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STATE OF MICHIGAN

IN THE SUPREME COURT

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs-Appellants,

v

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

Defendants-Appellees.

SC No. 163216
COA No. 350767
LC No. 19-000266-NH
(Ingham Circuit Court)

DEFENDANTS-APPELLEES' BRIEF ON APPEAL

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

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COUNTER-STATEMENT OF QUESTION PRESENTED

SHOULD THIS COURT REFRAIN FROM OVERTURNING *SCARSELLA V POLLAK,* 461 MICH 547; 607 NW2D 711 (2000) EITHER BECAUSE *SCARSELLA* WAS CORRECTLY DECIDED OR BECAUSE STARE DECISIS CONSIDERATIONS COUNSEL AGAINST CHANGING THE LAW UNDER THE CIRCUMSTANCES?

Plaintiffs-Appellants ("Plaintiffs") answer "no."

Defendants-Appellees ("Defendants") answer "yes."

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COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Introduction

This Court granted Plaintiffs' application for leave to appeal and directed the parties to address whether *Scarsella v Pollack*, 461 Mich 547; 607 NW2d 711 (2000) was correctly decided and whether Plaintiffs' complaint should have been dismissed without prejudice. *Scarsella* was correctly decided because the Court's decision effectuates the Legislature's intent in mandating that medical malpractice complaints be accompanied by an affidavit of merit ("AOM"), without which the applicable limitation period is not tolled. The Legislature's intent is helpfully shown by several actions taken by the Legislature in several statutes, all of which consistently reflect legislative intent in accordance with what this Court determined it to be in *Scarsella*. Plaintiffs' brief completely ignores the Legislature's actions that signal its intent in this regard, as well as several other impediments to their position that *Scarsella* was wrongly decided. Plaintiffs' argument also renders significant subsections of MCL 600.2912d illusory—another fact that Plaintiffs ignore.

The Court of Appeals correctly applied *Scarsella* and correctly ruled that Plaintiffs' complaint was properly dismissed with prejudice with respect to Plaintiffs' injuries arising from the May 1, 2017 surgery. That is because any re-filed complaint based on those injuries would have been time-barred.

Assuming arguendo the Court believes *Scarsella* was wrongly decided, the Court nevertheless should refrain from overturning it based on stare decisis principles. *Scarsella* has been followed for more than 20 years, and the legal and medical malpractice communities have come to rely on the settled law in this regard. Nothing about applying *Scarsella* has proven to be unworkable, and continuing to adhere to that decision will

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promote the Legislature's clear directive that medical malpractice complaints must be accompanied by an AOM.

Furthermore, overturning *Scarsella* would likely engender confusion and uncertainty in other areas of this Court's jurisprudence, decisions that employed the same reasoning that supported the holding in *Scarsella*. To start down that path by overturning *Scarsella*, notwithstanding its solid mooring to the Legislature's expressed intent, would strike a significant and unnecessary blow to a substantial body of jurisprudence that was painstakingly developed by this Court over many years, through many decisions that carefully dissected and construed the statutes by which the Legislature reformed medical malpractice law. The considerable, thoroughly analyzed, well developed, and well-functioning law in this area should be left alone, rather than thrown into potentially major upheaval—upheaval with consequences that would be difficult to predict but almost certainly widespread.

B. Plaintiffs' complaint and the absence of an AOM

This action arises from care and treatment rendered to Plaintiff Candi Ottgen by Dr. Abdalmaijid Katranji ("Dr. Katranji") for bilateral thumb pain, numbness, and tingling in Ms. Ottgen's fingers, which she was experiencing in 2016 and 2017. (**Apx 25a**, ¶ 4).[1] Ms. Ottgen was referred to Dr. Katranji, a hand surgeon. Dr. Katranji performed surgery on Ms. Ottgen's fingers on two dates, May 1, 2017 and July 23, 2017 (**Apx 28a**, ¶ 29). In their complaint, Plaintiffs alleged that Dr. Katranji committed professional malpractice on May 1,

[1] References to "Apx" are to Plaintiffs' appendix. References to "Appellee Apx" are to Appellees' appendix.

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2017 by removing her trapezium,[2] which they contend has caused a decreased range of motion in Ms. Ottgen's thumb, decreased strength, and difficulties when performing activities of her daily life. (**Apx 25a-28a**, Counts I and II). The only factual assertions of professional negligence relate to the performance of the May 1, 2017 arthroplasty on the patient's right thumb and removal of the trapezium (**Apx 27a**, ¶¶ 19-24).[3]

Plaintiffs' original complaint was filed on April 11, 2019. (Ingham County Case Events, Entry 1, **Apx 5a**). Plaintiffs did not file an AOM with that complaint. (*Id.*). Plaintiffs did send a notice of intent to Dr. Katranji and the other defendants on or about September 27, 2018. (**Apx 99a**). The notice of intent did not have any tolling effect because the period of limitations would not have otherwise expired during the notice of intent waiting period, measured either from May 1, 2017 or July 23, 2017. (**Apx 40a**, fn 4). Accordingly, the two-year statute of limitations with respect to the May 1, 2017 procedure expired on May 1, 2019, and the two-year period for the July 23, 2017 procedure expired on July 23, 2019. MCL 600.5838a(1).

C. Defendants' motion for summary disposition

Given the lack of an AOM, Defendants moved for summary disposition on or about May 9, 2019. (**Apx 31a - 43a**). They argued that dismissal was required because Plaintiffs' complaint without an AOM was a nullity under this Court's decision in *Scarsella,* and that the May 1, 2017 surgery claim was barred by the statute of limitations, thus warranting

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[2] The trapezium is the bone below the base of the thumb. Removal of the trapezium is a known method of relieving nerve pressure.

[3] The only reference to the July 23, 2017 carpel tunnel release surgery is in ¶ 14, which makes no reference to negligence, and in ¶ 29, in which Plaintiffs assert both the May 1, 2017 and the July 23, 2017 surgeries caused the patient damage (**Apx 26a, 28a**, ¶14, ¶ 29).

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dismissal with respect to that surgery "with prejudice." (See generally **Apx 31a – 43a**).

Plaintiffs filed a response on June 3, 2019, in which they admitted that the AOM was not filed with the complaint, explaining the AOM had been obtained earlier, on January 30, 2019, and was simply omitted from Plaintiffs' filing of her April 11, 2019 complaint and jury demand "due to a clerical error." (**Apx 74a**, ¶ 8). In that response, Plaintiffs also asserted they had filed an amended complaint on May 13, 2019, with the AOM, and asserted that the amended complaint related back to the original filing date of April 11, 2019, citing MCR 2.118(D). (*Id*. **Apx 73a – 87a**). Attached to that response was Plaintiffs' unfiled AOM, dated January 30, 2019 (**Apx 51a – 53a**), the original complaint and summons, dated April 11, 2019 (**Apx 24a – 30a**), and the first amended complaint and jury demand, dated May 13, 2019 (**Apx 44a – 50a**). Notably, there is no indication that Plaintiffs obtained an order granting leave to file a first amended complaint. Nor was the first amended complaint filed within 28 days, the extension of time provided for in MCL 600.2912d(2).

D. Plaintiffs' out-of-time motion to file late AOM

Plaintiffs also filed an emergency motion to file a late AOM, on May 14, 2019. (**Apx 54a – 55a**). They explained in a subsequently filed amended brief in support of that motion, dated May 16, 2019, that leave should be granted to file a late AOM because *Scarsella* was erroneously decided and should be overturned, and that "but for a scrivener's error," the AOM would have been filed with the original complaint on April 11, 2019. (**Appellee Apx 007b – 010b**, pp 7-10).

Defendants opposed that motion in their response in opposition to Plaintiffs' emergency motion to file a late affidavit of merit, May 15, 2019. (**Apx 56a – 63a**).

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Defendants explained that *Scarsella* remains good law in Michigan, that the AOM statute provides that an AOM "shall" be filed with the complaint, citing MCL 600.2912d, and that the filing of a medical malpractice complaint without an AOM does not toll the applicable limitation period. (**Apx 59a – 62a**; *Id*. at pp 4-7). Defendants also argued that the statute, MCL 600.2912d(2), allows only for a 28-day extension after the date the complaint is filed, and that the first amended complaint was filed on May 13, 2019, 32 days after the original complaint was filed. (**Apx 63a**; *Id*. at 8).

E. Motion to dismiss Plaintiffs' first amended complaint

On May 28, 2019, Defendants filed a motion to dismiss Plaintiffs' first amended complaint. (**Apx 64a – 72a**). They argued that a party may file an amended pleading within 14 days of being served with a responsive pleading, but that an AOM is not considered to be a pleading. Accordingly, an AOM could not be amended "of right." (**Apx 66a**; *Id*. at ¶ 9). Defendants further argued that, given the failure to file an AOM with the original complaint, there was no "action to amend," and accordingly no relation back. (**Apx 66a**; *Id*. at ¶¶ 10-11).

Plaintiffs responded on June 4, 2019. (**Apx 91a – 105a**). They again argued that *Scarsella* was erroneously decided and should be overturned (**Apx 100a – 105a**; *Id*. at 7-12), and that Plaintiffs' first amended complaint related back to the time of the filing of the original complaint (**Apx 105a**; *Id*. at 12).

Each of these motions was pending when the trial court scheduled oral argument for August 7, 2019. (**Apx 106a – 128a**; Tr. 8/7/2019).

F. The trial court's decision and reasoning

On August 7, 2019, Judge Canady heard oral argument from the attorneys. (**Apx**

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106a – 128a, Tr. 8/07/2019). Review of that transcript reveals no debate on the material facts underlying the legal question of whether there is an exception to *Scarsella* when an AOM has been prepared and is in the possession of the plaintiff's attorney, but is not filed with the complaint. The trial court also acknowledged Defendants' position that there are no exceptions to *Scarsella*. (**Apx 122a**; *Id*. at 17). But the trial court distinguished *Scarsella* on its facts:

> [I]n *Scarsella*, the Court sort of agreed 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.

(**Apx 122a – 123a**; *Id*. at 17-18). The trial court, thus, reasoned that *Scarsella* does not discuss such circumstances here—the AOM *existed* and was in the possession of the attorney—and found *Scarsella* distinguishable on that basis. The trial court then decided this case could proceed because the failure to file the AOM with the original complaint was found to be clerical error. (**Apx 126a**)

Notably, the trial court acknowledged that if no AOM was in existence at the time of the filing, "I probably would have agreed with you. But we don't have that situation here." (**Apx 123a**; *Id*. at 18).[4]

After the trial court stayed further proceedings to allow an appeal to move forward (**Apx 127a**; *Id*. at 22), and dismissed certain entities without prejudice through the consent of the parties (**Apx 127a**; *Id*.), the trial court entered its September 3, 2019 order denying

[4] As the Court of Appeals so recognized, this comment isolates the trial court's error: the *existence* of an AOM, rather than the actual *filing* of that affidavit with the complaint, governs the AOM requirement.

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summary disposition and denying the motion to dismiss Plaintiffs' first amended complaint.

G. The Michigan Court of Appeals opinion

Defendants applied for leave to appeal to the Court of Appeals from the order denying their motion for summary disposition. On February 19, 2020, the Court of Appeals granted leave to appeal. (**Appellee Apx 058b**; Court of Appeals Order).

In its ensuing May 20, 2021 unpublished opinion, the Court of Appeals found dispositive this Court's decision in *Scarsella*, reasoning that the mere filing of a complaint without an AOM that may have existed but was never filed constitutes a "wholly omitted" affidavit under *Scarsella* and rendered the complaint ineffective. (**Apx 134a – 136a,** Opinion at pp 3-5). The Court of Appeals, therefore, reversed the trial court's ruling on this point. *Id*. It then examined whether the nullification of the complaint under *Scarsella* rendered untimely the complaint with respect to the claims arising out of the May 1, 2017 surgery (time-barred) and the July 23, 2017 carpel tunnel release surgery (timely), determining that the two-year medical malpractice statute of limitations expired with respect to the first surgery before Plaintiffs filed the amended complaint with an AOM, but not with respect to the latter surgery. *Id*. at 8-9. The Court of Appeals also noted, and Plaintiff did not contest, that Plaintiff's motion to file a late AOM was filed after the statutory 28-day provision of MCL 600.2912d(2).[5]

The Court of Appeals thus held that dismissal with prejudice with regard to the May 1, 2017 surgery was appropriate, and that Plaintiffs' claims concerning the July 23, 2017

[5] Complaint filed on April 11, 2019, 28-day period expired May 9, 2019, Plaintiffs' motion to file late AOM filed on May 14, 2019.

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surgery could move forward. (**Apx 139a – 140a** *Id*. at 8-9).

H. Plaintiffs' Supreme Court application

On July 1, 2020, Plaintiffs filed their application for leave to appeal to this Court. Although Plaintiffs presented two arguments on appeal at the Court of Appeals level,[6] only one was presented for Supreme Court review: *Scarsella* should be reversed and the filing of a medical malpractice complaint without an AOM should have no tolling effect under MCL 600.5856(a). Plaintiffs admit that this relief requires a change in case law, specifically this Court abandoning the *Scarsella* "wholly omitted" AOM rule while rendering the filing of the complaint as ineffective and a nullity. Notably, the Court of Appeals found that Plaintiffs' only pending argument here was not raised before the trial court, Opinion p 5 (**Apx 136a**).

On December 22, 2021 this Court granted Plaintiffs' application and directed the parties to address whether *Scarsella* was correctly decided and whether Plaintiffs' complaint, which was filed without an affidavit of merit contrary to MCL 600.2912d(1), should have been dismissed without prejudice.

[6] Plaintiffs argued in the Court of Appeals that Defendants had not timely provided medical records under the notice of intent statute, MCL 600.2912b, and accordingly the AOM here could be filed within 91 days after the filing of the complaint, MCL 600.2912d(3). This argument was not presented at the trial court level. The Court of Appeals agreed and found this argument unpreserved. (**Apx 136a**, Opinion, p 5). It nonetheless addressed the issue and found that Defendants did allow claimant access to all medical records. (**Apx 136a – 137a**; *Id*. at 5-6).

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ARGUMENT

THIS COURT SHOULD REFRAIN FROM OVERTURNING *SCARSELLA* BOTH BECAUSE *SCARSELLA* WAS CORRECTLY DECIDED AND BECAUSE STARE DECISIS CONSIDERATIONS COUNSEL AGAINST CHANGING THE LAW UNDER THE CIRCUMSTANCES

I. Summary

This Court's holding in *Scarsella* regarding the tolling of the limitations period for medical malpractice claims was correct and should not be overturned. *Scarsella* correctly recognized that the filing of an AOM with a medical malpractice complaint was made mandatory by the Legislature, and that the legislation reflects the Legislature's intent that filing a complaint without an AOM does not toll the applicable limitations period.

Scarsella's holding is consistent with several decisions of this Court holding that the filing of a complaint prior to the expiration of the notice-of-intent ("NOI") period required in a medical malpractice action also does not toll the limitations period. The Court has so held, repeatedly, despite the fact that, in the NOI context, as in the AOM context, the tolling statute says nothing about whether tolling is impacted by a complaint filed in violation of medical malpractice-specific rules set forth in other statutes.

That *Scarsella*'s holding reflects the Legislature's intent is also supported by actions taken by the Legislature that shed helpful light on its intent. In fact, the Legislature has taken several steps that provide important clues regarding its intent as to whether the filing of a medical malpractice complaint without an AOM tolls the applicable limitations period. The Legislature has made quite clear that its intent was properly effectuated by this Court's decision in *Scarsella*, both by actions taken and by actions not taken in response to decisions of this Court in this area.

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Plaintiffs' argument that *Scarsella* was wrongly decided is based on three fundamental misconceptions: (1) that the filing of a complaint always tolls the applicable statute of limitations pursuant to MCL 600.5856(a); (2) that the Michigan Legislature is powerless to create an exception to the tolling provided by MCL 500.5856(a) except by amending that particular statute; and (3) that there is no indication the Legislature intended that the filing of a medical malpractice complaint without an AOM does not toll the limitation period under MCL 500.5856(a).

The notion that the filing of a complaint always tolls the running of a limitations period is refuted by several decisions from this Court and the Court of Appeals that have held, in several contexts (including the medical malpractice context), that the mere filing of a complaint does not necessarily toll the applicable limitations period. In fact, this Court has held, repeatedly, that it does not do so if the Legislature has mandated other action pertaining to the commencement of a medical malpractice lawsuit. Plaintiffs simply ignore those decisions.

The notion that the only way the Legislature can provide an exception to the general rule on tolling is by amending MCL 600.5856 is supported by no legislative or judicial principle. In fact, several decisions of this Court, which Plaintiffs ignore, have rejected that proposition.

And the suggestion that the Legislature has nowhere indicated its intent that the filing of a complaint without an AOM would not toll the applicable limitations period is flatly incorrect. The Legislature has taken several steps that reveal that its intent was exactly as this Court determined it to be in *Scarsella*. Plaintiffs ignore those steps as well.

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Even if the Court were of the view that *Scarsella* was wrongly decided, it should not be overturned. Stare decisis considerations mitigate heavily in favor of leaving *Scarsella* intact, particularly given the reliance placed on that decision for decades, and the fact that implementing the rule established in *Scarsella* has not been unworkable, contrary to Plaintiffs' argument. Overturning *Scarsella* would also cause a ripple effect within this Court's jurisprudence construing the medical malpractice statutes that likely would result in unintended but detrimental and far-ranging consequences.

II. *Scarsella*'s holding is correct because it effectuates the Legislature's intent.

The issue of whether the holding in *Scarsella* with respect to tolling is correct presents a question of statutory interpretation. "This Court's goal in interpreting a statute is to effectuate the Legislature's intent." *People v Magnant*, ___ Mich ___; ___ NW2d ___, No. 159371, 2021 WL 3235864, at *6 (July 30, 2021), *citing People v Shami*, 501 Mich 243, 250; 912 NW2d 526 (2018). *See also Estate of Shinholster v Annapolis Hosp,* 471 Mich 540, 548-549; 685 NW2d 275 (2004) (Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature); *Murphy v Michigan Bell Tel Co,* 447 Mich 93, 98; 523 NW2d 310 (1994) (same).

The fundamental reason why *Scarsella* was correctly decided is that the Court correctly discerned and gave effect to the intent of the Legislature in amending MCL 600.2912d(1) to require a medical malpractice plaintiff's attorney to file an AOM with the complaint. It was clear at the time *Scarsella* was decided that the Court properly effectuated the Legislature's intent. And that intent has only become clearer over time, given changes the Legislature has made to the tolling statute—and changes the Legislature has declined to make, as discussed below.

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A. The legislative requirement of an AOM with a complaint reflects intent that the omission of an AOM does not toll the limitations period—just as the filing of a complaint in violation of the NOI requirements does not do so, as this Court has repeatedly held.

This Court in *Scarsella* correctly recognized that the filing of an AOM with a medical malpractice complaint was made mandatory by MCL 600.2912d. It states, in pertinent part, that "the plaintiff in an action alleging medical malpractice … *shall file with the complaint an affidavit of merit* . . . ." of MCL 600.2912d(1) (emphasis added). That means, as this Court held in *Scarsella,* 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*, 461 Mich at 549.

Plaintiffs' argument that the Legislature could not have intended that the filing of a medical malpractice complaint without an AOM is insufficient to commence a lawsuit is based on two statutes: MCL 600.1901, which provides that "a civil action is commenced by filing a complaint with the court"; and MCL 600.5856, which generally addresses tolling. Plaintiffs argue that since a civil action is commenced by the filing of a complaint, there is no need in the medical malpractice context to have an AOM contemporaneously filed to allow the action to be commenced. According to Plaintiffs, the filing-of-complaint tolling provision, MCL 600.5856(a), always, without exception, tethers tolling to the filing of a complaint and nothing more. (Plaintiffs' Brief, pp 9-13).[7]

[7] Among other problems detailed below, the open-ended aspect of tolling suggested by Plaintiffs demonstrates its fallacy. If the filing of a medical malpractice complaint without an AOM were tolled simply by the filing of the complaint, then arguably it would be tolled through the entire time until an AOM is eventually filed with the court. Under Plaintiff's tolling proposition, there is no "end point" to the tolling. This flies in the face of common sense and the purpose of an AOM, which is to provide an initial demonstration of merit to the claim simultaneously with the filing of the complaint.

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Plaintiffs thus argue that § 1901 takes precedence over § 2912d(1) even in the medical malpractice context, without regard to (1) the well-established rule that the more specific statute governs, *Donkers v Kovich*, 277 Mich App 366, 371; 745 NW2d 154 (2007); and (2) "the rule[] of statutory construction . . . that a more recently enacted law has precedence over the older statute." *Travelers Ins v U-Haul of Mich, Inc*, 235 Mich App 273, 280; 597 NW2d 235 (1999). In fact, the latter rule "is particularly persuasive when one statute is both the more specific and the most recent." *Id*.

The first of several problems with Plaintiffs' argument is that, applying just these two rules of statutory construction here, § 2912d(1), the more specific and more recently enacted statute takes precedence over the general and earlier enacted § 1901. The AOM statute is tailor-made for medical malpractice actions, and as noted in the very case cited by Plaintiffs, *Progress Michigan v Attorney General,* 506 Mich 74; 954 NW2d 475 (2020), it applies in a specific type of civil action, namely a medical malpractice action.

A second, more glaring, flaw in Plaintiffs' argument that the mere filing of a complaint is always sufficient to toll the applicable limitations period is that it is squarely refuted by several decisions of this Court. The basis for Plaintiffs' argument is that MCL 600.5856 "says nothing about tolling being dependent on the filing of an affidavit of merit." (Plaintiffs' Brief, p 10).[8] But, in *Burton v Reed City Hosp Corp,* 471 Mich 745; 691 NW2d 424

[8] Thus, Plaintiffs argue that the only way the Legislature can possibly express an intent that the filing of a complaint without an AOM does not toll the applicable limitation period is by amending MCL 600.5856. But Plaintiffs cite nothing by way of legislative process or Michigan jurisprudence to support such a bizarre proposition. Of course, there is no such principle in law or in logic. Nothing prevents the Legislature from subjecting the tolling provided by MCL 600.5856 to the filing of an AOM with the complaint through a different statute—such as the statute requiring the filing of an AOM with a medical malpractice plaintiff's complaint. And that is exactly what the Legislature did, as discussed below.

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(2005), this Court held that the filing of a complaint does not toll the applicable statute of limitations when the complaint is filed prior to the expiration of the notice period provided by MCL 600.2912b. The Court so held despite the fact that MCL 600.5856 "says nothing about tolling being dependent on" a complaint being filed after the expiration of the NOI period, either. (Plaintiffs' Brief, p. 10). That omission did not prevent this Court from ruling as it did in *Burton*.

In fact, the Court in *Burton* even compared the directive regarding the filing of an NOI with the directive regarding the filing of an AOM. As the Court put it:

> The directive in § 2912b(1) that a person "shall not" commence a medical malpractice action until the expiration of the notice period is similar to the directive in § 2912d(1) that a plaintiff's attorney "shall file with the complaint an affidavit of merit. . . ." Each statute sets forth a prerequisite condition to the commencement of a medical malpractice lawsuit. The filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit. In each instance, the failure to comply with the statutory requirement renders the complaint insufficient to commence the action.

Burton, 471 Mich at 753-754.

Burton plainly illustrates that the Legislature may subject the tolling provided for in MCL 600.5856 to another requirement provided by the Legislature in another statute—in the very context of legislative requirements unique to medical malpractice claims. Plaintiffs' failure even to address *Burton*, which torpedoes their main argument as to why *Scarsella* was wrongly decided, speaks volumes.

It should also be noted that, while Justice Kelly, joined by Justice M. Cavanagh, dissented in *Burton,* the dissent was not based on an argument that *Scarsella* was wrongly decided or is materially distinguishable. Nor was the dissent based on a suggestion that the

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Legislature, in requiring the filing of a medical malpractice complaint only after expiration of the 182-day notice period, did not intend that requirement to impact the tolling required by MCL 600.5856. The dissent was based on the argument that the defendants waived the statute of limitations defense by requesting a late answer and expressing no objection to the early complaint. *Burton*, 471 Mich at 756 (J. Kelly dissenting).[9]

In *Boodt v Borges Medical Center,* 481 Mich 558; 751 NW2d 44 (2008), the Court held that a complaint filed with an AOM did not toll the limitations period under MCL 600.5856 where the NOI filed in the case was defective. Thus, *Boodt* is another decision of this Court demonstrating that the mere filing of a complaint does not necessarily toll the limitations period under § 5856, despite the fact that that section "says nothing about tolling being dependent on" a complaint and an AOM being filed on the heels of a defective NOI, either. (Plaintiffs' Brief, p. 10).

This Court again held that the filing of a complaint prior to the expiration of the NOI period does not toll the applicable limitations period in 2015, in *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68; 869 NW2d 213, 226 (2015). Citing both *Burton* and *Boodt,* among other cases, the Court held, "Although a civil action is generally commenced

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[9] Justice Viviano has also expressed agreement with *Burton*, in his concurring opinion in *Tyra v Organ Procurement Agency of Michigan,* 498 Mich 68; 869 NW2d 213 (2015). As Justice Viviano put it:

> And, as a matter of substantive law, *Burton's* answer is not unsound: a complaint that violates the requirement in MCL 600.2912(b)(1) that "a person shall not commence an action" without complying with the notice waiting period cannot, as a matter of law, commence the action.

Id. at 101-102 (J. Viviano concurring). The reason Defendants point this out is that Justice Viviano has expressed misgivings about *Scarsella*, which are hard to square with his agreement with *Burton*, as discussed in greater detail below.

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by filing a complaint, a medical malpractice action can only be commenced by filing a timely NOI and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired. *Id.,* at 94.

Plaintiffs' primary attack on *Scarsella,* that the filing of a complaint must be deemed sufficient to toll the applicable limitations period under MCL 600.5856 regardless of what some other statute may require in relation to a complaint, is disproven by all these cases. In some contexts, *including the medical malpractice context*, the filing of a complaint is not the only action that must occur. As this Court held in *Burton,* again in *Boodt,* and again in *Tyra,* the Legislature can, and sometimes does, impose requirements in statutes other than the tolling statute that speak to what much happen before a limitation period is tolled under MCL 600.5856.[10]

Plaintiffs' simplistic declaration that MCL 600.1901 is the only statute that can be considered in determining whether tolling applies under MCL 600.5856 is, therefore, wrong and contrary to well settled Michigan jurisprudence. Plaintiffs' assertion that "[a]ll

[10] The Court of Appeals has also held in several opinions that the filing of a complaint does not necessarily toll the applicable statute of limitations in another context. In *Fazzalare v Desa, Indus, Inc,* 135 Mich App 1; 351 NW2d 886 (1984), the Court of Appeals held that the filing of a "John Doe" complaint did not toll the running of the applicable statutory limitation period. *Id.* at 6. Two other decisions from that court reached similar rulings, *Thomas v Process Equip Corp,* 154 Mich App 78, 84; 397 NW2d 224 (1986), and *Meda v City of Howell*, 110 Mich App 179; 312 NW2d 202 (1981). As the court in *Fazzalare* recognized, "Would-be plaintiffs must diligently investigate potential claims within the timeframes established by the Legislature. Defendants are entitled to notice of claims within the applicable statutory limitations period." *Fazzalare*, 135 Mich App at 6. Similarly, would-be medical malpractice plaintiffs must obtain a signed AOM within the timeframes established by the Legislature, and medical malpractice defendants are entitled to notice of AOM support for claims against them within the limitation period. That is precisely what the Legislature required in MCL 600.2912d(1).

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that is needed to make a case a reality (as opposed to a nullity) is the filing of *a complaint*" (Plaintiffs' Brief, p. 9, emphasis in Plaintiffs' Brief), is simply not true, and is not a basis for concluding that *Scarsella* was wrongly decided.

B. Legislative action and inaction in both MCL 600.2912d and MCL 600.5856 suggest that *Scarsella*'s holding effectuates the Legislature's intent.

The Court's primary task in construing a statute, as noted, is to discern and give effect to the intent of the Legislature. *Shinholster,* 471 Mich at 548-549. Of particular importance in discerning the Legislature's intent here are two established tools, or sets of tools, of statutory interpretation that have clear application in this case.

First, it is well settled that this Court presumes that every portion of a statute has some meaning and must avoid any construction that would render any part of the statute surplusage or nugatory. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). Moreover, in construing a statute the Court must, whenever possible, do so "in such a way that the interpretation does not conflict with, or deny effect to, other portions of the statute." *Piper v Pettibone Corp*, 450 Mich 565, 572; 542 NW2d 269, 272 (1995), *citing Grand Rapids v Crocker*, 219 Mich 178, 182–183; 189 NW 221 (1922). *See also Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157, 160 (2002) (In a case of tension or conflict between sections of a statute, "it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them."). These principles have important application to the construction of MCL 600.2912d that was reached in *Scarsella*, as discussed below in subsection 1.

Second, and also well established, is the principle that the Legislature is presumed to be aware of and to legislate in harmony with existing laws when enacting new laws.

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Walen v Department of Corrections, 443 Mich 240, 248; 505 NW2d 519 (1993). As the Court in *Walen* put it, "It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." The Legislature is presumed to be aware of the consequences of the use or omission of language when it enacts the laws that govern the court's behavior. *Lumley v Univ of Michigan Board of Regents,* 215 Mich App 125, 129-130; 544 NW2d 692 (1996).

Furthermore, the Legislature is presumed to be aware of any existing judicial interpretation of statutes, and its silence suggests agreement with the courts' construction. *Fletcher v Fletcher,* 447 Mich 871, 880; 526 NW2d 889 (1994); *Craig v Larson,* 432 Mich 346, 353; 439 NW2d 899 (1989); *Browning v Michigan Department of Corrections,* 385 Mich 179, 186; 188 NW2d 552 (1971).

Indeed, "[i]t has long been recognized that where this Court has given an interpretation to a statute with no reaction from the legislature in the form of statutory revision, it may be assumed there is legislative acquiescence in the statute's meaning." *Smith v City of Detroit,* 388 Mich 637, 650; 202 NW2d 300 (1972). *See also Wood v Detroit Edison Co,* 409 Mich 279, 293-294; 294 NW2d 571 (1980) (same); *Sheppard v Michigan National Bank,* 348 Mich 577, 631-632; 83 NW2d 614 (1957), citing *Twork v Munising Paper Co,* 275 Mich 174, 178; 266 NW 311 (1936) ("When the Supreme Court has placed an interpretation on a statute over a considerable period of years it may indulge in the judicial assumption that the legislature has been content with that interpretation because of its failure to exercise its independent prerogative to restate the provision.").

Even more important—and more illuminating—than the concept of legislative acquiescence by silence is the principle that where the Legislature *has taken action in the*

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wake of judicial decisions, such action is an even more persuasive indicator of its intent. As this Court recognized, after noting the doctrine of legislative acquiescence by silence,

> even more persuasive is the rule that where the basic provisions of a statute have been construed by the courts and these provisions are subsequently reenacted by the legislature, it may be assumed that the legislature acted with knowledge of the Court's decisions and that the legislature intended the re-enacted statute to carry the Court's interpretation with it.

Smith, 388 Mich at 650-651; *Wood*, 409 Mich at 294.

Application of these principles demonstrates that *Scarsella* is consistent with the Legislature's intent, as discussed below in subsection 2.

1. The inclusion of potential extensions of time to file the AOM in MCL 600.2912d buttresses the Legislature's intent that the filing of a complaint without an AOM does not toll the limitations period.

Provisions within MCL 600.2912d itself shed helpful light on the Legislature's intent with respect to the impact on tolling of the filing of a complaint without an AOM. Subsection 2912d(2) states, "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 addition 28 days in which to file the affidavit required under subsection (1)." As this Court recognized in *Solowy v Oakwood Hosp Corp,* 454 Mich 214, 229; 561 NW2d 843 (1997), one function of this subsection is to *toll the statute of limitations* during the 28-day grace period for filing the required affidavit of merit.

Subsection 2912d(3) provides another, longer extension. It states that "[i]f 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 [AOM] may be filed within 91 days after the filing of the complaint." This provision, similar to subsection 2912d(2), allows for

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an AOM to be timely filed, and, thus for the limitations period to be tolled, for 91 days after the complaint is filed when its terms are met.

By providing for the tolling of the applicable limitations period for 28 days upon the grant of a plaintiff's motion for such an extension for good cause, and for 91 days when subsection (3) applies, the Legislature unmistakably conveyed its intent that there would be no tolling of the limitations period without such extensions. As the Court of Appeals and this Court correctly recognized in *Scarsella,* to hold that the filing of a complaint without an AOM nevertheless tolls the applicable limitations period "completely subverts . . . the legislative remedy of [MCL 600.2912d(2)] allowing a 28-day extension in instances were an affidavit cannot accompany the complaint." *Scarsella,* 461 Mich at 550, quoting Court App Opinion. That logic applies with equal force to the extension provided for in subsection 2912d(3).

In fact, in *Ligons v Crittenton Hosp,* 490 Mich 61, 85; 803 NW2d 271 (2011), the Court observed that merely permitting a plaintiff to *correct deficiencies* in the AOM through amendment "would directly conflict with the legislative remedies provided in MCL 600.2912d(2) and (3), which allow a plaintiff who is unable to submit a conforming AOM with the complaint an additional 28 or 91 days, respectively, to complete and submit the AOM." *Id.,* at 85.

The interpretation of § 2912d that Plaintiffs espouse would render subsections of the statute illusory, contrary to the rule prohibiting such an interpretation. *Borchard-Ruhland*, 460 Mich at 285. At a minimum, as was specifically recognized in both *Scarsella* and *Ligons,* Plaintiffs' interpretation would create a conflict with those legislative remedies in straightforward violation of the established rule prohibiting such an interpretation. *See*

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Piper, 450 Mich at 572; 542 NW2d 269, 272 (1995), *Crocker*, 219 Mich at 182–183; *Nowell*, 466 Mich at 483.

Plaintiffs make no attempt to deal with the statements in *Scarsella* and *Ligons* pointing out that their argument is contrary to the legislative intent reflected in the enactment of subsections (2) and (3) of MCL 600.2912d. Nor do Plaintiffs even cite, much less attempt to address, *Solowy,* in which this Court recognized the tolling provided by § 2912d(2).

If *Scarsella* is overturned and this Court holds that the applicable limitations period is not tolled by the filing of a complaint without an AOM, then the tolling mechanisms provided by the Legislature in subsections (2) and (3) of § 2912d would be rendered entirely illusory. At a minimum, overturning *Scarsella* would undermine the Legislature's intent as expressed in those subparts of § 2912d.

2. Changes the Legislature made—and changes it did not make—to MCL 600.5856 reflect the Legislature's agreement with *Scarsella*.

Quite aside from the legislative intent displayed by provisions included within MCL 600.2912d itself, the Legislature has taken action with respect to MCL 600.5856—the tolling statute that is at the heart of Plaintiffs' argument—that provides important insight into its intent regarding the *Scarsella* holding.

Based on the principles of statutory interpretation discussed above, the Legislature is presumed to be aware of *Scarsella*'s interpretation of MCL 600.2912d as requiring the filing of an AOM with a complaint to toll the limitations period in a medical malpractice action. Yet, the Legislature has made no change either to that statute or to MCL 600.5856 in the wake of *Scarsella* to express a different intent—such as by amending MCL 600.5856 to confirm that the failure to file an AOM with a complaint does not affect tolling, as one

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would expect the Legislature to have done if *Scarsella* so dramatically rewrote MCL 600.5856 as Plaintiffs claim it did (Plaintiffs' Brief, p 11).

The Legislature did, however, amend MCL 600.5856 after *Scarsella* was decided. And it did so shortly after this Court issued another decision with which the Legislature apparently did disagree, in a very similar context. That decision held that a defective NOI does not toll the applicable limitations period under MCL 600.5856. The Legislature reacted to that decision, decided just two years after *Scarsella,* by amending § 5856. The amendment led to a changed rule regarding tolling by a defective NOI, as this Court would subsequently recognize. The Legislature did not, however, make any change that would impact the rule as established in *Scarsella* with regard to a complaint filed without an AOM when it amended § 600.5856. This important history is expansively detailed below, as it provides crucial insight into the Legislature's apparent agreement with *Scarsella*.

The legislative requirements of an NOI (MCL 600.2912b) and an AOM (MCL 600.2912d) were enacted in 1994. In 2000, this Court issued *Scarsella*, holding that the filing of a complaint without an AOM does not toll the statute of limitations. As noted, the Legislature took no action to amend either § 600.2912d or § 600.5856 in response to *Scarsella.*

In 2002, the Court issued *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57; 642 NW2d 663 (2002) ("*Roberts I*"), holding that a *defective* NOI does not toll the statute of limitations. *Id.* at 64.

In 2004, the Legislature made amendments to MCL 600.5856 that, as this Court would subsequently recognize, "significantly clarified the proper role of an NOI provided pursuant to MCL 600.2912b." *Bush v Shabahang,* 484 Mich 156, 161; 772 NW2d 272

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(2009). The 2004 amendments to § 600.5856 essentially overturned, legislatively, the Court's holding in *Roberts I* that a defective NOI does not toll the statute of limitations. Applying the statute as amended, this Court held in *Bush* that if an NOI is timely, the statute of limitations is tolled despite defects in the NOI:

> We conclude that the 2004 amendments of MCL 600.5856 have significantly clarified the proper role of an NOI provided pursuant to MCL 600.2912b. While the former statute, MCL 600.5856(d), has been interpreted to preclude tolling when defects are found in an NOI, the current statute, § 5856(c), makes clear that the question whether tolling applies is determined by the timeliness of the NOI. Thus, if an NOI is timely, the statute of limitations is tolled despite defects contained therein.

Bush, 484 Mich at 161. The Court in *Bush* specifically noted, "Significantly, *Roberts I* interpreted the *former* MCL 600.5856(d), as the amendment was not enacted until after *Roberts I* was decided." *Id.* at 166 (emphasis in original).[11]

In 2005, the Court issued *Burton*, in which it held, as discussed above, that the filing of a complaint prior to the expiration of the NOI period does not toll the statute of limitations. As with *Scarsella,* the Legislature made no amendments to any statutes in response to *Burton.*

And in 2007, the Court issued *Kirkaldy v Rim,* 478 Mich 581; 734 NW2d 201 (2007), holding that the filing of a complaint with a *defective* AOM is not akin to the filing of a complaint without any AOM. Where a defective AOM is filed, the statute of limitations is tolled, unlike the situation of a complaint filed without an AOM, in which the statute of

[11] The Court's decision in *Boodt* also was based on the version of MCL 600.5856 in effect prior to the 2004 amendments. While *Boodt* was not decided until 2008, the complaint at issue in that case was filed prior to the 2004 amendment. *See Bush,* 484 Mich at 166.

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limitations is not tolled, per *Scarsella*. *Id.* at 586. The Legislature took no action in response to *Kirkaldy*.

To recap, the Legislature amended MCL 600.5856 in 2004, in apparent reaction to *Roberts I*, to clarify that a *defective* NOI would toll the applicable limitations period. Neither that nor any other legislative amendment did anything to alter the law as developed in: 1) *Scarsella*, which held that the filing of a complaint without an AOM does not toll the running of the applicable limitations period; 2) *Burton*, which held that the filing of a complaint prior to the expiration of the NOI period does not toll the applicable limitations period; or 3) *Kirkaldy*, which drew a distinction between the filing of a complaint with a defective AOM (which tolls the limitations period) and the filing of a complaint without any AOM (which does *not* toll the limitations period, per *Scarsella*).

A clear picture of the Legislature's intent emerges from this action and concomitant inaction during the development of this Court's jurisprudence applying tolling to the NOI and AOM requirements. The Legislature apparently agreed that there is an important distinction between *defective* filings, be they NOIs or AOMs, on one hand, and the *complete failure* to file (an AOM) or to comply with the NOI period. These distinctions are sensible and are in keeping with the statutory language used in MCL 600.2912b and 2912d. Except for *Roberts I,* which the Legislature addressed through a statutory amendment, these distinctions are also consistent with the jurisprudence developed in this Court from 2000, when *Scarsella* was decided, through 2007, when *Kirkaldy* was decided. The Court's jurisprudence, thus, was in perfect harmony with the Legislature's intent except for the decision in *Roberts I,* which the Legislature took action to correct.

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This activity by the Legislature provide an unmistakable indication of its acquiescence in *Scarsella*. Even if the Court, or some of its Justices, remain of the view that mere silence by the Legislature is not necessarily the best indicator of legislative intent,[12] here, the Legislature was *not* silent during the years that this Court was developing the law interpreting the Legislature's intent with regard to the effect on tolling of violations pertaining to the NOI and AOM requirements. The Legislature took action to correct one, and only one, ruling from this Court in this context: the ruling in *Roberts I* that the filing of a defective NOI would not toll the applicable limitations period. Having amended the tolling statute to address that ruling and not the Court's ruling in *Scarsella*, the Legislature *affirmatively* indicated legislative acquiescence in *Scarsella's* interpretation of the statutory scheme—or at least came as close to conveying affirmative acquiescence in a decision of this Court as could be expected.

The Court's decision in *Wood* applied the rules regarding legislative acquiescence and legislative reaction in a way that is instructive here. In *Wood,* the Court was faced with the situation where the Legislature amended the wrongful death act after one decision had been issued but took no action after a different decision was issued. In that context the Court said this: "It can be assumed that when the Legislature amended the wrongful death act in 1965, it was aware of the *Wycko* decision and it approved of that decision. . . . Further, in this same vein after this Court's *Bunda* decision, the Legislature took no action whatsoever. Approval may be assumed from this Legislative acquiescence." *Wood,* 409 Mich at 293, 294. *See also Jarvis v Providence Hosp,* 178 Mich App 586, 597; 444 NW2d 236

[12] *See Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), in which the Court expressed skepticism of the value of mere silence by the Legislature.

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(1989) ("We note that the wrongful death act was amended after *O'Neill* was decided by the Legislature did not alter the language to avoid the impact of *O'Neill*, leaving us to conclude that the Legislature accepted the *O'Neill* Court's interpretation of the wrongful death act.").

The Legislature's conduct with regard to the Court's construction of §§ 2912b, 2912d, and 5856 is functionally identical to conduct that this Court in *Wood* viewed as confirming the Legislature's intent. Indeed, Defendants respectfully submit that there is no *better* indication of legislative intent than the Legislature's reaction to decisions of this Court.

Plaintiffs make no attempt to deal with any of this activity by the Legislature. Whatever the reason for that omission, the activity speaks for itself, and it forcefully demonstrates that the Legislature's intent was and is exactly as the Court determined it to be in *Scarsella*.

C. Plaintiffs' remaining arguments are without merit, and the criticisms of *Scarsella* in Opinions by Chief Justice McCormack and Justice Viviano do not show *Scarcella* to be incorrect.

Plaintiffs' main arguments have been shown to lack merit, as discussed above. In fact, none of the arguments Plaintiffs assert has merit or warrants overturning *Scarsella,* including Plaintiffs' adoption of arguments asserted by Chief Justice McCormack and Justice Viviano, as discussed below.

1. Plaintiffs' argument regarding clues from legislative inaction is baseless.

Plaintiffs make no attempt to deal with the actions of the Legislature, both in enacting the mechanisms for extensions in MCL 600.2912d(2) and (3) and in amending MCL 600.5856 in 2004 to respond only to *Roberts I*, and not to *Scarsella, Burton,* or

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Kirkaldy. As noted, these actions, especially when considered collectively, display the Legislature's agreement with and acquiescence in *Scarsella.*

Nor do Plaintiffs make any argument that action taken by the Legislature could be construed as expressing disagreement with *Scarcella.* The closest they come to doing so is to identify a single instance of *inaction* in 1993. They point out that the Legislature did not amend § 5856(a) to explicitly address tolling of a complaint without an AOM when it adopted the AOM requirement. Plaintiffs argue, based on that fact alone, "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.*" (Plaintiffs' Brief, p 12).

The mere fact that the Legislature could have written a statute to "dictate" a holding that a court later renders in construing the statute demonstrates exactly nothing of any substance. This argument is nothing more than a repackaging of Plaintiffs' baseless argument that the only way the Legislature can impact how tolling works in a particular context is by explicitly amending the tolling statute, MCL 600.5856. As discussed at length above, and as shown by this Court's decisions in *Burton, Boodt*, and *Tyra*, that argument is without merit.

If anything, Plaintiffs' strained argument in this regard demonstrates their inability to point to *anything* done, or not done, by the Legislature that could be construed as disagreement with *Scarsella.* The absence of any such legislative activity stands in stark contrast with the legislative actions discussed by Defendants above, which unmistakably reveal the Legislature's agreement with *Scarsella*.

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2. The Opinions of Chief Justice McCormack and Justice Viviano addressing the correctness of *Scarsella* do not persuade.

Plaintiffs also put much stock, understandably, in concurring opinions authored by Chief Justice McCormack and Justice Viviano in several cases expressing misgivings about *Scarsella.* Defendants respectfully submit that the criticisms of *Scarsella* in those opinions miss the mark.

As Plaintiffs point out, Justice Viviano noted in his concurring opinion in *Castro v Goulet,* 501 Mich 884, 886; 901 NW2d 614 (2017), that "[n]o 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." Defendants respectfully submit that that is the wrong question. The question should not be whether the Legislature could have mandated the AOM filing in § 2912d(1) while permitting § 5856(1) to toll the applicable limitations period. Nor is the proper question whether that would be a better approach if this Court were establishing the law.

The question should be: What did the Legislature intend in mandating the filing of an AOM with a medical malpractice complaint in enacting MCL 600.2912d? *That* question is best answered by 1) the words the Legislature used, which unquestionably are susceptible to the interpretation given them by *Scarsella*; and 2) actions taken by the Legislature with respect to § 2912d and § 5856 that shed light on the Legislature's intent. The Legislature's actions in that regard strongly suggest the Legislature's agreement with the Court's holding in *Scarsella*, as discussed above.

Justice Viviano's main point seems to be that "Section 2912d says absolutely nothing about the limitations period and does not explicitly condition tolling on a timely filed AOM. All the statute requires is that the plaintiff file the AOM with the complaint, or later if an

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exception applies." *Castro,* 501 Mich at 886. Justice Viviano also notes that "[b]ecause § 5856(a) refers to the complaint but not the AOM, a persuasive argument can be made that the Legislature did not intend for the AOM to play any role in tolling." *Id.*

But these same points could be made about the requirement that a complaint not be filed before expiration of the 182-day notice period required by § 2912b. Section 2912b also "says absolutely nothing about the limitations period and does not explicitly condition tolling on" a complaint being filed only after the expiration of the NOI period. And, while MCL 600.5856 does mention § 2912b (in subsection (c)), it says nothing about whether a complaint filed prior to the expiration of the notice period tolls the applicable limitation period. And yet, despite this silence, this Court held in *Burton* that the filing of a complaint prior to the expiration of the 182-day NOI period does not toll the applicable limitations period. And, as noted, Justice Viviano expressed agreement with the holding in *Burton* (*see* fn 9).

Justice Viviano's concurring opinion in *Castro* also finds it significant that the Legislature explicitly addressed medical malpractice cases by providing for tolling at the time notice is given in compliance with § 2912b. *Castro,* 501 Mich at 887. But the provision extending tolling from the date an NOI is filed, provided for in MCL 600.5856(c), is something that could not possibly have been implied had the Legislature not explicitly stated it. The impact on tolling by the failure to file an AOM with a complaint, on the other hand, *like the impact on tolling by the filing of a complaint prior to expiration of the 182-day notice period provided for in § 2912b*, quite clearly *can* be implied by virtue of the fact the Legislature mandated those two requirements in §§ 2912b and 2912d.

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Justice Viviano's concurring opinion also suggests that § 2912d(2) is silent regarding tolling, thus implying that the AOM has no effect on commencing a lawsuit for purposes of the statute of limitations. *Castro*, 501 Mich at 889. But, as this Court recognized in *Solowy,* subsection 2912d(2) does provide for tolling—of 28 days when a motion is filed showing good cause for an extension of time to file the AOM. The failure to do so explicitly does not mean tolling is not implied, as was correctly recognized in *Solowy*, which Justice Viviano's concurring opinion does not address.

Chief Justice McCormack's concurring opinion in *Progress Michigan* also merits addressing, obviously, given its criticism of *Scarsella*. The Court in *Progress Michigan* held that a timely filed original complaint was not rendered a nullity by virtue of the failure to comply with a verification requirement. In concurring, Chief Justice McCormack noted that *Scarsella* is distinguishable, but nevertheless stated that she would overturn *Scarsella*. Defendants respectfully submit that the analysis in that concurring opinion is flawed.

First, as with the concurring opinion of Justice Viviano in *Castro*, the concurring opinion in *Progress Michigan* does not address the important history of the Legislature responding to *Roberts I* by amending MCL 600.5856, while *not* making any change that could be viewed as disagreement with *Scarsella*.

The concurring opinion in *Progress Michigan* also, like Justice Viviano's concurring opinion in *Castro,* makes no attempt to distinguish *Burton, Boodt,* or *Tyra*. Chief Justice McCormack did mention *Burton*. *See Progress Michigan*, 506 Mich at 105. But the concurring opinion in *Progress Michigan* makes no direct attack on *Burton's* reasoning. Defendants respectfully submit that *Burton* was correctly decided and should not be overturned (Plaintiffs have never suggested otherwise), and that *Scarsella* also should not

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be overturned because, among other things, the logic of *Burton* applies with equal force to *Scarsella*: Where the Legislature has mandated a requirement unique to the commencement of a medical malpractice claim and that mandate is not met, the claim should be deemed not to have been commenced such that the applicable limitations period is tolled.

Chief Justice McCormack's concurring opinion also picked up on Justice Viviano's point in *Castro* that, because the Legislature, in MCL 600.5856(c) provided for tolling from the time an NOI is given, that implies that a complaint filed without an AOM does not impact tolling. *Progress Michigan,* 506 Mich at 103. Defendants respectfully disagree. An NOI is not a complaint and is not to be filed along with a complaint. The tolling that accompanies the filing of an NOI is something that the Legislature had to state explicitly, because there would be no other statutory provision that would allow an implication of tolling based on the mere filing of an NOI. The fact the Legislature did that says absolutely nothing about whether the mandatory filing of an AOM with a complaint is required in order to toll the applicable limitations period. It also says absolutely nothing about whether the filing of a complaint prior to the expiration of an NOI tolls the applicable limitations period.

What does speak to the Legislature's intent when it comes to how tolling works in the context of either the filing of a complaint without an AOM or the filing of a complaint prior to the expiration of the NOI period are subsections (2) and (3) of § 2912d, which allow for tolling, and the Legislature's amendment to MCL 600.5856 to correct only one decision from this Court within the quartet of *Scarsella*, *Roberts I, Burton,* and *Kirkaldy*. The fact the Legislature conveyed disagreement with *Roberts I*, only, and took no action to alter

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MCL 600.5856 in response to *Scarsella, Burton,* or *Kirkaldy,* implies legislative agreement with those decisions. Respectfully, that action and inaction by the Legislature provides a much better indicator of the Legislature's intent than the fact that the Legislature explicitly provided for tolling by the filing of an NOI.

3. Plaintiffs' ancillary arguments are without merit and do not demonstrate that *Scarsella* is incorrect.

Plaintiffs' brief includes several other incorrect points and arguments that are found in neither of the concurring opinions in *Castro* or *Progress Michigan*, but also merit a response. Plaintiffs claim in their lengthy footnote 2 that there is "much to lament about this Court's decision in *Scarsella* . . . ." (Plaintiffs' Brief, p. 6, n 2). The elaborate discussion that follows identifies exactly two things: The fact that *Scarsella* adopted the Court of Appeals opinion, rather than granting leave and receiving further briefing and oral argument; and the fact that the Court in *Scarsella* addressed whether tolling would apply in the event the plaintiff in *Scarsella* were to file a complaint in the future.

The suggestion that the Court would have reached a different result had it not adopted the Court of Appeals opinion is not supported by any analysis. Indeed, this Court appears to have granted leave, received briefing, and conducted oral argument in *Burton*, and it reached a similar result in a similar context, as discussed above. As with so many other impediments to their argument, Plaintiffs make no attempt to deal with *Burton*.

Plaintiffs' argument that the Court erred by addressing the tolling impact on a potential future complaint in *Scarsella* is nonsense. Nothing prohibits a court from addressing whether tolling extends the time to file an amended complaint when, without tolling, the amended complaint would be untimely. The suggestion that this Court must await the filing of the untimely complaint in order to address tolling is absurd.

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In their next footnote, Plaintiffs argue that, had the Court of Appeals opinion in *Scarsella* been issued after this Court's opinion in *Dorris v Detroit Osteopathic Hosp Corp,* 460 Mich 26; 594 NW2d 455 (1999), it is "very difficult to believe" that the Court of Appeals would have rendered the decision that it rendered. (Plaintiffs' Brief, p 8, n 3). That is because, Plaintiffs argue, this Court in *Dorris* held that the appropriate judicial response to a medical malpractice complaint filed without an AOM is dismissal without prejudice—and the Court of Appeals in *Scarsella* ordered dismissal with prejudice. But Plaintiffs ignore the fact that the reason the complaint was dismissed with prejudice in *Scarsella* is because any amended complaint would be time-barred because the untolled limitations period had already expired. This Court's holding in *Dorris* would have no impact on the propriety of affirming the dismissal of a complaint with prejudice when it is already clear that it would be too late to file an amended complaint.

Plaintiffs also argue that the observation in *Scarsella* that a ruling allowing a complaint without an AOM to toll the limitations period would undo the Legislature's clear statement in § 2912d that an AOM shall be filed with the complaint "makes no sense." (Plaintiffs' Brief, p. 14). The only reason Plaintiffs think that observation makes no sense is because they think the Legislature is not permitted to subject the tolling of MCL 600.5856 to a mandate set forth in another statute. But, as has been demonstrated, the Legislature is not powerless to do so. It did so, as this Court correctly recognized, not only with the mandate that an AOM be filed with a complaint, but with the mandate that a complaint not be filed until expiration of the 182-day notice period. *Burton*, *Boodt, Tyra*. Plaintiff ignore all three cases.

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Notably, in criticizing this observation in *Scarsella*, Plaintiffs also ignore the court's separate observation that the interpretation Plaintiffs advance plainly subverts the requirement of MCL 600.2912d(2), which provides for a 28-day tolling period in cases where the plaintiff moves for good cause for an extension of time to file the AOM. The Court made the same observation in *Ligons,* 490 Mich at 85, adding that the argument Plaintiffs advance would also subvert subsection 2912d(3). Plaintiffs make no attempt to deal with those separate observations in both *Scarsella* and *Ligons* or with the flaws in Plaintiffs' argument that they expose.

D. The Court of Appeals correctly held that Plaintiffs' complaint must be dismissed with prejudice with respect to Plaintiffs' injuries arising from the May 1, 2017 surgery.

The Court of Appeals correctly applied *Scarsella,* and correctly ruled that Plaintiffs' complaint must be dismissed with prejudice with respect to the injuries arising from the May 1, 2017 surgery. That is because the claim is time-barred as to those injuries. Based on a straightforward application of *Scarsella,* the Court of Appeals correctly recognized that, as to injuries arising from the May 1, 2017 surgery, it was too late to file a complaint with an AOM based on the expiration of the applicable limitations period.

III. Stare decisis considerations counsel against overturning *Scarsella*.

In the event this Court is of the view that *Scarsella* was wrongly decided, the Court nevertheless should refrain from overturning it based on stare decisis principles. *Scarsella* constitutes well established, straightforward law that has been on the books for over 20 years, and it has provided clarity to the bench and bar on the issue presented.

The Court must consider stare decisis as a factor before overruling *Scarsella*. *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). "[T]he mere fact that

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an earlier case was wrongly decided does not mean overruling it is invariably appropriate." 462 Mich at 565 (footnote omitted). The Court must examine the effects of overruling a decision, including most importantly "the effect on reliance interests and whether overruling would work an undue hardship because of that reliance." *Id*. As to the reliance interests, the Court must ask whether a previous decision "has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just the adjustments but practical real-world dislocations." *Id*. at 466 (footnote omitted).

The medical and legal communities have relied upon the *Scarsella* rule for the last 22 years. It carries "practical workability" because of its certainty: an AOM must be filed with the complaint or otherwise that complaint is ineffective and considered a nullity. There is no guesswork and, although it places an affirmative burden on a plaintiff with respect to dismissal, it also carries a significant consequence for a defendant who fails to file an affidavit of meritorious defense: subject to default. MCL 600.2912e(1). In each instance, the attorney for the relevant litigant understands and abides by the law.

As with Plaintiffs' failure to reconcile open-ended tolling with the 28-day extension period granted by the Legislature to file a late AOM, so too this allowance/grace period provided by the Legislature bodes against overruling *Scarsella* which, to be fair, cannot reasonably be classified as "wrongly decided," but rather in Plaintiffs' view, "better decided" with the injection of AOM tolling. Stare decisis considerations bode against the overruling of *Scarsella* as requested by Plaintiffs.

Justice Markman's concurring opinion in *Progress Michigan* correctly pointed out that there is nothing unworkable, or even difficult, in applying *Scarsella*. To the contrary, as Justice Markman pointed out, "*Scarsella* and its progeny have beneficially contributed to

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the overall clarity of Michigan's comprehensive medical malpractice reforms of the 1990s, giving practical meaning to those reforms in a disciplined and responsible manner." *Progress Michigan,* 506 Mich at 112.

Justice Markman also pointed out the distinction that has been drawn in this Court's cases (with apparent Legislative approval) between *defective* filings and *absent* filings. Plaintiffs suggest in a footnote that this distinction is too blurry to apply in practice. (Plaintiffs' Brief, p 22, n 9). It is not. There is absolutely nothing difficult or unworkable in adhering to that distinction in the context of AOMs. Either an AOM is filed with a complaint or it is not. If so, the applicable limitations period is tolled, and any grounds for dismissing without prejudice based on defects in the AOM can be dealt with. If not, the unaccompanied complaint does not toll the limitations period. This straightforward approach counsels strongly in favor of keeping *Scarsella* in place, in accordance with stare decisis principles.

Another factor that mitigates against overturning *Scarsella* is the jurisprudence established in *Burton, Boodt,* and *Tyra,* among potentially other decisions. Those holdings are based on the same logic that supports the holding in *Scarsella*: A legislative mandate regarding requirements for commencing a medical malpractice claim, if disregarded entirely, does not allow the mere filing of a complaint to toll the applicable limitations period. To overturn *Scarsella* would cast doubt on the viability of *Burton, Boodt, Tyra,* and any other decision holding that a legislative mandate can impact tolling, thus exacerbating confusion in the caselaw surrounding important requirements that must be met when pursuing a medical malpractice complaint.

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This Court should decline Plaintiffs' invitation to wreak such havoc in settled, reasoned Michigan jurisprudence firmly establishing the rules for proceeding with a medical malpractice claim. Those rules were established through many thoughtful judicial decisions that have established a reliable, workable framework for medical malpractice litigation in keeping with the legislation. Those rules have worked fine for over 20 years, and they should not be jettisoned in favor of confusion and uncertainty in this Court's jurisprudence and the rules that govern medical malpractice cases.

RELIEF

For the reasons set forth herein, Defendants request that this Court affirm the judgment of the Court of Appeals, that the Court reaffirm *Scarsella* as having been correctly decided, and that the Court not overturn *Scarsella*. Defendants further request any and all other relief to which they are entitled.

Respectfully submitted,

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