how statutes of limitations are tolled. That statute is MCL 600.5856(a), which provides that statutes of limitations are tolled, "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." (emphasis added). Like §1901, the language of §5856(a) is clear and it is unequivocal. A statute of limitations is tolled when a complaint is filed provided that the summons and complaint are served on the defendant in a timely fashion as provided in the court rules.[4] What is required to toll the statute of limitations

[4]The second requirement for tolling under §5856(a) - timely service of the complaint - is not contested in this case. There is no question here that the Ottgens' complaint was served on the defendant within the time period provided in §5856(a).

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under this statute that actually governs the tolling of the statute of limitations is the filing of a *complaint*. The statute says nothing about tolling being dependent on the filing of an affidavit of merit.

There is, therefore, a Michigan statute that determines when a cause of action is commenced and, contrary to the Court's holding in *Scarsella*, that statute is *not* §2912d. Rather, the statute that controls whether a case has been commenced, *i.e.* whether a case is or is not a nullity, is §1901. Similarly, there is a Michigan statute that dictates when and how a statute of limitations is tolled and that statute is *not* §2912d, it is §5856(a).[5]

In answering the question of whether the plaintiff's complaint was, in fact, filed or whether it was a nullity, the *Scarsella* Court should have found its answer in §1901, not as it did in §2912d. And, in determining whether the statute of limitations was tolled, the Court in *Scarsella* should have looked to the only Michigan statute the controls this tolling question, §5856(a), not §2912d.

Plaintiffs do not contest the fact that §2912d has something to say about whether a medical malpractice action has been *properly* instituted. Plaintiffs agree with the holding announced by this Court in *Dorris* - a medical malpractice action filed without an affidavit of merit has not been properly filed and, for that reason, is subject to dismissal without prejudice.

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[5]The fundamental error in the Court's decision in *Scarsella* can be captured in one sentence that this Court adopted from the Court of Appeals opinion in that case, a sentence that actually cited to, but failed to heed §5856(a). The Court of Appeals in its opinion in *Scarsella* had ruled: "*Generally*, a civil action is commenced and the period of limitations is tolled when a complaint is filed. *See* MCR 2.101(B) and MCL 600.5856 . . ." 232 Mich App at 63, quoted at 461 Mich at 549 (emphasis added). This statement is wrong. There is no "generally" about it. By legislative decree in §5856(a), a statute of limitations is *always* tolled when a complaint is filed and served within the time period allowed by the court rules. Similarly, a case is *always* (not "generally") filed under §1901 when a complaint is filed.

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But, the fact that such a complaint had not been *properly* filed does not negate the fact that, under §1901, that complaint *was* filed. The affidavit of merit statute does nothing to negate the reach of the Michigan statute that governs *whether* a cause of action has been filed (§1901) or the statute the controls *whether* the statute of limitations has been tolled (§5856(a)).

The Court failed to apply the literal language of either §1901 or §5856(a) in *Scarsella*. The Court gave no consideration whatsoever to the former statute. MCL 600.5856 was, in fact, mentioned in the *Scarsella* decision, but rather than applying that statute as the Legislature wrote it, the *Scarsella* Court fundamentally rewrote that statute. Under the interpretation of this provision adopted by the Supreme Court in *Scarsella,* §5856(a) has been rewritten to provide something like this:

> Sec. 5856. The statutes of limitations or repose are tolled:
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant. *Provided, however, that in an action alleging medical malpractice, statutes of limitation or repose are tolled when a complaint and an affidavit of merit called for by MCL 600.2912d are filed*.

The italicized language in the proceeding paragraph was somehow added to §5856(a) by the Court in *Scarsella.* This italicized language is nowhere to be found in §5856(a) as it was drafted by the Michigan Legislature. Instead, the language chosen by the Legislature is absolutely unequivocal. The tolling provision provided in that statute applies when *a complaint* is timely filed and that *complaint* is served on the defendant. MCL 600.5856(a) as written says nothing about tolling being dependent on the filing of affidavits of merit and these words cannot be added to the statute by judicial decree. *Younkin v Zimmer*, 497 Mich 7, 11; 857 NW2d 244 (2014); *cf Castro v Goulet*, 501 Mich 884, 887; 901 NW2d 614 (2017) ("we must be cautious

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'not to read into the statute what is not within the Legislature's intent as derived from the language of the statute.'") (Viviano, J., concurring).

Without question, the Michigan Legislature could have written §5856(a) in such a way as to require the result that was reached by the Court in *Scarsella.* One of the strange quirks of *Scarsella's* misinterpretation of §5856(a) is that P.A. 1993, No. 78, the same 1983 public act that established the affidavit of merit requirement now found in §2912d, also amended §5856. Thus, in 1993, at the same time the Legislature first established the affidavit of merit requirement in medical malpractice cases, it also amended §5856 to include a new tolling provision, what is now MCL 600.5856(c), allowing for a tolling period in a malpractice action during the presuit waiting period mandated by §2912b.

But, in establishing the affidavit of merit requirement and by amending §5856 in P.A. 1993, No. 78, to add §5856©, the Michigan Legislature made absolutely no changes to §5856(a) - the provision of the tolling statute that was misconstrued in *Scarsella*. Before the passage of P.A. 1993, No. 78, §5856(a) unequivocally provided that statutes of limitations would be tolled merely with the filing of a complaint and service of that complaint on the defendant. *After* P.A. 1993, No. 78 was passed, precisely the same tolling provision was contained in §5856(a).

This bit of history demonstrates dramatically that the Michigan Legislature had the opportunity in 1993 to rewrite §5856(a) to dictate the result reached seven years later by this Court in *Scarsella*. *See Progress Michigan v Attorney General*, 506 Mich 74, 102-103; 954 NW2d 475 (2020) (McCormack, CJ, concurring). The Michigan Legislature, when it formulated the affidavit of merit requirement in medical malpractice cases, could have altered §5856(a) to require that in a such cases there would be no tolling of the limitations period unless both a

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complaint and an affidavit of merit were filed. But the Legislature did not do so.

Properly applying §1901 and §5856(a) to the facts of this case should have led to the following disposition of the Ottgens' case. Plaintiffs' original complaint was filed on April 11, 2019, twenty days before the expiration of the statute of limitations on their claim associated with the professional negligence of Dr. Katranji committed during Ms. Ottgen's May 1, 2017 surgery.

That complaint was, however, subject to dismissal because it was not filed with an affidavit of merit as required by §2912d. Under *Dorris*, that dismissal should had been a dismissal *without* prejudice to plaintiffs' right to refile their case. But, contrary to the determination made by the Court in *Scarsella,* such a refiled action *could be* timely filed precisely because plaintiffs' original case was *not* a nullity; that case was unquestionably "commenced" under §1901 and, since the case was unquestionably commenced, the statute of limitations was unquestionably tolled under §5856(a).

Since the statute of limitations was tolled with the filing of plaintiffs' April 11, 2019 complaint, when the defendants moved for summary disposition for plaintiffs' failure to file an affidavit of merit, that motion should have been granted, an order dismissing the case *without* prejudice should have been entered, and, because the limitations period had been tolled as of April 11, 2019, the plaintiffs would have then had the same amount of time as had been left on the limitations period as of April 11, 2019 (20 days) to refile their malpractice complaint this time with the affidavit of merit Dr. Boyer had signed several months before.

The *Scarsella* Court resisted this application of the tolling principles that govern under §5856(a), suggesting that such an approach would somehow defeat the purpose behind §2912d's

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affidavit of merit requirement. The Court in *Scarsella* asserted that allowing a complaint that was not accompanied by an affidavit of merit to toll the statute of limitations would completely subvert §2912d's affidavit of merit requirement: "As explained by the Court of Appeals in the opinion we are adopting today, such an interpretation of [§5856a] would undo the Legislature's clear statement [in §2912d] that an affidavit of merit 'shall' be filed with the complaint." 461 Mich at 552.[6] This statement, to be blunt, makes no sense.

As the foregoing discussion of how this case should have been treated under §1901 and §5856(a) demonstrates, what should have resulted in this case is the entry of an order dismissing the Ottgens' cause of action because of their failure to file an affidavit of merit with the complaint. But that dismissal should have been *without* prejudice to the plaintiffs' ability to refile their cause of action. Had plaintiffs refiled their malpractice complaint and accompanied that refiled cause of action with Dr. Boyer's affidavit of merit that complied with §2912d, *the "purposes" of §2912d would have been completely served.* That new refiled cause of action would have included *at its outset* an affidavit signed by a qualified professional attesting to the

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[6]This statement is actually based on a misperception of what the Court of Appeals ruled in *Scarsella*. The Court of Appeals did, in fact, reject one argument that the plaintiff advanced in that Court on the ground that it would "effectively repeal" §2912d's affidavit requirement. *Scarsella,* 232 Mich App at 65. But, the argument that the Court of Appeals rejected as "effectively repealing" §2912d and its requirement that an affidavit of merit accompany the complaint was not associated with tolling. Rather, it was plaintiff's alternative argument that he could cure any defect in his original filing by being allowed to file an amended complaint with an affidavit of merit. According to plaintiff's argument to the Court of Appeals, the amended complaint (and affidavit of merit) would then relate back to the filing of the original complaint, remedying his failure to file an affidavit of merit with his original complaint. The Court of Appeals properly rejected this argument. 232 Mich App at 65. Plaintiffs are willing to concede that the Court of Appeals could reject this particular argument since it would effectively undo the affidavit of merit requirement of §2912d. But the same is not true with respect to the tolling issue that was taken up by this Court in *Scarsella*.

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validity of the plaintiff's claim. The purpose of the affidavit of merit requirement, as this Court has recognized, is to deter frivolous medical malpractice actions. *Barnett v Hidalgo,* 478 Mich 151, 163-164; 732 NW2d 472 (2007). That purpose would be completely served without the nontextual interpretation that the Court imparted to §5856(a) in *Scarsella*.

One member of this Court has recognized the obvious error in this aspect of the *Scarsella* decision. Justice David F. Viviano, in an opinion concurring in the denial of leave to appeal in *Castro*, correctly identified the fundamental error made by the majority in *Scarsella* in concluding that tolling of the statute of limitations under §5856(a) was not appropriate*:*

> No one has yet offered a convincing argument why it would be inconsistent to mandate the AOM filing in § 2912d(1) while at the same time permitting § 5856(1) to toll the running of the statutory limitations period. Tolling in these circumstances would not appear to vitiate the requirements of § 2912d(1): plaintiffs would still have to file the AOM and their claims might be dismissed when they failed to do so, just not on statute of limitations grounds. In other words, § 2912d(1) has its own work to do-namely, forcing plaintiffs to provide medical opinion evidence that their claims are not frivolous-and it need not take on the additional task of tolling the limitations period, especially when it nowhere mentions that period
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> 501 Mich at 886 (Viviano, J. concurring).

Castro is but one of the decisions in which Michigan appellate judges have expressed disagreement with the holding in *Scarsella*.[7] Of particular import on this point is the Court's

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[7]In addition to Justice Viviano's concurring opinions in *Castro* and *Wade v McCadie*, 503 Mich 1024; 926 NW2d 577 (2019) (Viviano, J., concurring), other members of this Court have called for the overruling of this aspect of *Scarsella. See Kirkaldy v Rim*, 478 Mich 581, 586-587; 734 NW2d 201 (2007) (M. Cavanaugh J.; M. Kelley, J., concurring); *Progress Michigan v Attorney General*, 506 Mich 74, 99-106; 954 MW2d 475 (2020) (McCormack, CJ, concurring). In addition, at least two panels of the Court of Appeals have also requested that this Court revisit its ruling in *Scarsella. Kirkaldy v Rim*, 266 Mich App 626, 628; 702 NW2d 686 (2005); *Young v Sellers*, 254 Mich App 447, 452; 657 NW2d 555 (2002).

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recent decision in *Progress Michigan v Attorney General*, 506 Mich 74; 954 NW2d 475 (2020).

That case was an action filed against the Attorney General brought under Michigan's Freedom of Information Act (FOIA), MCL 15.231, *et seq*. The plaintiff in *Progress Michigan* timely filed its cause of action in the Court of Claims on April 11, 2017. Plaintiff's complaint, however, was not verified as required by two Michigan statutes pertaining to procedure in the Court of Claims, MCL 600.6431(1) and MCL 600.6434(2).[8] The Attorney General moved for summary disposition based on the complaint's lack of verification. Plaintiff responded to that motion by immediately filing an amended complaint with the required verification. The amended complaint, however, was filed beyond FOIA's short 180-day period of limitation. *See* MCL 15.240.

The plaintiff in *Progress Michigan* asserted that the amended complaint, filed after the expiration of the limitations period, was timely under relation back principles. *See* MCR 2.118(D). The Attorney General, however, argued that there was nothing to relate back to since the plaintiffs' original complaint, lacking the verification required by MCL 600.6431(1) and MCL 600.6434(2), was a nullity. The Attorney General argued that the plaintiff's original complaint, like the plaintiff's complaint in *Scarsella,* was effectively never filed.

The Court of Claims rejected the Attorney General's argument, but on appeal to the Court of Appeals, a panel of that Court reversed. *Progress Michigan v Attorney General*, 324 Mich App 659; 922 NW2d 654 (2018). Analogizing plaintiff's original filing of an unverified

[8]Both of these Court of Claims verification statutes are written in mandatory language. MCL 600.6431(1) provides that a written claim or notice filed with the Clerk of the Court of Claims "shall be signed and verified by the claimant by an officer authorized to administer oaths." MCL 600.6434(2) specifies that a complaint filed in the Court of Claims "shall be verified."

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Court of Claims complaint to the malpractice complaint that was filed without an affidavit of merit in *Scarsella*, the Court of Appeals held in *Progress Michigan* that plaintiff's original complaint was a nullity and that the plaintiff's amended complaint was untimely because it could not relate back. 324 Mich App at 671-672. Thus, the Court of Appeals in *Progress Michigan* relied on *Scarsella* in concluding that the plaintiff's originally filed suit was a nullity that did not toll the statute of limitations and, as a result, that limitations period had expired prior to the filing of the plaintiff's amended complaint..

This Court in *Progress Michigan* reversed, unanimously rejecting the Court of Appeals reliance on *Scarsella*. While an amicus curiae brief submitted in *Progress Michigan* had raised the question of whether *Scarsella'*s holding with respect to the tolling of the statute of limitations should be expressly overruled, five members of the Court declined to address that question, "because plaintiff has not asked us to do so and the case is distinguishable by its own terms." 506 Mich at 97, fn. 16.

The five person majority in *Progress Michigan*, therefore, saw no reason to address directly the question of whether *Scarsella* was correctly decided because that case could be easily distinguished. 506 Mich at 96-97. But, in rejecting the extension of *Scarsella* to the verification requirements applicable in the Court of Claims, the *Progress Michigan* majority identified precisely what was wrong with *Scarsella*'s reasoning. The Court's majority in *Progress Michigan* rejected the Court of Appeals conclusion that the plaintiff's original complaint was a nullity that did not toll the statute of limitations because that ruling was directly at odds with the two statutes that have been discussed previously in this brief, §1901 and §5856(a):

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> The Revised Judicature Act (RJA), MCL 600.101 *et seq.*, governs practice and procedure in the Court of Claims because the [Court of Claims Act] is contained within the RJA. Relevant to this case, two provisions of the RJA prescribe the practice and procedure in the circuit court and, therefore, the Court of Claims: MCL 600.1901 and MCL 600.5856. MCL 600.1901 states that an action is commenced upon the filing of a complaint in a court. MCL 600.5856(a) states that the statutory period of limitations is tolled upon the filing of a complaint. Nothing in the COCA or the FOIA prescribes different practices or procedures governing the commencement of an action or the tolling of a limitations period. *Accordingly, these statutes apply, and plaintiff's FOIA action was commenced when it filed the complaint on April 11, 2017; the filing of the original complaint tolled the 180-day limitations period under MCL 15.240, leaving six days remaining before the limitations period passed.*
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> 506 Mich at 94 (emphasis added).

The majority in *Progress Michigan* also noted that there was nothing in the Court of Claims verification statutes that defendant was relying on that dictated the conclusion that an unverified complaint was a nullity or that the verification statute served to undermine the general statutory rules regarding commencement of a cause of action or the tolling of the statute of limitations found in §1901 and §5856(a):

> Further, nothing in MCL 600.6431 or MCL 600.6434 suggests that the failure to comply with the verification requirements renders a complaint "null and void." Nor does any other provision of the COCA or the FOIA.
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> * * *
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> Construing MCL 600.6434 as requiring that the complaint be verified, as we must under *McCahan*, *does not mean that an unverified complaint does not commence a civil action under MCL 600.5856*. Nothing in MCL 600.6434 (or any other provision of the COCA) suggests otherwise. *MCL 600.6434 says absolutely nothing that would contradict or override the general rules pertaining to commencing an action under MCL 600.1901 or tolling the limitations period under MCL 600.5856. Nor does MCL 600.6434 explicitly condition tolling on the verification requirement*. All MCL 600.6434 requires is that the complaint be verified. It is not inconsistent to require a plaintiff to comply with the verification requirement in MCL 600.6434 while at the same time permitting the action to be commenced under MCL 600.1901 and the limitations period tolled under MCL

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600.5856(1).

506 Mich at 97-98 (emphasis added).

While the *Progress Michigan* majority may not have addressed directly whether *Scarsella* was correctly decided, its cataloging of the errors in the Court of Appeals analysis in that case applies with equal force to this Court's decision in *Scarsella*. Like the Court of Claims verification statutes at issue in *Progress Michigan,* there is nothing in the affidavit of merit statute that "prescribes different practices or procedures governing the commencement of an action or the tolling of a limitations period." 506 Mich at 94. Similarly, §2912d "says absolutely nothing that would contradict or override the general rules pertaining to commencing an action under MCL 600.1901 or tolling the limitations period under MCL 600.5856." 506 Mich at 97-98.

The majority in *Progress Michigan* also embraced the views expressed by Justice Viviano in his concurring opinion in *Castro*, explaining why the application of §1901 and §5856(a) in these circumstances would not render the verification requirements of MCL 600.6431(1) or MCL 600.6434(2) "meaningless," since the plaintiff would still be required to comply with this requirement in a later filed complaint. 506 Mich at 98, fn. 17. As Justice Viviano explained in *Castro*, precisely the same can be said of the plaintiff's duty to comply with the affidavit of merit requirement of §2912d.

Two members of the Court in *Progress Michigan* would have overruled *Scarsella* outright. Chief Justice McCormack, in an opinion joined by Justice Viviano, noted the obvious: the majority's opinion in *Progress Michigan* refusing to extend *Scarsella* "should not be interpreted as an endorsement of *Scarsella*." 506 Mich at 102 (McCormack, CJ, concurring). The

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Chief Justice further recognized that the reasons offered by the majority for concluding that the plaintiff's original FOIA complaint was not a nullity applied with equal force to the Court 's ruling in *Scarsella*:

> [T]he Court explains today that the Court of Claims Act "says absolutely nothing that would contradict or override" the statutory rules for when an action is commenced or when the limitations period is tolled. See MCL 600.1901; MCL 600.5856. And tolling the statute of limitations in a case such as this one would not render meaningless the Court of Claims Act's signature and verification requirements—a defective complaint might still be subject to dismissal, but the running of the imitations period would be tolled until that time.
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> All true. *And of course, these same points apply to medical malpractice actions because there is no statutory provision that conditions tolling on the plaintiff's filing of an affidavit of merit*.

Id. (emphasis added).

Chief Justice McCormack, therefore, advocated that the Court take "the final step this case implies" and overrule *Scarsella*. *Id.*, at 105. This Court should now take the final, small step foreshadowed by its decision in *Progress Michigan* and overrule its decision in *Scarsella*.

Finally, something must be said in response to Justice Stephen J. Markman's concurring opinion in *Progress Michigan*. In that opinion, Justice Markman expressed his disagreement with Chief Justice McCormack's view that *Scarsella* should be overruled. After joining a majority opinion whose entire analysis of §1901 and §5856(a) happened to be at odds with the reasoning employed by this Court in *Scarsella*, Justice Markman in his *Progress Michigan* concurring opinion expressed his view that *Scarsella* was correctly decided. 506 Mich at 106-113.

Justice Markman first offered a defense of the decision in *Scarsella* on the basis of the

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mandatory language contained in the affidavit of merit statute. That statute provides that in a medical malpractice action the plaintiff "*shall* file with the complaint an affidavit of merit . . ." MCL 600.2912d. According to Justice Markman, this mandatory language dictated the result reached by the Court's majority in *Scarsella, i.e.* a malpractice complaint filed without an affidavit of merit was a nullity, incapable of tolling the statute of limitations. 506 Mich at 106-107. (Markman, J., concurring).

Justice Markman's focus on the purportedly mandatory language of §2912d is less than convincing in light of the fact that the Court of Claims verification statutes at issue in *Progress Michigan* contained equally mandatory language. See fn. 8, *supra*. In the majority opinion in which Justice Markman joined, the Court in *Progress Michigan* held that this mandatory language in MCL 600.6431(2) and MCL 600.6434(2) was not sufficient to overcome the general rules regarding commencement of a cause of action or the tolling of a statute of limitations contained in §1901 and §5856(a). It is difficult to see how comparable "mandatory" language in §2912d could call for the different result that the Court reached in *Scarsella*.

Justice Markman's reliance on the "mandatory" language of §2912d overlooks one other significant point. The language in §2912d on which Justice Markman relies does not simply state that a plaintiff in a medical malpractice action shall file an affidavit of merit with the complaint. Rather, that statute specifies that the plaintiff in such a case, "shall file with the complaint an affidavit *signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.*" (Emphasis added).

Thus, the mandatory language in §2912d on which Justice Markman predicated his defense of the *Scarsella* decision requires not merely an affidavit of merit, but an affidavit of

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merit signed by a health care professional whom plaintiff's counsel believes meets the requirements of MCL 600.2169. What is significant about this purportedly mandatory language in §2912d is that in *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), the plaintiff filed a medical malpractice action with an affidavit of merit, but that affidavit was *not* signed by a doctor who was qualified to testify against the defendant under MCL 600.2169. Despite the fact that the mandatory language of §2912d compels the filing of an affidavit signed by a doctor who satisfies the requirements of §2169, Justice Markman joined the Court's opinion in *Kirkaldy* that held that plaintiff's original complaint was *not* a nullity and could, in fact, toll the statute of limitations. 478 Mich at 585-586.

Again, it is difficult to understand how the mandatory language that, in Justice Markman's view, justified the holding in *Scarsella*, could call for a such a different result in *Kirkaldy*. The Court's ruling in *Kirkaldy,* therefore, serves to demonstrate that the "mandatory" character of the language contained in §2912d cannot account for the tolling ruling reached by the Court in *Scarsella.*[9]

In his concurring opinion in *Progress Michigan*, Justice Markman also offered the view that, §2912d, was a more specific statutory provision pertaining to affidavits of merit and, on

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[9]Justice Markman ultimately sought to square his vote with the majority in *Progress Michigan* and his defense of *Scarsella* with this highly unsatisfactory bit of line-drawing: "I ultimately agree with and join the conclusion of the majority opinion that the complaint here was sufficient to toll the statute of limitations because the failure to verify the complaint more closely resembled a *defective* affidavit of merit than an *absent* affidavit of merit." 506 Mich at 109 (Markman, J., concurring)(emphasis in original). Thus, in Justice Markman's view, future cases in which Michigan courts are asked to decide whether a complaint is or is not a nullity based on a failure to satisfy some procedural requirement are to be decided on the basis of whether the case "more closely resembles" a defective affidavit of merit or no affidavit of merit at all. Best of luck with this test.

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that basis, should control over what he viewed as the more general principles of law reflected in §1901 and §5856(a)[10] 506 Mich at 106-107 (Markman, J., concurring).

There is a rule of construction in Michigan law that gives some weight to the distinction between "specific" and "general" laws. But, resort to these distinctions is reserved for those cases in which two statutes are found to be irreconcilably in conflict with each other. *See e.g. Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991); *Imlay Twp Primary School District No. 5 v State Bd of Education*, 359 Mich 478; 102 NW2d 720 (1960). In the circumstances where two statutes are in conflict, this Court has distinguished between "specific" and "general" legislation to resolve that conflict. The Court examined this rule of construction in *In re Midland Publishing Company, Inc.*, 420 Mich 148; 362 NW2d 580 (1984):

> It is a fundamental rule of statutory construction that "apparently conflicting statutes should be construed, if possible, to give each full force and effect". It is also well established that a later-enacted specific statute operates as an exception or a qualification to a more general prior statute covering the same subject matter and that, if there is an irreconcilable conflict between two statutes, the later-enacted one will control.

Id., at 163.

Thus, the predicate for giving effect to a specific statute over a more general statute is a conclusion that these two statutes are in irreconcilable conflict. But there is no inherent conflict between §2912d and either §5856a or §1901. The critical issue that the *Scarsella* Court got wrong was the question of the tolling of the statute of limitations. On this subject, there is no possible conflict between §2912d and §5856a since only one of these two statutes actually

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[10]This reasoning poses the obvious question of why Justice Markman was unable to view MCL 600.6434(2) as the more specific statutes when it came to the contents of complaints filed in the Court of Claims, a view he clearly did not hold since he joined the majority in *Progress Michigan*.

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addresses the question of the tolling of the statute of limitations. That statute is *not* §2912d. Similarly, as between §2912d and §1901, only one of these two statutes governs *whether* a complaint has been filed. That statute is §1901, not §2912d.

Finally, Justice Markman offered his personal view that the *Scarsella* decision represents "an eminently reasonable and manageable rule of procedure." 506 Mich at 113. Plaintiff would disagree with this characterization of the ruling in *Scarsella.*[11] But the question here really is not

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[11]In her concurring opinion in *Progress Michigan*, Chief Justice McCormack properly characterized *Scarsella* as creating a strange class of "spectral" cases - cases that have all the appearances of being filed, but in actuality have not been filed. 506 Mich at 105 (McCormack, CJ, concurring). At one point in time this Court had to come to grips with the potential mischief that could result from the existence of the class of spectral cases created by *Scarsella*. The case in which the Court was compelled to confront the procedural quagmire that its invention of a class of spectral cases might create was *Saffian v Simmons*, 477 Mich 8; 727 NW2d 132 (2007). In *Siphon*, the defendant was defaulted when he failed to respond to the plaintiff's medical malpractice complaint. The defendant, taking a page from this Court's decision in *Scarsella*, argued that he could not be defaulted because the affidavit of merit that accompanied the plaintiff's complaint was defective, rendering that complaint a nullity. Thus, the defendant in *Saffian*, citing the "spectral" character of plaintiff's complaint under this Court's decision in *Scarsella*, argued that he had no duty to comply with the court rules or statutes requiring him to timely respond to plaintiff's complaint. In other words, the defendant argued that, because plaintiff's case was a "nullity", he could safely ignore the filing of the plaintiff's case despite what Michigan statutes or court rules might say about his obligation to respond to the complaint. In essence, the defendant in *Saffian* was of the view that statutes, court rules and maybe even court orders could be blissfully disregarded in any case that was void from its inception under the ruling announced by this Court in *Scarsella.* This argument proved too much for a five-person majority of this Court in *Saffian*, four of whom comprised the Court's majority seven years earlier in *Scarsella*. Among the five person majority in *Saffian* was Justice Markman. The Court in *Saffian* held that defendant was required to comply with the court rules and answer the complaint before challenging the adequacy of the affidavit of merit (and, by extension, the "nullity" complaint). In arriving at this result, the Court in *Saffian* grasped the "chaotic uncertainty" that could follow from adoption of the defendant's position, a tacit admission that its decision in *Scarsella* could well generate such uncertainty. The *Saffian* Court ruled:

> Further, this more orderly process of honoring the presumption of the validity of pleadings, requiring an answer, and then allowing the defendant to challenge the affidavit reduces the chaotic uncertainty that allowing the defendant to decline to answer would introduce.

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whether the *Scarsella* decision was "reasonable" or "manageable." Rather, the essential question is whether, in light of two clearly written statutes governing the commencement of cases and the tolling of the statute of limitations, *Scarsella* was correctly decided. Justice Markman, in pronouncing the *Scarsella* decision "reasonable" and "manageable" without any discussion of the impact of §1901 and §5856(a), failed to address the precise question that this case presents.

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477 Mich at 14.

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RELIEF REQUESTED

For the foregoing reasons, plaintiffs-appellants, Candi Ottgen and Patrick Ottgen, request that this Court reverse the Court of Appeals May 20, 2021 opinion and remand this case to the Ingham County Circuit Court for further proceedings.

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Dated: February 18, 2022.