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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)

BRIEF OF *AMICUS CURIAE* MICHIGAN DEFENSE TRIAL COUNSEL, INC.

RHOADES McKEE PC
James R. Poll (P70191)
Attorneys for Amicus Curiae Michigan Defense Trial Counsel, Inc.
55 Campau Avenue NW, Suite 300
Grand Rapids, MI 49503
(616) 235-3500
Email: jrpoll@rhoadesmckee.com

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QUESTION PRESENTED

Should this Court decline Plaintiffs—Appellants' invitation to overrule its opinion in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000) where the Court's holding in *Scarsella* is faithful to the Legislature's intent discerned through application of principles of statutory interpretation and where the doctrine of stare decisis favors leaving *Scarsella* undisturbed?

The Court of Appeals would say "yes"
The Circuit Court would say "no"
Plaintiffs-Appellants say "no"
Defendants—Appellees say "yes"
Amicus Curiae Michigan Defendant Trial Counsel says "yes"

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STATEMENT REGARDING JURISDICTION

Amicus curiae Michigan Defense Trial Counsel, Inc. (MDTC) agrees with the parties' statements of the basis for jurisdiction.

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STATEMENT OF INTEREST OF AMICUS CURIAE

MDTC is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. MDTC was established in 1979 to enhance and promote the civil-defense bar. It accomplishes that goal by facilitating dialogue among and advancing the knowledge and skills of civil defense lawyers. MDTC appears before this Court as a representative for Michigan's civil defense lawyers and their clients, a significant portion of which could be affected by the issues involved in this case.[1] The Court's order granting leave invited MDTC to file an amicus curiae brief.

[1] This brief was not authored by counsel for any party in this case having been drafted entirely by the undersigned counsel. MCR 7.313(H)(4). No party or individual other than the amicus curiae made monetary contributions to the preparation of this brief. *Id.*

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STATEMENT OF FACTS AND PROCEEDINGS

Amicus curiae MDTC adopts and incorporates the summary of the material facts and proceedings from the Defendants—Appellees' Brief on Appeal. Appellees' Brief on Appeal, pp. 2-9.

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INTRODUCTION

Even if this Court concludes that it could reasonably have decided *Scarsella* differently, it will need to confront whether taking action to overrule *Scarsella* is wise or justified under the doctrine of stare decisis. Despite this, Plaintiffs' brief on appeal ignores the impact and role of stare decisis. The doctrine of stare decisis is "a foundation stone of the rule of law." *Michigan v Bay Mills Indian Community*, 572 US 782, 798 (2014). As this Court has recognized, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *McCormick v Carrier*, 487 Mich 180, 209; 795 NW2d 517 (2010) (internal quotation and citation omitted). The rule of stare decisis is particularly significant in this case given that *Scarsella* involved interpretation of a statute. The United States Supreme Court had recognized that "stare decisis carries *enhanced force* when a decision . . . interprets a statute." *Kimble v Marvel Entertainment, LLC,* 576 US 446, 455 (2015) (emphasis added). Further, "[r]especting stare decisis means sticking to some wrong decisions." *Kimble*, 576 US at 455.

In short, it is not sufficient for Plaintiffs to contend that *Scarsella* was wrongly decided. Even if this Court determines that it could reasonably have decided *Scarsella* differently, it will still need to justify departing from the doctrine of stare decisis. "Indeed, stare decisis has consequence only to the extent it sustains incorrect decisions . . ." *Kimble*, 576 US at 455. As Justice Brandeis once wrote, it is generally "more important that the applicable rule of law be settled than that it be settled right." *Burnet v Coronado Oil & Gas Co*, 285 US 393, 406 (1932) (dissenting opinion).

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The Michigan Legislature enacted comprehensive tort reform legislation in 1986 and 1994 that created a unique and comprehensive statutory scheme governing commencement and maintenance of medical malpractice actions. This comprehensive and unique statutory scheme makes such claims distinguishable from civil actions at large. Since its publication in 2000, *Scarsella* has become settled, reliable and predictable law within this unique procedural system. This Court has followed and employed similar reasoning to that underlying *Scarsella* in subsequent opinions addressing the unique procedural framework governing medical malpractice claims. See *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005); *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68; 869 NW2d 213 (2015).

There is no evidence that the *Scarsella* rule has created confusion or become unworkable within the unique statutory scheme governing medical malpractice actions in Michigan. It is a clear and straight forward standard. Plaintiffs do not allege that they failed to file their affidavit of merit "with their complaint" as required by MCL 600.2912d due to confusion about the *Scarsella* holding.

While stare decisis permits a prior opinion to remain undisturbed even if it could reasonably have been decided differently, there is ample basis to conclude that this Court's interpretation of MCL 600.2912d in *Scarsella* was proper and consistent with the Legislature's intent. The goal of statutory interpretation is to discern the Legislature's intent as determined by the language of the statute. *Bukowski v City of Detroit*, 478 Mich 268, 274; 732 NW2d 75 (2007). Application of relevant principles of statutory interpretation support the reasonableness of the *Scarsella* holding and interpretation.

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Since its publication over two decades ago, the Legislature has not acted to amend any statute, including MCL 600.5856, in reaction to *Scarsella* to clarify that filing a complaint without the mandatory affidavit of merit tolls the statute of limitations. In fact, the Legislature took action to amend MCL 600.5856 in 2004 to clarify that a timely but defective NOI tolls the statute of limitations. *Bush v Shabahang*, 484 Mich 156, 161; 772 NW2d 272 (2009). The Legislature took no similar action to address the impact of a complete failure to file an affidavit of merit on the statute of limitations.

Application of relevant principles of statutory interpretation supporting the reasonableness of the *Scarsella* interpretation of MCL 600.2912d include:

- Where two statutory provisions conflict, the more specific statutory provision controls over a general provision. *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006). MCL 600.2912d is more specific with respect to the requirements for commencement of a medical malpractice action within the unique statutory scheme governing malpractice actions than the general statutes regarding commencement of civil actions (MCL 600.1901) and tolling of the statute of limitations (MCL 600.5856).

- Where two statutory provisions conflict, the more recently enacted provision controls. *Huron Twp v City Disposal Sys, Inc*, 448 Mich 362, 366; 531 NW2d 153 (1995). MCL 600.2912d was enacted in 1986 and amended in 1994. MCL 600.1901 and MCL 600.5856 were enacted in 1961. As the more recent (and specific) statute, MCL 600.2912d should control over MCL 600.1901 and MCL 600.5856.

- A court must assume that every portion of a statute has meaning and avoid interpreting a statute in a manner that renders statutory language superfluous or nugatory. *Duffy v Michigan Dept of Natural Resources*, 490 Mich 198, 215; 805 NW2d 399 (2011). Plaintiffs' proposed interpretation of MCL 600.2912d renders entire provisions of the statute, including subsections (2) and (3) superfluous. Why would a plaintiff undertake the burden of making the good cause showing required for a 28 day extension under subsection (2) if he or she can simply allow dismissal of the complaint without prejudice and refile it free of penalty with the required affidavit?

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- The express mention of something in a statute implies the exclusion of other things (*expressio unius est exclusio alterius*). *Pittsfield Charter Twp v Washtenaw* Co, 468 Mich 702, 712; 664 NW2d 193 (2003). The Legislature provided two explicit exceptions to the plain requirement that the affidavit of merit be filed "with the complaint." MCL 600.2912d(2) & (3). The fact that the Legislature provided two specific exceptions permitting a later filing of an affidavit of merit implies the exclusion of any other exception and an intent to exclude tolling where neither exception applies. As this Court recognized in *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 229; 561 NW2d 843 (1997), subsection 2 provides for tolling during the extended 28 day period upon good cause shown. See also *Castro v Goulet*, 312 Mich App 1, 5; 877 NW2d 161 (2015). This necessarily implies no tolling if neither subsection 2 nor subsection 3 apply.

- If two or more statutes relate to the same subject or share a common purpose they should, if possible, be read together to create a harmonious body of law (*in para materia*). *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015). MCL 600.2912d was amended in the same public act that enacted the notice of intent requirement of MCL 600.2912b. As this Court recognized in *Burton*, the directive in MCL 600.2912b that a person "shall not" commence a medical malpractice action without providing notice, is complimentary to the mandatory language of MCL 600.2912d mandating that the plaintiff "shall file with the complaint an affidavit of merit." *Burton*, 471 Mich at 753-754. Both statutes create a prerequisite condition that must be satisfied to commence a medical malpractice action. Therefore, MCL 600.2912d should be read *in pari materia* with MCL 600.2912b.

In short, this Court's interpretation of MCL 600.2912d in *Scarsella* was reasonable and faithful to the legislative intent as discerned through application of the rules of statutory interpretation. However, even if there is a viable argument that *Scarsella* was wrongly decided, Plaintiffs have provided the Court no basis to justify departing from the doctrine of stare decisis. The *Scarsella* holding is well established within the unique procedural framework governing medical malpractice actions which are distinct from civil actions at large. The holding is not confusing or difficult to apply. Plaintiffs do not argue otherwise. As a result, even if the Court were to conclude that *Scarsella* could

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reasonably have been decided differently, there is no substantial justification for departing from the rule of stare decisis.

DISCUSSION

I. Enactment and legislative intent underlying MCL 600.2912d.

The legislature enacted MCL 600.2912d in 1986 as part of the first package of tort reform legislation enacted in Michigan. 1986 PA 178. The 1986 tort reform act placed *enhanced responsibilities* on plaintiffs seeking to pursue medical malpractice actions. *Solowy*, 454 Mich at 228. As originally enacted, MCL 600.2912d provided:

> (1) In an action alleging medical malpractice, *the complaint shall be accompanied either by security for costs or by an affidavit*, as required by this section.
>
> (2) Subject to subsection (4), the plaintiff in an action alleging medical malpractice shall be in compliance with subsection (1) if the plaintiff posts a bond with surety or any other equivalent security approved by the court, including cash in an escrow account, for costs in an amount of $2,000.00 *within 91 days after the filing of the complaint*.
>
> (3) The plaintiff in an action alleging medical malpractice shall be in compliance with subsection (1) if the plaintiff's attorney or, if the plaintiff is not represented by an attorney, the plaintiff files an affidavit attesting that the attorney signing the complaint, or the plaintiff if not represented by an attorney, has obtained a written opinion from a licensed physician, dentist, or other appropriate licensed health care provider that the claim alleged is meritorious *within 91 days after the filing of the complaint.*
>
> (4) If upon expiration of the ninety-first day after the complaint is filed, or the expiration of the extension period described in subsection (5), whichever is later, the plaintiff has failed to post security as described in subsection (2) or has failed to file an affidavit as described in subsection (3), then the court, upon motion of any party or upon the court's own motion, shall increase the amount of security required by subsection (2). If the plaintiff fails to post the increased security, the court may, upon motion and for good cause shown, dismiss the complaint without prejudice.

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> (5) The court, upon motion of any party and for good cause shown, may extend the time for the plaintiff to comply with subsection (2) or (3) for a period not to exceed 91 days.
>
> (6) Discovery concerning the affidavit, including the written opinion and the identity of the health care provider who supplied the opinion, shall be allowed only upon application under section 2591 by a prevailing party for costs or attorney fees after judgment is entered.

1986 PA 178 (emphasis added). As outlined above, the original version of MCL 600.2912d required a plaintiff to post security of costs or an affidavit signed by the plaintiff's attorney that a written opinion had been secured from a licensed health care provider that the claims alleged was meritorious. The original statute required the security for costs or affidavit to be filed within 91 days *after* filing the complaint.

In 1994, the legislature amended MCL 600.2912d as part of a second package of tort reform legislation. The 1994 amendment made significant changes to MCL 600.2912d including removal of the "security for costs" provision and unequivocally providing that an affidavit of merit signed by an expert witness "shall" be filed "with the complaint":

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

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> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.
>
> (2) *Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).*
>
> (3) *If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.*

MCL 600.2912d (current version) (emphasis added). As outlined above, in the 1994 amendment, the Legislature explicitly required that an affidavit of merit signed by an expert witness meeting the requirements of MCL 600.2169 "shall" be filed "with the complaint." The Legislature also provided two explicit exceptions to the mandatory requirement that the affidavit be filed "with the complaint."

The purpose of MCL 600.2912d is to deter the *filing* of frivolous medical malpractice claims. *Castro v Goulet*, 312 Mich App 1, 8; 877 NW2d 161 (2015); *Young v Sellers*, 254 Mich App 446, 452; 657 NW2d 555 (2002). Specifically:

> In reliance on the directives from our Supreme Court regarding issues of statutory construction, this Court has recognized that the Legislature's purpose in enacting § 2912d was to deter frivolous lawsuits and that 'requiring an affidavit of merit is rationally related to achieving the result of reduced frivolous medical-malpractice claims' because a medical malpractice plaintiff 'will eventually be required to provide evidence that a facility or professional deviated from professional norms.' In essence, the *statute provides a gate-keeping role* of ensuring against frivolous medical malpractice claims by requiring plaintiffs to file an affidavit of merit *at the time an action is commenced*.

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King v Reed, 278 Mich App 504, 515-516; 751 NW2d 525 (2008) (quoting *Bartlett v North Ottawa Community Hosp*, 244 Mich App 685, 695; NW2d 470 (2001) (emphasis added).

As part of the 1994 tort reform legislation, the Legislature also enacted MCL 600.2912b mandating that a person intending to commence an action alleging medical malpractice serve written notice of intent to file a claim and wait 182 days after providing written notice. 1993 PA 78. MCL 600.2912b(1) provides that "a person *shall not commence an action* alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b. Coupled with the amendment of MCL 600.2912d to require the filing of an affidavit of merit "with the complaint", the enactment of MCL 600.2912b in the same legislation mandating written notice and a waiting period prior to commencement of a medical malpractice action signals a legislative intent to create mandatory procedural requirements to *commencing* a malpractice action.

In summary, the Legislature amended MCL 600.2912d in 1994 to mandate that an affidavit of merit signed by an expert be filed "with the complaint" if the complaint alleged medical malpractice as opposed to requiring a *subsequent* surety bond or affidavit. Thus, the Legislature intended the mandatory affidavit of merit requirement to play a gate keeping role precluding the commencement of malpractice actions not accompanied by the mandatory affidavit. It is clear that the Legislature intended the new affidavit of merit requirement in the 1994 amendment to be an essential component to the *initial*

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commencement of an action alleging medical malpractice rather than a *subsequent* action validating the complaint as provided in the prior version of the statute.

II. The erosion of the significance of the AOM requirement since its amendment in 1994.

Since its amendment in 1994, action by the courts of this State have dramatically limited the significance of the affidavit of merit requirement of MCL 600.2912d leaving *Scarsella* as one of the lone remaining protections giving meaning to the statutory requirement. The erosion of the significance of the affidavit of merit requirement has made complying with MCL 600.2912d significantly less burdensome for medical malpractice plaintiffs. *Scarsella* merely requires that a plaintiff file an affidavit with his/her complaint or comply with one of the two clear exceptions providing an extension. It is not a burdensome requirement.

In 2010, this Court amended MCR 2.112 and MCR 2.118 to create a 63 day deadline for challenges to a defective affidavit of merit and allow for relation back amendment of an affidavit of merit pursuant to MCR 2.118(D). MCR 2.112(L)(2)(b); MCR 2.118(D). The 2010 amendments of MCR 2.112 and MCR 2.118 have essentially eliminated any consequence to plaintiffs for failure to comply with the content requirements of MCL 600.2912d.

More recently, the Court of Appeals considered a case where the plaintiff filed an affidavit of merit signed by an expert in the wrong specialty. *Legion-London v Surgical Institute of Mich*, 331 Mich App 364; 951 NW2d 687 (2020) lv denied ___ Mich ___ (2021). The defendant in *Legion-London* was an orthopedic surgeon. The affidavit filed by the

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plaintiff was signed by a neurosurgeon. The defendant Dr. Crawford moved for summary disposition based on the deficient affidavit of merit which the trial court granted. *Legion-London*, 331 Mich App at 368. The plaintiff filed a motion for leave to file an "amended" affidavit of merit signed by an orthopedic surgery expert. *Id.* The trial court denied the motion concluding that a new affidavit signed by a different expert could not constitute an amendment under MCR 2.112 or MCR 2.118. *Id.*

On appeal, in a 2-1 opinion, the Court of Appeals reversed the trial court's holding and held that a new affidavit of merit signed by a different expert/affiant constituted an "amendment" under MCR 2.112(L)(2)(b) that would relate back to the filing of the complaint under MCR 2.118(D). *Legion-London*, 331 Mich App at 376-377. The majority relied on the 2010 amendments to MCR 2.112 and MCR 2.118 and concluded that the "court rule changes were intended to ensure plaintiffs in medical malpractice cases have an opportunity to cure any defect in an AOM." *Id.* at 376.

Judge Cameron issued a lengthy dissent contending that a new substitute affidavit of merit could not be an "amendment under any commonly understood sense of the word." *Id.* at 381. Judge Cameron also persuasively noted that the majority failed to address MCL 600.2912d(1) or analyze the requirement that a plaintiff or plaintiff's attorney must have a "reasonable belief" that the expert affiant meets the requirements of MCL 600.2169(1). *Id.* at 382. Judge Cameron opined that the majority's expansive interpretation of MCR 2.112(L)(2)(b) "subverts the requirements of MCL 600.2912d(1) and holds that even if a plaintiff's attorney did not reasonably believe that the proposed expert met the requirements of an expert witness, the trial court should nonetheless

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permit the action to proceed." *Id*. at 384. The majority's interpretation "essentially concludes that a plaintiff's attorney need not investigate whether a potential expert meets the requirements of MCL 600.2169 before filing a medical malpractice action and that, in the event the expert's qualifications are successfully challenged, amendment must be permitted regardless of whether the plaintiff's attorney possessed a reasonable belief that the signer of the AOM was qualified under MCL 600.2169." *Id*. at 384-385.

As outlined above, the amendment of MCR 2.112 and MCR 2.118 by this Court in 2010 and the expansive interpretation of those amendments by the Court of Appeals majority in *Legion-London*, have dramatically eroded the significance of the affidavit of merit requirement contrary to the Legislature's intent for it to serve a gate keeping purpose. Following *Legion-London*, not only is there no meaningful consequence for filing an affidavit of merit that fails to comply with the substantive requirements of MCL 600.2912d, there is no meaningful consequence for filing an affidavit of merit signed by an expert that the plaintiff attorney could not have reasonably believed met the requirements of MCL 600.2169(1). These changes have rendered significant portions of MCL 600.2912d nugatory and have added requirements for defendants not included or intended by the Legislature in the 1994 tort reform legislation. *Scarsella* is the lone remaining protection giving meaning to the mandatory statutory affidavit of merit requirement. If it is overruled, there will be no meaningful consequence for filing a defective affidavit, an affidavit signed by the wrong expert or even completely failing to file an affidavit. Plaintiffs will have little remaining incentive to make a good faith effort to comply with the mandatory statutory requirements and defendants will have little to

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gain from challenging defective or even omitted affidavits of merit. In effect, the affidavit of merit requirement will become meaningless.

III. This Court's interpretation of MCL 600.2921d in *Scarsella* is faithful to the legislative intent underlying the affidavit of merit requirement.

A. Summary of *Scarsella*.

In *Scarsella*, the plaintiff filed a complaint alleging medical malpractice without the mandatory affidavit of merit on September 22, 1995 approximately two to three weeks prior to expiration of the statute of limitations. *Scarsella*, 461 Mich at 549. The plaintiff failed to move for a 28 extension as permitted by MCL 600.2912d(2). *Id*. The defendant filed a motion for summary disposition on March 12, 1996 based on the plaintiff's failure to comply with MCL 600.2912d. *Id*. The plaintiff filed an affidavit of merit on April 22, 1996. *Id*. The trial court granted the defendant's motion concluding that the complete failure to file an affidavit of merit rendered the complaint null and void. *Scarsella*, 461 Mich at 549. Further, the complaint filed without the mandatory affidavit of merit did commence an action and therefore did not toll the statute of limitations making dismissal with prejudice appropriate. *Id*.

On appeal, the Court of Appeals unanimously affirmed the trial court's holding in a per curiam opinion. *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998). This Court granted leave and determined that the Court of Appeals had "crafted a clear, concise opinion that correctly resolves an important issue." *Scarsella*, 461 Mich at 548. This Court adopted the Court of Appeals opinion in its entirety and added additional clarifications. The Court of Appeals opinion, adopted by this Court, appropriately

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applied rules of statutory interpretation to conclude that wholly omitting to file the required affidavit of merit with a complaint alleging medical malpractice is insufficient to commence a medical malpractice action.

First, the Court held that the Legislature's use of the word "shall" in MCL 600.2912d(1) "indicates that an affidavit accompanying the complaint is mandatory and imperative." *Scarsella*, 461 Mich at 549. While the Court recognized that, generally, the filing of a complaint tolled the statute of limitations, it found that the specific and mandatory requirement of MCL 600.2912d(1) mandating the filing of an affidavit of merit "with the complaint" controlled over the general rule that filing a complaint tolls the statute of limitations. The Court cited to this Court's indication in *Solowy* that a plaintiff must move for the 28 day extension provided in MCL 600.2912d(2) in order to obtain tolling for a complaint filed without the required affidavit of merit. *Id*. at 550 (citing *Solowy*, 454 Mich at 229). In effect, the Court appropriately applied the rule that the more specific statute controls over the more general statute where statutory provisions conflict. *In re Haley*, 476 Mich at 198.

The Court further held that accepting the plaintiff's position would effectively repeal the statutory affidavit of merit requirement. *Scarsella*, 461 Mich at 550. The Court noted that plaintiffs could routinely file complaints alleging medical malpractice without the required affidavit of merit in contravention of the Legislature's clear intent that that affidavit be filed "with the complaint." *Id*. The Court further noted that allowing a complaint alleging medical malpractice filed without the required affidavit of merit to toll the statute of limitations would render the provision permitting a 28 day extension

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for good cause shown nugatory. *Id*. In short, the Court of Appeals analysis, as adopted by this Court, appropriately applied the plain language of the statute to discern the Legislature's intent and avoided an interpretation that would render significant portions of MCL 600.2912d superfluous.

In addition to adopting the Court of Appeals' opinion and analysis, this Court emphasized that permitting a complaint alleging medical malpractice filed without the mandatory affidavit of merit to toll the statute of limitations would "undo the Legislature's clear statement that an affidavit of merit 'shall' be filed with the complaint." *Scarsella*, 461 Mich at 552. This Court also cited its earlier recognition in *Solowy*, that plaintiffs must comply with the specific exceptions/extensions provided by the Legislature to obtain tolling for a medical malpractice complaint filed without the mandatory affidavit of merit. *Id*. Finally, the Court clarified that its holding applied only to the narrow category of cases where a medical malpractice plaintiff wholly omits to file the required affidavit of merit. *Id*.

B. This Court's interpretation of MCL 600.2912d in *Scarsella* was reasonable and faithful to the legislative intent underlying the statute.

This Court's interpretation of MCL 600.2912d in *Scarsella* was reasonable and faithful to the Legislature's intent underlying MCL 600.2912d as discerned through the rules of statutory interpretation. The goal of statutory interpretation is to discern the Legislature's intent as determined by the language of the statute. *Bukowski*, 478 Mich at 274. Statutory interpretation begins with interpreting the plain language of the statute. *Bank of America, N.A. v First American Title Ins Co*, 499 Mich 74, 85; 878 NW2d 816 (2016).

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As appropriately recognized by this Court in *Scarsella*, the plain language of the statute providing that an affidavit of merit "shall" be filed "with the complaint" and explicit provision of two exceptions to this mandatory rule reveal the Legislature's intent that a complaint filed without the required affidavit of merit does not commence an action alleging medical malpractice.

The statutes cited by Plaintiffs to support their position that *Scarsella* is wrongly decided (MCL 600.1901 & MCL 600.5856) are both more general and older than MCL 600.2912d. Under well accepted rules of statutory interpretation, the older and more general statutes must yield to the more specific and recent statutory provision of MCL 600.2912d.

Where two statutory provisions conflict, the more specific statutory provision controls over a general provision. *In re Haley*, 476 Mich at 198. MCL 600.2912d is more specific with respect the requirements for commencement of a medical malpractice action within the unique statutory scheme governing malpractice actions than the general statutes regarding commencement of civil actions (MCL 600.1901) and tolling of the statute of limitations (MCL 600.5856). This Court previously applied this rule of statutory interpretation to MCL 600.2912d and MCL 600.1901 in *Tyra*:

> [M]ore specific statutory provisions control over more general statutory provisions, and those the specific requirements of [MCL 600.2912b(1)] regarding 'commenc[ing] an action alleging medical malpractice' prevail over the general requirements of MCL 600.1901 regarding the commencing of civil actions.

Tyra, 498 Mich at 94 (quoting *Boodt v Borgess Med Ctr*, 482 Mich 1001, 1002; 756 NW2d 78 (2008)). In short, medical malpractice actions are subject to a unique procedural

framework containing specific procedural prerequisites for properly commencing an action alleging medical malpractice. Therefore, as this Court has previously recognized, MCL 600.2912d should be interpreted as controlling over the more general provisions of MCL 600.1901 and MCL 600.5856.

Where two statutory provisions conflict, the more recently enacted provision controls. *Huron Twp*, 448 Mich at 366. MCL 600.2912d was enacted in 1986 and amended in 1994. MCL 600.1901 and MCL 600.5856 were enacted in 1961. As the more recent (and specific) statute, MCL 600.2912d should control over MCL 600.1901 and MCL 600.5856.[2] Significantly, this rule of statutory construction is even more persuasive when the more recent statute is also more specific. *Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 28; 811 NW2d 98 (2011).

When interpreting a statute, a court must assume that every portion of a statute has meaning and avoid interpreting a statute in a manner than renders statutory language superfluous or nugatory. *Duffy*, 490 Mich at 215. When enacting MCL

[2] The Legislature amended MCL 600.5856 in 2004. However, as explained by this Court in *Bush*, the amendment was a reaction to this Court's holding in *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002) that a defective NOI does not toll the statute of limitations. *Bush*, 484 Mich at 161. The Legislature took no action to address this Court's holding in *Scarsella* when it amended MCL 600.5856 in 2004. The Legislature is presumed to be aware of any existing judicial interpretation of statutes and its silence suggests acquiescence with the courts' interpretation. See *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994). This rule is even stronger where the Legislature takes action to amend a statute following a court's interpretation and supports interpreting the amended statute as incorporating a court's prior interpretation. See *Wood v Detroit Edison Co*, 409 Mich 279, 293-294; 294 NW2d 571 (1980). This is yet another rule of statutory interpretation supporting this Court's interpretation of MCL 600.2912d in *Scarsella*.

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600.2912d, the Legislature chose to include two explicit exceptions to the mandatory language requiring that a plaintiff alleging medical malpractice "shall" file an affidavit of merit "with the complaint." Under subsection (2), "[u]pon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff . . . an additional 28 days in which to file the affidavit required under subsection (1)." MCL 600.2912d(2). Under subsection (3), if the defendant fails to allow access to medical records within 56 days as required by MCL 600.2912b(6), "the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint." MCL 600.2912d(3).

Plaintiffs' proposed interpretation of MCL 600.2912d renders the exceptions provided by subsection (2) and subsection (3) essentially superfluous. Why would a plaintiff undertake the burden of making the good cause showing required for a 28 day extension under subsection (2) if he or she can simply allow dismissal of the complaint without prejudice and refile it free of penalty? Under Plaintiffs' interpretation, a plaintiff would have nothing to gain from filing a motion for extension under subsection (2). If *Scarsella* is overruled, a plaintiff would be better served to allow the defendant to file a motion for summary disposition, wait for the trial court to grant the motion and dismiss the case without prejudice and refile the complaint later with the required affidavit of merit. Taking such an approach will afford plaintiffs a significantly longer extension than the 28 day extension expressly provided by the Legislature in subsection (2) and avoid the need to establish good cause. As this Court recognized in *Solowy*, interpreting subsection (2) as supporting the Legislature's intent that filing a motion for extension

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under subsection (2) is necessary to obtain tolling of the statute of limitations gives meaning to subsection (2) and promotes the gate keeping function intended by the Legislature.

Under another well recognized rule of statutory interpretation, the express mention of something in a statute implies the exclusion of other things (*expressio unius est exclusio alterius*). *Pittsfield*, 468 Mich at 712. The Legislature provided two explicit exceptions to the plain requirement that the affidavit of merit be filed "with the complaint." MCL 600.2912d(2) & (3). The Legislature's provision of two specific exceptions permitting a later filing of an affidavit of merit implies the exclusion of any other exception and an intent to exclude tolling where neither exception applies. If the Legislature intended the remedy for failing to file the mandatory affidavit of merit with the complaint to be dismissal without prejudice with tolling, there would have been no reason to provide exceptions to the rule. The fact that the Legislature provided two explicit exceptions implies the exclusion of the type of broad and open ended exception that permitting dismissal without prejudice with tolling would provide.

Finally, if two or more statutes relate to the same subject or share a common purpose they should be read together to create a harmonious body of law (*in para materia*). *Mazur*, 497 Mich at 313. MCL 600.2912d was amended in the same public act that enacted the notice of intent requirement of MCL 600.2912b and therefore should be read together to create a harmonious body of law. As this Court recognized in *Burton*, the requirement in MCL 600.2912b that a person "shall not commence a medical malpractice action"

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without providing notice, is complimentary and analogous to the mandatory language of MCL 600.2912d:

> 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 perquisite 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 (emphasis added).[3]

This Court's analysis of MCL 600.2912b(1) and its reading of the statute with MCL 600.2912d(1) in *Burton* is significant. First, this Court's analysis in *Burton* supports reading the two statutes *in pari materia* as creating procedural prerequisites to commencement of an action alleging medical malpractice. The language of MCL 600.2912b(1) informs and compliments the language of MCL 600.2912d(1) and confirms that the Legislature intended the notice of intent and affidavit of merit requirements to serve a gatekeeping function that preclude commencement of a medical malpractice action if not met. Second, this Court's holding in *Burton* undermines the primary

[3] This Court confirmed the *Burton* holding and analysis in *Tyra* where it held that "*Burton* held that the filing of a complaint before the expiration of the NOI waiting period does not commence an action or toll the running of the period of limitations." *Tyra*, 498 Mich at 92. Therefore, in the instant cases (as well as in *Zwiers*), plaintiffs' filing of their complaints before the expiration of the NOI waiting period did not commence their actions or toll the running of the limitations period." *Id*. at 92. This Court recognized that the "complaints, filed before the NOI waiting period expired, could not commence an action." *Id*.

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argument advanced by Plaintiffs that the filing of a complaint necessarily tolls the statute of limitations *in every case*. This Court's holding in *Burton* that the filing of a complaint prior to expiration of the mandatory notice period of MCL 600.2912b belies that argument and demonstrates that the Legislature may create exceptions to the general rule that the filing of a complaint tolls the statute of limitations without expressly stating so in the statute. Given that MCL 600.2912b was enacted in the same tort reform package that amended MCL 600.2912d to require filing an affidavit of merit "with the complaint", MCL 600.2912d should be read *in pari materia* with MCL 600.2912b. Both statutes create a prerequisite condition that must be satisfied to commence a medical malpractice action and toll the statute of limitations.

IV. The Court of Appeals properly applied *Scarsella*

The Court of Appeals properly applied *Scarsella* in its opinion. The trial court ruled that *Scarsella* did not apply because an affidavit of merit had been signed and was in existence prior to the filing of the complaint. *Ottgen v Katranji*, unpublished opinion per curiam of the Court of Appeals, decided May 20, 2021 (Docket No. 350767) at 2. The *Ottgen* panel appropriately concluded that the *Scarsella* rule was clear and did not include an exception for an existing but inadvertently unfiled affidavit of merit:

> Furthermore, as explained earlier, our Supreme Court clarified that 'the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation' under MCL 600.5856(a) when a plaintiff 'wholly omits to file the affidavit required by MCL 600.2912d(1).' *Scarsella*, 461 Mich at 553. Consequently, because the April 11, 2019 complaint was ineffective, there was nothing for the subsequently filed May 13, 2019 amended complaint to relate back to. The *Scarsella* Court's mandate *is clear*: when a complaint is filed without an affidavit of merit, the lawsuit is not commenced and the statute of limitations is not tolled. We do not find that

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> an exception to the mandate exists, as a plaintiff being in possession of an affidavit of merit but erroneously does not file the affidavit of merit with the original complaint.

Ottgen, unpub op, at 4-5 (emphasis added). The Court of Appeals' holding and application of *Scarsella* was correct and should be affirmed.

V. The doctrine of stare decisis weighs against overruling *Scarsella*.

In his concurrence in *Castro*, Justice Viviano recognized that even if *Scarsella* did not reach the correct result, "stare decisis might counsel retaining it." *Castro v Goulet*, 501 Mich 884; 901 NW2d 614 (2017). Amicus curiae MDTC respectfully submits that the doctrine of stare decisis does counsel retaining *Scarsella* even if the Court concludes that it could reasonably have decided the case differently.

The doctrine of stare decisis is "a foundation stone of the rule of law." *Michigan*, 572 US at 798. As this Court has recognized, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *McCormick*, 487 Mich 180 at 209. The rule of stare decisis is enhanced where the prior decision involves statutory interpretation. *Kimble*, 576 US at 455. Further, "[r]especting stare decisis means sticking to some wrong decisions." *Id*. at 455. Among the factors to be considered when assessing whether to depart from the rule of stare decisis are: (1) whether the rule has proven to defy practical workability and (2) whether reliance on the rule is such that overruling it would cause a special hardship. *Peterson v Maga Corp*, 484 Mich 314, 317; 773 NW2d 564 (2009). The Court must examine the effects of overruling a decision, including the "effect on the reliance interest and whether overruling would

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work an undue hardship because of that reliance." *Robinson v City of Detroit,* 462 Mich 439, 464; 613 NW2d 307 (2000).

The *Scarsella* holding and rule has not proven to defy practical workability. In contrast, it is a clear and bright line rule that promotes certainty. There is nothing ambiguous about the rule or difficult about applying it. All attorneys practicing in the medical malpractice arena understand that a complete failure to file an affidavit of merit with a complaint alleging medical malpractice does not toll the statute of limitations. As Justice Markman wrote in his concurrence in *Progress Michigan v Attorney General*, 506 Mich 74, 112; 954 NW2d 475 (2020), "*Scarsella* and its progeny have beneficially contributed to 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." Further, there is nothing difficult about distinguishing between defective and omitted affidavits. As the Court of Appeals wrote in this case, "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." *Ottgen*, unpub op at 5 (emphasis added).

The Court of Appeals opinion in *Castro* demonstrates that the statutory scheme established by the Legislature and interpreted by *Scarsella* and its progeny works as intended and is understood by plaintiffs. In *Castro*, the plaintiffs filed their complaint alleging medical malpractice prior to expiration of the statute of limitations but did not include the required affidavit of merit. However, the plaintiffs properly filed a motion requesting a 28 day extension pursuant to MCL 600.2912d(2). The plaintiffs subsequently

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filed the required affidavit of merit within the 28 day period. However, the trial court granted the motion after the 28 day period and expiration of the statute of limitations (if not tolled) and eventually ruled that the granting of the motion after the 28 day period rendered it ineffective to comply with the 28 day extension provided by MCL 600.2912d(2). On appeal, the Court of Appeals held that the plaintiffs "acted properly pursuant to both statute and caselaw." *Castro*, 312 Mich App at 5-6. The *Castro* panel held that the "28-day period must run from the date the complaint is filed, irrespective of when the motion is granted." *Id*. at 6. The panel further held that the trial court properly found that the plaintiffs had established good cause for the 28 day extension. *Id*. at 7-9.

The *Castro* opinion provides a roadmap for plaintiffs regarding the proper procedure for obtaining a 28 day extension under MCL 600.2912d(2) which includes tolling as recognized by this Court in *Solowy*. *Castro* further demonstrates that the Legislature has provided a workable exception to plaintiffs for a 28 day extension to file an affidavit of merit which includes tolling of the statute of limitations. The plaintiffs in *Castro* clearly understood the *Scarsella* rule and that a motion for a 28 day extension was necessary to obtain tolling of the statute of limitations. The plaintiffs followed the plain statutory language as interpreted by *Scarsella* and its progeny and successfully obtained an extension of the AOM deadline and tolling of the statute of limitations.

Since its publication over 20 years ago, *Scarsella* has become an integral component of the body of caselaw interpreting the unique comprehensive procedural system governing medical malpractice actions. Medical malpractice defendants have relied on

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the clear *Scarsella* rule for over two decades. The affidavit of merit rule is unique to medical malpractice actions and does not have broader implications for this State's jurisprudence beyond the unique procedural system governing medical malpractice actions. This Court's opinion in *Progress Michigan* demonstrates this. While the Court of Appeals found *Scarsella* analogous and applied the rule outside the medical malpractice context, this Court found that *Scarsella* was distinguishable and unique to the medical malpractice procedural scheme. *Progress Michigan*, 506 Mich at 95-97. Given that the application of the *Scarsella* holding is limited to the unique procedural system governing medical malpractice actions, there is no compelling reason for this Court to overturn the opinion.

Finally, overruling *Scarsella* will have negative consequences for the unique body of caselaw that has developed following the tort reform legislation of 1986 and 1994. The *Scarsella* holding has been applied by numerous subsequent opinions of the Court of Appeals and this Court. One significant example is this Court's opinion in *Burton*. Overruling *Scarsella* will undoubtedly cast doubt on *Burton* unnecessarily causing uncertainty in area of well settled and clearly understood law. Moreover, if *Scarsella* and *Burton* are overruled, plaintiffs will be free to file actions alleging medical malpractice during the mandatory notice period of MCL 600.2912b and without the mandatory affidavit of merit required by MCL 600.2912d. In the case of MCL 600.2912d, overruling *Scarsella* will essentially give plaintiffs a completely open ended extension for filing an affidavit of merit accompanied by tolling. For example, a plaintiff could simply continue refiling a complaint alleging medical malpractice without the mandatory affidavit of

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merit following dismissal effectively tolling the statute of limitations and affidavit of merit deadline indefinitely.

In sum, the *Scarsella* rule is an important part of the unique procedural system governing medical malpractice actions in our State. The rule is clear and easy to apply. It is well settled and understood by all attorneys practicing in the medical malpractice area. It effectively promotes the legislative intent underlying the affidavit of merit of serving a gatekeeping role precluding commencement of medical malpractice actions without a contemporaneous affidavit attesting to the merits of the malpractice claims alleged in the complaint. However, the rule is also limited in scope to medical malpractice actions. As limited by *Progress Michigan*, the rule has no significant impact on this State's larger jurisprudence beyond the discrete and unique body of medical malpractice caselaw implementing the tort reform statutes of 1986 and 1994. For all of these reasons, the Court should refrain from overruling *Scarsella* under the doctrine of stare decisis even if it concludes that it could reasonably have been decided differently.

RELIEF REQUESTED

Amicus curiae MDTC respectfully requests that the Court affirm the judgment of the Court of Appeals, reaffirm *Scarsella* as having been correctly decided and refrain from overruling *Scarsella*.

Respectfully submitted,

RHOADES McKEE PC
Attorneys for Amicus Curiae Michigan Defense Trial Counsel, Inc.

Dated: April 15, 2022

By: __/s/James R. Poll_____
James R. Poll (P70191)
Business Address:
55 Campau Avenue NW
Suite 300
Grand Rapids, MI 49503
(616) 235-3500

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