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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, P.L.L.C., THE KATRANJI FAMILY FOUNDATION, KATRANJI HAND CENTER, and KATRANJI INSTITUTE,

Defendants-Appellees.

Supreme Court Case No. 163216

Court of Appeals Case No. 350767

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

AMICUS CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION

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STATEMENT OF INTEREST OF AMICI CURIAE MICHIGAN STATE MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION[1]

MSMS is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS is frequently called upon to express its views with respect to legal issues of significance to the medical profession.

AMA is the largest professional association of physicians, residents, and medical students in the United States. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice and reside in all states, including Michigan. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy-making process.

MSMS and the AMA seek leave to file an amicus curiae brief on their own and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

In granting leave to appeal in *Ottgen v Katranji*, this Court directed the parties to address "whether *Scarsella v Pollack*, 461 Mich 547 (2000), was correctly decided and whether the plaintiffs' complaint, which was filed without an affidavit of merit contrary to MCL 600.2912d(1),

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[1] Pursuant to MCR 7.312(H)(4), amici curiae Michigan State Medical Society and American Medical Association state that neither appellant's counsel nor appellee's counsel authored this brief in whole or in part, or contributed money that was intended to fund the preparation or submission of the brief. Further, no person other than the amici curiae have contributed money intended to fund the preparation and submission of this brief.

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should have been dismissed without prejudice." Amici Curiae believe that *Scarsella* was correctly decided and should not be overruled. *Scarsella*'s holding that a medical malpractice complaint filed without an affidavit of merit does not commence the action and does not toll the statute of limitations effectuates the Legislature's intent to make a demonstration of merit at the inception of the action mandatory and to thereby deter frivolous claims.

A decision to overrule *Scarsella* will create an open-ended exception to MCL 600.2912d(1). The statute provides that in an action for medical malpractice, a plaintiff "*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 …" (emphasis added). MCL 600.2912d specifies two exceptions to this mandate. Subsection (2) provides that "[u]pon 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)." MCL 600.2912d(2). Subsection (3) provides for a 91-day extension to file the affidavit of merit "[i]f the defendant … fails to allow access to medical records" within the time specified in MCL 600.2912b. MCL 600.2912d(3).[2] No further exceptions are provided in the statute.

Approximately ten years after *Scarsella*, this Court adopted MCR 2.112(L), which requires the filing of an affidavit "as provided in MCL 600.2912d." MCR 2.112(L)(1). The court rule also specifies the time-period for challenging an affidavit of merit and the vehicles for amending a defective affidavit. MCR 2.112(L)(2)(b). The rule, however, leaves *Scarsella* undisturbed.

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[2] MCL 600.2912b, which requires a plaintiff to give notice 182 days before commencing an action for medical malpractice, generally requires the health professional to allow the claimant access to medical records in the health professional's control within 56 days after receiving notice. See MCL 600.2912b(5).

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The affidavit of merit requirement is an integral feature of the framework required for medical malpractice actions and this Court's unequivocal holding in *Scarsella* has been the law for over 20 years. This appeal is therefore of great importance to MSMS, AMA, and their members. MSMS and AMA believe they can best assist this Court in understanding the issues from the physicians' perspective by presenting this amicus curiae brief for the Court's consideration.

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STATEMENT OF QUESTION ADDRESSED BY AMICI CURIAE

As identified by this Court, the question presented is "whether *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), was correctly decided and whether the plaintiffs' complaint, which was filed without an affidavit of merit contrary to MCL 600.2912d(1), should have been dismissed without prejudice."

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CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amici Curiae MSMS and AMA refer this Court to the facts asserted in the brief of Defendants-Appellees.

ARGUMENT

I. *Scarsella* Was Correctly Decided and Should Not be Disturbed.

MCL 600.2912d provides that an affidavit of merit, sometimes referred to as an "AOM," "shall" be filed with the complaint. The affidavit must be signed by a health professional who the plaintiff's attorney reasonably believes satisfies the expert witness requirements in MCL 600.2169 and "shall contain" a statement regarding the applicable standard of care, breach of the standard, the conduct required to comply with the standard of care, and the manner in which the breach proximately caused the alleged injuries. MCL 600.2912d(1). The purpose of the AOM requirement is to deter frivolous claims, which makes its filing *with the complaint* at the inception of the lawsuit integral to achieving its purpose.

The statute recognizes that there may be circumstances which prevent the affidavit from being filed with the complaint. Upon motion for good cause shown, the trial court may grant an additional 28 days to file the affidavit. MCL 600.2912d(2). In addition, if the defendant fails to allow access to medical records within the time specified in MCL 600.2912b(6), the affidavit may be filed within 91 days after the complaint is filed. If one of these exceptions applies, the later-filed AOM will be timely and the complaint as originally filed will be deemed to have commenced the action and tolled the statute of limitations. See e.g., *Solowy v Oakwood Hosp*, 454 Mich 214, 229; 561 NW2d 843 (1997) (MCL 600.2912d(2) "allows, upon a showing of good cause, an additional twenty-eight days to obtain the required affidavit of merit. During this period, the statute will be tolled …").

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Because the temporal language of the statute is mandatory, subject only to the timing exceptions stated in the statute, this Court held in S*carsella* that the filing of a medical malpractice complaint without an affidavit of merit does not toll the limitations period. The Court now queries whether *Scarsella* was correctly decided. MSMS and AMA answer affirmatively – *Scarsella* is correct and should be upheld. *Scarsella* effectuates the Legislature's intent to require an affidavit of merit to be filed with every medical malpractice complaint. It respects the limited statutory exceptions. It provides a clear and workable rule. And its holding is necessary to achieve the AOM's intended purpose. Disassembling the logic of *Scarsella* will effectively eliminate the temporal requirement designed to deter frivolous actions and swallow the exceptions. Even when adopting MCR 2.112(L) to provide a remedy for a defective affidavit of merit, this Court reaffirmed the requirement that the affidavit be filed *with* the complaint and did not go so far as to disturb the essential holding of *Scarsella*. Respectfully, it should not do so now.

In *Scarsella*, the plaintiff failed to file an affidavit of merit with his complaint, nor did he file a motion for an extension of time to file the affidavit and the period of limitations expired. 461 Mich at 548-549. This Court held that the word "shall" in MCL 600.2912d(1) meant that the filing of the affidavit with the complaint was mandatory. *Id*. at 549. This Court further found that "the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit" and "did not toll the period of limitation." *Id*. at 549-550. Accordingly, the plaintiff's claim was time-barred. *Id*. at 550. This Court specifically stated that it was only addressing the situation in which the affidavit is wholly omitted and that its holding "does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective." *Id*. at 553.

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The holding in *Scarsella* has become embedded in this State's caselaw and consistently applied. However, although the opinion in *Scarsella* specifically reserved the issue of the effect of filing a defective affidavit, in the years after *Scarsella* courts applied its holding to defective affidavits. For example, in *Mouradian v Goldberg*, 256 Mich App 566, 568; 664 NW2d 805 (2003), the plaintiffs filed a complaint on November 13, 2000, but did not file the affidavit of merit until December 8, 2000, asserting that their expert was unavailable to sign it at the time the complaint was filed. The plaintiffs alleged two different claims of malpractice with periods of limitation expiring on November 13, 2000 and December 11, 2000. *Id*. at 571. The Court held that summary disposition was properly granted on the first claim because the limitations period expired before the affidavit of merit was filed. *Id*. With respect to the second claim, although the affidavit was filed within the limitations period, the Court held that the affidavit of merit was "grossly nonconforming" to the requirements of the statute and was therefore insufficient to constitute an affidavit of merit. *Id*. at 573-574. Therefore, as a matter of law, the plaintiffs' complaint was not commenced and summary disposition in favor of the defendants was appropriate. *Id*. at 574. Similarly, in *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003), the Court held that an affidavit of merit signed by a physician with a different board certification than the defendant was defective and insufficient to commence a medical malpractice action.

The *Mouradian* and *Geralds* holdings met with some resistance in *Ward v Rooney-Gandy*, 265 Mich App 515, 522; 696 NW2d 64 (2005), where the plaintiff's counsel timely filed a complaint with an affidavit of merit but inadvertently attached an affidavit from a different lawsuit with the same affiant. The defendant waited seven months, until after the limitations period had expired, to file a motion for summary disposition on the ground that the affidavit was defective.

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Id. at 523. The Court of Appeals invoked the doctrine of equitable tolling to prevent injustice and held that the action was not time-barred. *Id*. at 520-523. Judge O'Connell dissented, stating that the plaintiff's failure to comply with the statutory requirements was a product of negligent failure rather than any understandable confusion about the legal nature of her claim, so equitable tolling should not apply. *Id*. at 528-529 (O'CONNELL, J., dissenting). Judge O'Connell noted the current state of the law under cases like *Scarsella*, *Mouradian*, and *Geralds*, and stated that the filing of a defective affidavit did not toll the limitations period. *Id*. Judge O'Connell also encouraged the Supreme Court to amend the Michigan Court Rules to require a defendant to raise with particularity any objections to the validity of an affidavit of merit in the first responsive pleading to prevent the type of gamesmanship that occurred. *Id*. at 528. Thereafter, this Court reversed the Court of Appeals' judgment and reinstated the trial court's dismissal of the complaint with prejudice for the reasons stated in Judge O'Connell's dissent. *Ward v Rooney-Gandy*, 474 Mich 917; 705 NW2d 686 (2005).

Mouradian, *Geralds*, and their progeny were overruled by this Court in *Kirkaldy v Rim*, 478 Mich 581, 583; 734 NW2d 201 (2007), but *Scarsella* was not disturbed. In *Kirkaldy*, this Court held that "the period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendant." 478 Mich at 585. If the defendant successfully challenges the affidavit, the period of limitations resumes running. *Id*. at 586. Therefore, the proper remedy for a defective affidavit is dismissal without prejudice, and the plaintiff then has whatever time remains in the limitations period to re-file with a conforming affidavit of merit. *Id*. See also, *Potter v McLeary*, 480 Mich 915; 739 NW2d 866 (2007) (reversing dismissal with prejudice in light of holding in *Kirkaldy*); *Glisson v Gerrity*, 480 Mich 883; 738 NW2d 237 (2007) (same).

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This Court subsequently amended the court rules to address defective affidavits but left the actual holding of *Scarsella* intact. While requiring that an affidavit of merit be filed as provided in MCL 600.2912d, MCR 2.112 and MCR 2.118, amended effective May 1, 2010, provide a vehicle to amend defective affidavits with relation back to the date of filing the complaint. MCR 2.112(L)(1) states:

> (1) In an action alleging medical malpractice filed on or after October 1, 1993, *each party must file an affidavit as provided in MCL 600.2912d and 600.2912e.* Notice of filing the affidavit must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court. [*Id*. (emphasis added)]

MCR 2.112(L)(2)(b) then provides that unless the court allows a later challenge for good cause:

> [A]ll challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the signer, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301.

MCR 2.118 governs amended and supplemental pleadings. Subsection (D) provides for relation back of amendments to the date of the original filing, including amendment of an AOM:

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. *In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit*. [MCR 2.118(D) (emphasis added)] [3]

[3] MCR 2.112(L)(2)(b) also allows amendment pursuant to MCL 600.2301, which provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

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These rules were liberally applied in *Legion-London v Surgical Institute of Michigan Ambulatory Surgery Ctr, LLC*, 331 Mich App 364, 367; 951 NW2d 687 (2020), where the plaintiff filed an affidavit of merit with her complaint that was signed by a neurosurgeon and stated that the applicable standard of care was that of a neurosurgeon. When defendant moved for summary disposition on the ground that he was an orthopedist, the plaintiff moved to amend the affidavit of merit. *Id*. The trial court denied plaintiff's motion and granted summary disposition for defendant because an affidavit signed by a new affiant was not an amendment. *Id*. at 368. The Court of Appeals reversed, finding that the court rule revisions allowed amendment of the affidavit, which related back to the original filing. *Id*. at 376. The Court found that the amendment arose out of the same conduct as the original affidavit, the substantive allegations pertained to the same event, and the standard of care allegations were materially the same. *Id*. at 369. The Court also found that a change of affiant was contemplated by the language in MCR 2.112(L)(2)(b) regarding challenges to the qualifications of the signer. *Id*. at 370.

This Court ordered a MOAA in *Legion-London* to consider "whether the Court of Appeals erred when it determined that the second affidavit of merit constituted an amendment of the first affidavit of merit." 507 Mich 888; 955 NW2d 482 (2021). Following oral argument, a divided Court denied leave. 967 NW2d 381 (2021). See also, *id*. (Zahra, J., dissenting) ("In sum, the Court of Appeals majority's interpretation of the 2010 court rule amendments now makes clear that these 'procedural' amendments were judicial legislation in which the Court imposes its perceived substantive policy preferences over that of duly enacted legislative tort-reform measures. Because the Court of Appeals majority's decision is incorrect and its interpretation of the 2010 court rule amendments poses significant constitutional questions in regard to this Court's authority to

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promulgate "substantive" policy under the guise of its "procedural" rulemaking authority, I dissent.").

Irrespective of disagreement regarding the scope of amendment allowed under MCR 2.112(L) and MCR 2.118(D), it seems quite clear that the court rules leave the holding of *Scarsella* intact. Reinforcing the requirement that an affidavit be filed "as provided in MCL 600.2912d," in light of the effect *Scarsella* gives to that mandate, reflects this Court's acceptance of *Scarsella,* which is likewise evidenced by this Court's numerous post-*Scarsella* decisions.

II. The Rule of Stare Decisis Opposes the Reversal of *Scarsella*.

Over the past two decades, this Court has considered, through opinions and leave applications, various aspects of MCL 600.2912d and/or *Scarsella* and/or its extension to other areas of the law and has not seen fit to overrule it. The cases include the following:

Castro v Goulet. In *Castro*, the plaintiffs did not file an affidavit of merit with their complaint, but instead, filed a motion to extend the time for filing an affidavit by 28 days pursuant to MCL 600.2912d(2). The affidavit of merit and order granting the motion were not filed until after the statute of limitations expired. The Court of Appeals held that the action was not untimely because the plaintiffs filed their complaint within the limitations period, filed their affidavit within 28 days after the filing of the complaint, and the trial court ultimately granted the motion to extend, further stating, "the 28-day period must run from the date the complaint is filed, irrespective of when the motion is granted." 312 Mich App 1, 5-6; 877 NW2d 161 (2015). This Court granted a MOAA in *Castro* to address "whether the filing of a motion for an extension of time to file an affidavit of merit, which is subsequently granted, *is sufficient to toll the statute of limitations."* 499 Mich 951; 879 NW2d 647 (2016) (emphasis added). Thereafter, this Court denied leave. 501 Mich 884; 901 NW2d 614 (2017).

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Progress Michigan v Attorney General, 506 Mich 74; 954 NW2d 475 (2020) (finding *Scarsella* inapplicable to the verification requirement of the Court of Claims Act).

Wade v McCadie, 503 Mich 1024; 926 NW2d 577 (2019) (denying leave to appeal from a Court of Appeals decision upholding the grant of summary disposition in favor of defendants under *Scarsella*).

Tyra v Organ Procurement Agency of Mich, 498 Mich 68, 93-94; 869 NW2d 213 (2015). *Tyra* involved two Court of Appeals opinions addressing the statute of limitations effect of prematurely filed complaints. *Tyra v Organ Procurement Agency*, 302 Mich App 208; 860 NW2d 667 (2013), and *Furr v McLeod*, 304 Mich App 677; 848 NW2d 465 (2014). This Court rejected the notion that MCL 600.1901, which states that a civil action is commenced by filing a complaint with the court, controlled the result, reiterating that a medical malpractice action is not properly commenced unless the notice and affidavit of merit requirements are satisfied *before the statute of limitations expires*. This Court explained:

> Although a civil action is generally commenced 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. Because plaintiffs did not wait until the applicable notice period expired before they filed their complaints and affidavits of merit, they did not commence actions against defendants. Because the statute of limitations has since expired, plaintiffs' complaints must be dismissed with prejudice. [498 Mich at 94 (emphasis added).]

This Court rejected arguments to overrule *Scarsella* and other decisions.

Ligons v Crittenton Hosp, 490 Mich 61, 73; 803 NW2d 271 (2011). In *Ligons*, this Court was asked to decide whether a medical malpractice suit must be dismissed if a defective affidavit of merit is filed after both the limitations period and the wrongful death savings period have expired. In holding that dismissal with prejudice was required, this Court explained that "allowing amendment of the deficient AOM would directly conflict with the statutory scheme governing

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medical malpractice actions, the clear language of the court rules, and precedent of this Court." *Id*. at 65. This Court reiterated that *Scarsella* establishes that when a plaintiff omits to file the required AOM, the complaint is ineffective and "does not work a tolling of the applicable period of limitation." *Id.* at 73. Further, "[w]hen the untolled period of limitations expires before the plaintiff files a complaint accompanied by an AOM, the case must be dismissed with prejudice on statute-of-limitations grounds." *Id*. at 73.

Kirkaldy v Rim, 478 Mich 581, 585; 734 NW2d 201 (2007) (citing *Scarsella*'s holding "that filing a medical-malpractice complaint without an affidavit of merit 'is ineffective, and does not work a tolling of the applicable period of limitation'").

Glisson v Gerrity, 480 Mich 883; 738 NW2d 237 (2007) (entering order in lieu of granting leave and stating in part "'[u]nder MCL 600.5856(a) and MCL 600.2912d, the period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendant'"), quoting *Kirkaldy*, 478 Mich at 585.

Burton v Reed City Hosp, 471 Mich 745, 752; 591 NW2d 424 (2005) (stating that "in *Scarsella*, we held that a complaint alleging medical malpractice that is not accompanied by the statutorily required affidavit of merit is not effective to toll the limitations period because the Legislature clearly intended that an affidavit of merit 'shall' be filed with the complaint").

Scarsella is clearly well-established precedent that this Court has followed for over two decades. Certainly, overruling precedent is not a simple ask. *Stare decisis* principles must be considered, including whether the decision was wrongly reasoned or decided; the effects of overruling the decision including reliance interests and whether overruling would work an undue hardship; whether the decision defies practical workability; and whether changes in the law or

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facts no longer justify the decision. See *Robinson v Detroit*, 462 Mich 439, 464-465; 613 NW2d 307 (2000).

"Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed." *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990), citing *Kirby v Larson*, 400 Mich 585, 618, 256 NW2d 400 (1977) ("Alterations are not usually made in a doctrine which is serving well, and with which the bench, bar and public are satisfied."). The *Robinson* factors "recognize[] that a variety of considerations, including individual reliance interests and the extent to which a past decision has become embedded in the legal fabric, must be evaluated." *Rowland v Washtenaw Co Rd Com'n*, 477 Mich 197, 225; 731 NW2d 41, 57 (2007) (MARKMAN, J. concurring). Simply put, "the longer a rule has continued, the more thoroughly has it inevitably become interwoven with the business and property interests of the community at large; and, therefore, the more disastrous must be a change, especially a sudden change." *N Am Brokers LLC v Howell Pub Sch*, 502 Mich 882, 913 NW2d 638, 642 (2018), quoting Wells, A Treatise on the Doctrines of Res Judicata and Stare Decisis (1878), pp 544–545.

Scarsella has a long legacy in the decisions of this Court. Although challenges have been raised (as discussed *infra*), there has never been a consensus that *Scarsella* should be overruled. Despite *Scarsella*'s detractors, there is no basis to now conclude that the decision is erroneous, unworkable, or unjustified and can be overruled without chaos and dislocation. Quite the contrary, if *Scarsella* is overruled, dislocation is a given, particularly in light of the decisions that this Court and the Court of Appeals have issued in reliance upon *Scarsella*. [4]

[4] MSMS and AMA concur in the discussion of stare decisis set forth in the brief of Defendants-Appellees and in the amicus brief filed by the Michigan Defense Trial Counsel.

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III. *Scarsella* is not Undermined by Previously Raised Concerns.

Scarsella permits a complaint filed without the required affidavit of merit to be dismissed without prejudice such that the action can be refiled if the statute of limitations has not expired. Presumably, this Court's grant of leave in *Ottgen* does not address or affect those cases. The issue arises when the action cannot be refiled because the statute of limitations has expired, leading this Court to now question *Scarsella*'s holding that a complaint for medical malpractice filed without an affidavit of merit does not commence the action or toll the statute of limitations.

The concerns which may have prompted the *Ottgen* order have been previewed in various concurring opinions which advocate reconsidering *Scarsella* (Justice Viviano)[5] and overruling it (Chief Justice McCormack).[6] The brief descriptions of the concerns provided here are not intended to misstate or otherwise characterize the concurring opinions by addition or omission, but to merely provide a context for the points Amici Curiae will address. As with all referenced opinions, Amici Curiae refers this Court to the full concurrences as authored by the Justices.

A. Conflict and Nullity Require That MCL 600.1901 and MCL 600.5856 Give Way to the More Specific and Recent MCL 600.2912d.

Justice Viviano disagreed with *Scarsella*'s foundational conclusion that the general commencement and tolling rules in MCL 600.1901 and MCL 600.5856 must give way to the more specific requirement for commencing a medical malpractice action in MCL 600.2912d. Justice

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[5] In an opinion concurring with this Court's denial of leave to appeal following a MOAA in *Castro v Goulet*, 501 Mich 884; 901 NW2d 614 (2017), Justice Viviano wrote that this Court "should, in an appropriate case, reconsider our opinion in *Scarsella* …" *Id.* at 884 (VIVIANO, J., concurring). Justice Viviano subsequently referred to this concurrence in other cases. See e.g., *Wade v McCadie*, 503 Mich 1024; 926 NW2d 577 (2019).

[6] In a concurring opinion in *Progress Michigan v Attorney General*, 506 Mich 74, 100; 954 NW2d 475 (2020), Chief Justice McCormack advocated that *Scarsella* be overruled, and Chief Justice Pro Tem Viviano concurred in that concurrence.

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Viviano explained the basis for his conclusion – principally, the rules do not conflict and MCL 600.2912d would not be nullified if general tolling rules applied:

> It is true that general statutory provisions must give way to more specific provisions. This interpretative canon typically applies either when the general and specific provisions conflict, or when applying the general provision would render the specific one superfluous. But § 5856 and § 2912d do not conflict, and the latter would not be nullified if the former's general tolling rules applied to medical malpractice claims. 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 exception applies. No one has yet offered a convincing argument why it would be inconsistent to mandate the AOM filing in § 2912d(1) while at the same time permitting § 5856(1) to toll the running of the statutory limitations period. Tolling in these circumstances would not appear to vitiate the requirements of § 2912d(1): plaintiffs would still have to file the AOM and their claims might be dismissed when they failed to do so, just not on statute of limitations grounds. In other words, § 2912d(1) has its own work to do—namely, forcing plaintiffs to provide medical opinion evidence that their claims are not frivolous—and it need not take on the additional task of tolling the limitations period, especially when it nowhere mentions that period.[*Castro,* 501 Mich at 885-886 (VIVIANO, J., concurring) (footnotes omitted).]

Response: Respectfully, applying general tolling rules to a medical malpractice complaint filed without an affidavit of merit nullifies the mandatory language of MCL 600.2912d and the legislatively-drafted exceptions. The concurring opinions hardly discuss, if at all, how the court can give effect to "shall file *with the complaint*" if an action can be properly commenced without the affidavit. Indeed, overruling *Scarsella* would, in effect, create an unlimited and unauthorized exception to MCL 600.2912d(1) and swallow the only two exceptions the Legislature deemed appropriate, leaving no room for limitation, let alone the limitations imposed by the Legislature.

Here, the mandate of MCL 600.2912d(1) is subject only to the exceptions stated in the statute: the exception in subsection (2) that permits the court to grant a 28-day extension upon a motion for good cause shown, and the extension allowed in subsection (3) for delay in producing medical records. The statute states in pertinent part:

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> (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 . . .
>
> (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 (emphasis added).]

Each AOM filing extension is time limited and comes with prerequisites; the wholesale exception that would result from the reversal of *Scarsella*'s tolling rule would have neither. No consequences would follow a failure to file "with the complaint," hence rendering it unnecessary to seek an extension or to show good cause. The discretion afforded to the trial court to grant *or deny* such a motion would be nullified as would the applicable time-period. If a complaint filed without an affidavit of merit is sufficient to commence an action, Subsection (2), to which subsection (1) is expressly "subject," would be mere surplusage.

In *Nickola v MIC Gen Ins Co*, 500 Mich 115, 123; 894 NW2d 552 (2017), this Court recognized that what a statute does not say is equally reflective of its purpose and intent. Referring to Scalia & Garner, *Reading Law*: *The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 57-58, this Court explained:

> "[T]he limitations of a text—what a text chooses *not* to do—are as much a part of its 'purpose' as its affirmative dispositions. These exceptions or limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose." [*Nickola,* 500 Mich at 125, n 25 (emphasis in original).]

Indeed, this Court has recognized that when a statute expressly mentions one or more exceptions, other exceptions that are not mentioned cannot be implied. See, e.g., *In re MCI Telecom*

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Complaint, 460 Mich 396, 415; 596 NW2d 164 (1999) ("The express mention of one thing in a statute implies the exclusion of other similar things."); see also *Kaufman v Carter,* 952 F Supp 520, 529 (WD Mich, 1996) ("Where '[e]xceptions to [a statute's] sweeping language are carefully enumerated…[t]he express enumeration indicates that other exceptions should not be implied.'"). In *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74–75; 711 NW2d 340 (2006), this Court interpreted a section of the Uniform Commercial Code relating to accord and satisfaction. This Court noted that "MCL 440.3311(3) and (4) contain exceptions or conditions" and that "[t]heir enumeration eliminates the possibility of their being other exceptions under the legal maxim *expressio unius est exclusio alterius*" – defined to mean "[t]he expression of one thing is the exclusion of another." *Id*. at n 8, citing Black's Law Dictionary (7th ed), p 1635. The same is true here. If the action can be commenced without the filing of an affidavit of merit, "shall file with the complaint" and its only exceptions are a nullity.

B. The Affidavit of Merit is not Mentioned in MCL 600.5856(c) Because Unlike the Notice of Intent Statute, it Does Not Impose a Mandatory Waiting Period That Might Otherwise Shorten the Statute of Limitations.

Justice Viviano states: "[t]hat the Legislature provided for the NOI's tolling effect [in MCL 600.5856], but not the AOM's, suggests the AOM may not be needed for tolling to occur." *Castro*, 501 Mich at 887 (VIVIANO, J., concurring). Similarly, Chief Justice McCormack remarks that the Legislature's *silence* on whether an affidavit of merit is needed to effectuate tolling under MCL 600.5856(a)", despite having "explained in words how the new notice provision worked with the tolling statute," is "well, *loud.*" *Progress Michigan*, 506 Mich at 103 (MCCORMACK, C.J., concurring). Chief Justice McCormack quoted a statement in Justice Viviano's *Castro* concurrence that "the Legislature knows how to tweak the limitations period in the medical malpractice context, but does not appear to have done so for [affidavits of merit]." *Id.*

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Response: MCL 600.5856 provides for tolling during the mandatory notice period because the prohibition against filing a complaint during that notice period might otherwise shorten the statute of limitations applicable to the claim. The affidavit of merit requirement does not have this effect of shortening the statute of limitations period.

The notice of intent (NOI) requirement is stated in MCL 600.2912b(1), which provides: "Except as otherwise provided in this section, 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…" (emphasis added).

To ensure that the mandatory waiting period will not deprive a plaintiff of the full limitations period afforded for the claim, MCL 600.5856(c) tolls the statute of limitations if the statute of limitations would expire during the waiting period. See e.g., *Waltz v Wyse*, 469 Mich 642, 649; 677 NW2d 813 (2004) ("When the interval when a potential plaintiff is not allowed to commence an action would end after the expiration of the limitations period, then M.C.L. § 600.5856(d) [now subsection (c)] applies and the period of limitations is tolled for 182 days … if the notice meets the substantive requirements set forth in M.C.L. § 600.2912b") (citations omitted).

The NOI tolling statute makes this clear. MCL 600.5856(c) provides: "The statutes of limitations or repose are tolled…[a]t the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given."

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MCL 600.2912d(1), on the other hand, imposes no waiting period and does not shorten the statute of limitations; tolling the statute of limitations is not necessary to ensure that a plaintiff receives the full limitations period for filing his or her complaint and affidavit of merit. So, unlike the NOI requirement, there is no reason to mention MCL 600.2912d in MCL 600.5856(c).

C. That the Affidavit of Merit is Not Mentioned as a "Tolling" Event in MCL 600.5856(a) Does not Undermine *Scarsella*.

Justice Viviano noted that the Court has consistently referred to the affidavit of merit and the complaint as distinct documents, as does MCL 600.2912d, and because MCL 600.5856(a) refers to the complaint but not the affidavit of merit, "a persuasive argument can be made that the Legislature did not intend for the AOM to play any role in tolling." *Castro*, 501 Mich at 886 (VIVIANO, J., concurring).

Response: Respectfully, the pivotal point should not be whether the complaint and affidavit of merit comprise a single document. MCL 600.2912d(1) clearly requires their simultaneous filing (absent one of the two statutory exceptions). Further, specifying in MCL 600.5856(a) that tolling does not occur if the affidavit of merit is not filed is unnecessary if one reads the applicable statutes and court rules together, as we are called upon to do. For example, MCL 600.5856(a) specifically refers to the "supreme court rules," which in MCR 2.112(L) requires the filing of the affidavit of merit as provided in MCL 600.2912d i.e., with the complaint, and prompt service upon the defendant. MCL 600.5856(a) states:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, *if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules*. [emphasis added]

MCR 2.112(L)(1) states:

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> In an action alleging medical malpractice filed on or after October 1, 1993, *each party must file an affidavit as provided in MCL 600.2912d* and 600.2912e. *Notice of filing the affidavit must be promptly served on the opposing party*. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court. [(emphasis added).]

While enactment of this rule followed MCL 600.2912d by a number of years, it reinforces *Scarsella* and leaves it undisturbed.

D. *Scarsella* is not Undermined Because MCL 600.2912d is not Mentioned in MCL 600.5838a.

Justice Viviano also analyzed MCL 600.5838 and MCL 600.5838a, which he concluded state that the rules in MCL 600.5805 and MCL 600.5856 prescribe the rules for commencing a medical malpractice action and neither refers to MCL 600.2912d(1). Justice Viviano concludes, "Thus, none of these provisions suggests that the AOM requirement in § 2912d(1) has any bearing on when an action commences. Under this interpretation the usual tolling regime would apply to medical malpractice cases, i.e., under § 5856[a], the running of the statutory limitations period would be tolled when the complaint is filed and served." *Castro*, 501 Mich at 888 (VIVIANO, J., concurring).

Response: As expressed above, given the reference to our court rules in MCL 600.5856(a) and the reference in MCR 2.112(L) to the mandatory affidavit of merit requirement in MCL 600.2912d, there is a direct link between the tolling statute and the affidavit of merit requirement. All of these provisions should be read *in pari materia* such that effect can be given to each. "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). This applies equally to a court rule and a statute. See e.g., *In re McBride*, unpublished opinion of the Court of Appeals, issued July 15, 2008 (Docket No. 282062), at *7, 2008 WL 2751233 (GLEICHER,

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J., concurring in part and dissenting in part) ("The court rules and MCL 712A.17c(5) must be interpreted in pari materia because these provisions share a common purpose and intent…");[7] see also *Grievance Administrator v Underwood*, 462 Mich 188, 193–194; 612 NW2d 116 (2000) ("When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes."). This rule of construction requires that the statute and the court rule be construed in a way that preserves the effectiveness of each. As this Court explained:

> Statutes *in pari materia* are those sharing a common purpose or those that relate to the same subject. *State Treasurer v. Schuster*, 456 Mich. 408, 417, 572 N.W.2d 628 (1998); *Crawford Co. v. Secretary of State*, 160 Mich.App. 88, 95, 408 N.W.2d 112 (1987). Statutes *in pari materia* are to be read and construed together as one law even if they were enacted at different times and without specific reference to each other. *Schuster*, supra at 417, 572 N.W.2d 628. "[T]hey must be construed to preserve the intent of each and, if possible, interpreted in such a way that neither denies the effectiveness of the other." *Crawford Co*, *supra* at 95, 408 N.W.2d 112. If statutory provisions can be construed in a manner that avoids conflict, then that construction should control the analysis. *People v. Webb*, 458 Mich. 265, 274, 580 N.W.2d 884 (1998). [*Sinicropi v Mazurek*, 273 Mich App 149, 157; 729 NW2d 256 (2006)]

Here, MCL 600.5856(a), MCL 600.2912d, and MCR 2.112(L) can be construed and applied harmoniously, without conflict. MCL 600.2912d and MCR 2.112(L) require a plaintiff alleging medical malpractice to file an affidavit of merit with the complaint. Once that complaint with the affidavit of merit is properly filed, MCL 600.5856(a) tolls the statute of limitations. MCR 2.112(L) then provides a mechanism for amending a challenged affidavit of merit within the time that remains prior to such tolling. Reading these statutes and court rules together eliminates conflict and avoids nullifying the mandate (and limited exceptions) of MCL 600.2912d.

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[7] *McBride* is cited as an example of the application of the *in pari materia* doctrine to a statute and a court rule which cover the same subject matter. Unpublished cases are attached as Exhibit A.

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E. The Docketing and Pendency of a Defective Complaint is not Unique to *Scarsella*.

Observing that the Court's "post-*Scarsella* opinions have not confronted *Scarsella* head-on but have, instead, tried to make sense of its (I assume) unintended consequences …", Chief Justice McCormack noted that "[t]he result has been a category of lawsuits that amicus curiae, Michigan Association for Justice, aptly describes as 'spectral': cases assigned a docket number and litigated in the courts, but somehow never begun because the cases were a 'nullity.'" *Progress Michigan*, 506 Mich at 105 (MCCORMACK, C.J., concurring). "[T]these 'spectral cases' are not resolved on their underlying merits but, instead, on whether the plaintiff managed to navigate the complex set of tolling rules we have created." *Id.*

Response: As an initial matter, *Scarsella* has not complicated the tolling rules. As Chief Justice McCormack notes, "*Scarsella*'s rule is clear: when a plaintiff 'wholly omits' to file the affidavit of merit 'the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation.' *Scarsella*, 461 Mich at 553, 607 NW2d 711. This language leaves no room for interpretation or debate; under *Scarsella*, no attorney can omit filing the affidavit and expect a different result." *Progress Michigan*, 506 Mich at 104 (MCCORMACK, C.J., concurring).

Beyond this initial observation, there are certainly other categories of defects relating to the commencement of an action that render the complaint a nullity despite having been clerically accepted on the Court's docket. For example, in *Rowland v Washtenaw County Road Comm'n*, 477 Mich 197, 223; 731 NW2d 41 (2007), this Court remanded the case to the trial court for dismissal of the complaint because the plaintiff failed to comply with a statutory provision requiring her to give the government notice of her injuries sustained due to a defective highway within 120 days of the occurrence. As another example, in *McCahan v Brennan*, 492 Mich 730, 751-752; 822 NW2d 747 (2012), this Court affirmed summary disposition in favor of the defendant

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university where the plaintiff failed to comply with the plain language of a statute requiring the filing of notice with the court of claims within six months of her injury. In another case, dismissal was required because the action was filed before the mandatory medical malpractice notice period expired. See *Driver v Naini*, 490 Mich 239, 256; 802 NW2d 311 (2011) ("when a plaintiff fails to strictly comply with the notice waiting period under MCL 600.2912b, his or her prematurely filed complaint fails to commence an action that tolls the statute of limitations"). The dismissal of docketed complaints for failure to comply with a statutory requirement is not unique to affidavit of merit cases and does not undermine the rationale of *Scarsella*.

CONCLUSION AND RELIEF REQUESTED

To summarize, *Scarsella* was correctly decided and should not be overruled. *Scarsella*'s holding that a medical malpractice complaint filed without an affidavit of merit does not commence the action and does not toll the statute of limitations effectuates the Legislature's intent to make the filing of an affidavit of merit with the complaint mandatory. MCL 600.2912d specifies two exceptions to this mandate. Allowing a plaintiff to commence a medical malpractice action without an affidavit of merit nullifies the mandatory language of MCL 600.2912d and the only exceptions intended by the Legislature. There is no reason to overrule *Scarsella*.

For these reasons, as well as those expressed by Defendants-Appellees and Amicus Curiae MDTC, Amici Curiae Michigan State Medical Society and the American Medical Association respectfully request that this Court uphold *Scarsella* as correctly decided.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

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Dated: April 29, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2022, I electronically filed the foregoing Amici Curiae Brief with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/ Cynthia J. Villeneuve
Cynthia J. Villeneuve

Exhibit A

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2008 WL 2751233
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

In the Matter of Skyler Leroy McBRIDE, Alexander Garand McBride, and Sawyer Dale McBride, Minors.
Department of Human Services,
Petitioner-Appellee,
v.
Ronald D. McBride, Jr.,
Respondent-Appellant,
and
Susan McBride, Respondent.
In the Matter of Skyler Leroy McBride, Alexander Garand McBride, and Sawyer Dale McBride, Minors.
Department of Human Services,
Petitioner-Appellee,
v.
Susan McBride, Respondent-Appellant,
and
Ronald D. McBride, Jr., Respondent.

Docket Nos. 282062, 282243.
|
July 15, 2008.

Bay Circuit Court, Family Division; LC No. 06-009381-NA.

Before: GLEICHER, P.J., and FITZGERALD and HOEKSTRA, JJ.

Opinion

PER CURIAM.

***1** In Docket No. 282062, respondent-father appeals as of right the order terminating his parental rights to the three minor children[1] pursuant to MCL 712A.19b(3)(g) and (h). In Docket No. 282243, respondent-mother appeals as of right the same order terminating her parental rights to the children pursuant to MCL 712A. 19b(3)(c)(i), (g), and (j). Because the trial court's error in finding that respondent-father had waived his right to counsel was harmless and because the trial court did not clearly err in terminating respondents' parental rights, we affirm.

I. Docket No. 282062

Respondent-father was incarcerated in 2004 after being convicted of first- and second-degree criminal sexual conduct against a minor.[2] His earliest possible release date from prison is June 30, 2015, at which time the youngest of the three minor children will be 17 years of age. Based on these facts, the trial court terminated respondent-father's parental rights. Respondent-father claims on appeal that because he was unfairly denied his right to counsel, the trial court erred in terminating his parental rights. We disagree.

To terminate parental rights, a trial court must find clear and convincing evidence of at least one statutory ground listed in MCL 712A. 19b. *In re McIntyre,* 192 Mich.App 47, 50; 480 NW2d 293 (1991). "Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo Minors,* 462 Mich. 341, 354; 612 NW2d 407 (2000); see also MCL 712A. 19b(5). This Court reviews for clear error a trial court's decision to terminate parental rights. *In re Powers Minors,* 244 Mich.App 111, 117; 624 NW2d 472 (2000). A finding is clearly erroneous if the Court is left with a definite and firm conviction that a mistake has been made. *Id.* at 117-118.

As already stated, respondent-father was incarcerated at the time of the termination hearing. He had been imprisoned since 2004 for the sexual assault of a minor, and he would remain in prison at least until 2015, at which time the youngest minor child would be 17 years of age. Under these circumstances, the trial court did not clearly err in finding clear and convincing evidence to terminate respondent-father's parental rights under MCL 712A.19b(3)(g) or (h) or in finding that the termination was in the best interests of the minor children.[3]

We are cognizant of respondent-father's argument that the trial court erred in denying his request for a court-appointed attorney at the termination hearing. At the

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start of the termination hearing, respondent-father requested that counsel be appointed for him. The trial court denied the request, holding that because respondent-father had received notices of the hearings that informed him of his right to counsel, and because he had not requested counsel until the start of the termination hearing, respondent-father had waived his right to counsel.

***2** The constitutional guarantees of due process and equal protection extend the right to counsel to respondents in termination proceedings. *In re Powers Minors, supra* at 121. Although a respondent in a child protection proceeding may waive his right to counsel, MCL 712A.17c(6); MCR 3.915(B)(1)(c), we conclude that a respondent does not waive his right to counsel by failing to request a court-appointed attorney before his first court appearance. At a respondent's first court appearance in a child protection proceeding, the trial court shall inform him of his right to a court-appointed attorney if he is financially unable to retain an attorney. MCL 712A.17c(4)(b); MCR 3.915(B)(1)(a)(i). In addition, the trial court shall inform the respondent that if he is not represented by an attorney, he may request a court-appointed attorney at any later hearing. MCL 712A.17c(4)(c); MCR 3.915(B)(1)(a)(ii). To hold that a respondent waives his right to counsel by failing to request a court-appointed attorney before his first court appearance is inconsistent with the plain language of MCL 712A. 17c(4) and MCR 3.915(B)(1)(a). See also *In re Hall,* 188 Mich.App 217, 222; 469 NW2d 56 (1991) (indicating that even if a respondent waives his right to counsel by failing to appear at various hearings, the respondent may reassert the right at a later time). The trial court erred in finding that respondent-father had waived his right to counsel.

However, reversal of the trial court's order terminating respondent-father's parental rights is not required. The erroneous deprivation of counsel at child protective proceedings can be subject to a harmless error analysis. *Id.* at 222-223. Although respondent-father was deprived of his right to counsel at a termination hearing as opposed to a dispositional review hearing as was the respondent in *Hall, id; In re Powers Minors, supra* at 123, we nonetheless conclude the trial court's error was harmless. It was undisputed that, because of his incarceration, respondent-father had not provided for the minor children's care or custody in three years and would not be able to provide for them for almost another eight years, by which time the two oldest children would have reached the age of majority and the youngest child would be 17 years of age. Based on these facts, we are convinced that even if respondent-father had been represented by counsel at the termination hearing, counsel could have provided no defense to these indisputable facts and, therefore, the trial court would have terminated respondent-father's parental rights. Accordingly, we affirm the order terminating respondent-father's parental rights to the minor children.

II. Docket No. 282243

With respect to respondent-mother, the trial court found sufficient evidence to terminate her parental rights stemming from her protracted abuse of prescription medications. When respondent-mother was overmedicated, the children were forced to fend for themselves. In fact, respondent-mother admitted that she was unable to provide proper parenting while she was overmedicated. Throughout the yearlong child protection proceeding, respondent-mother completed inpatient and outpatient substance abuse treatment programs and progressed to the point where overnight visitations were allowed. However, at these overnight visitations, she appeared to be under the influence of drugs, and the oldest child discovered a bottle of prescription medication on her bed stand, thus causing visitations to be scaled back to supervised at the Department of Human Services. It was not until the July 30, 2007 permanency planning hearing (where the permanency goal was changed to termination) that respondent-mother recognized her addiction problem and realized the need to stop use of all narcotic medications. Although her behavior improved after that hearing date and she claimed to be successfully weaned from all narcotic medications by early August 2007, she appeared groggy at a September 24, 2007 family therapy session. Testimony from respondent-mother's therapist described an 18-month therapy program recently entered into by respondent-mother, and the children and family therapist said it would take longer than six months before reunification would be possible. Although respondent-mother's substance abuse therapist said respondent-mother was in the middle phase of recovery, she also testified that respondent-mother had only recently acknowledged her substance abuse. Given this evidence, along with the ages of the minor children, the trial court did not clearly err in finding sufficient evidence to terminate respondent-mother's parental rights under MCL 712A.19b(3)(g). Because only one statutory ground needs to be proven to terminate parental rights, *In re Powers Minors, supra* at 118, we need not address whether the trial court erred in finding sufficient evidence to terminate respondent-mother's parental rights under MCL 712A.19b(3)(c)(ii) or (j).

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***3** The trial court also did not clearly err in its best interests determination in light of the persuasive testimony of the damage inflicted upon the minor children by respondent-mother's addiction. Although it was clear the children loved respondent-mother and she loved them, it was also clear that the children's psyches were injured with every setback in respondent-mother's treatment. The children were older, tired of having their hopes raised and then dashed, and were well practiced in living without a mother figure. We affirm the order terminating respondent-mother's parental rights to the three minor children.

Affirmed.

GLEICHER, J. (concurring in part and dissenting in part).

I concur with the majority's determination that the trial court properly terminated respondent-mother's parental rights. I also agree that the trial court erred by finding that respondent-father waived his right to counsel. However, I respectfully disagree that the deprivation of respondent-father's right to counsel constitutes harmless error.

I. Background Facts and Proceedings

On September 14, 2006, the Department of Human Services (DHS) filed a petition seeking circuit court jurisdiction of the three involved minor children. The petition alleged that respondent-father was incarcerated after his conviction of first-degree criminal sexual conduct, with an earliest release date of June 30, 2015.

A referee conducted a preliminary hearing on the day the petition was filed. Although respondent-mother was incarcerated in the Bay County Jail at the time of the preliminary hearing, she appeared at the hearing with appointed counsel. The prosecutor advised the referee that petitioner had not provided respondent-father with notice of the child protective proceedings. Neither the referee nor the prosecutor articulated a specific plan to include respondent-father in future hearings, to determine his interest in the proceedings, or to appoint counsel for him. The referee signed an order authorizing the petition and placing the children in foster care, and scheduled a September 29, 2006 pretrial hearing. The prosecutor mailed a copy of the referee's September 14, 2006 order and notice of the September 29, 2006 hearing to respondent-father's address at the Carson City Correctional Facility.

On September 18, 2006, petitioner sent respondent-father a copy of the petition by registered mail. The post office delivered it to the Carson City Correctional Facility mailroom, where someone at the prison acknowledged its receipt. Petitioner filed a proof of service with the trial court, but did not file a pleading or motion stating that the Michigan Court Rules required a telephonic hearing that included respondent-father.

On September 29, 2006, the trial court conducted an adjudication hearing. Respondent-father did not attend by telephone, and was not represented by counsel. At the conclusion of the hearing, Kelly McBride, respondent-father's sister, asked the court whether respondent-father could continue visiting with his children at the prison. The record reveals the following exchange:

> ***4** *The Court:* Well, have they been regularly going to the prison to visit him?
>
> *Kelly McBride:* Well, when they get a ride up there, yes, they do. The[y] go and see 'im.
>
> *The Court:* I'm not requiring that and I'm not permitting that at this point. All right.
>
> Once we make some progress, we'll see what the-what the situation should be, but as-as of today, I'm certainly not gonna require foster parents to transport kids to a prison to visit their dad, so-
>
> *Kelly McBride:* Even their grandparents can't-
>
> *The Court:* No.
>
> *Kelly McBride:* Okay.
>
> *The Court:* And we'll determine-You know, we can talk about that more if that's an issue and the children are highly bonded to their father and they've been up there frequently. You need to let D.H.S. know that because if there's some emotional harm that comes to them from not seeing him, that's an issue I'd consider.
>
> But if it's something where-
>
> *The Prosecutor:* We can address that on November 6th-

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* * *

> *The Court:*-we'll address it at the hearing. Which is just a month away anyway, so, okay.
>
> All right. Thank you, everyone. We'll sign an adjudication order. We'll see you back here November 6 at 2:30.

Respondent-father did not telephonically attend the dispositional review hearing conducted on November 6, 2006, and once again did not have counsel. The trial court observed that a proof of service reflected service of notice of the hearing on respondent-father in prison, "but at this point because of the fact that he's going to be in for many more years, we don't need to bring him in-um-for the hearings." Later in the hearing, the trial court noted that visitation with respondent-father had been "suspended ... because he is not available due to his imprisonment."

Respondent-father did not telephonically attend the dispositional review hearings conducted on February 7, 2007, March 26, 2007, May 7, 2007, or the July 30, 2007 permanency planning hearing. Respondent-father also did not have counsel for any of those proceedings. On August 27, 2007, the prosecutor filed a petition seeking termination of both respondents' parental rights, and arranged for personal service of a copy of the petition and notice of the hearing on respondent-father. On September 13, 2007, the prosecutor filed a "motion for order to allow incarcerated party to participate in a telephonic proceeding." The trial court granted the motion and sent a copy of its order to the warden of the Carson City Correctional Facility.

Respondent-father appeared telephonically at the October 10, 2007 termination hearing, and immediately requested appointed counsel. The following exchange occurred:

> *The Court:* Well, it's a little late to appoint counsel at this date. Um, as far as I'm concerned, you know, we've got the proofs ready to go today. And you-if-you've been notified prior that if you wanted an attorney to represent you, you should have notified the court before then.
>
> ***5** Um, I will permit you to be present by telephone, if you wish to be present. And I'll allow you to testify, if you wish to testify. But I don't think it's appropriate when this case is ten-well, it's over a year old, to appoint counsel on the termination date when we haven't had any requests from you or contact from you um requesting that-that right previously. In fact, the only reason we've got you here by telephone today is because the prosecutor's secretary thought that you should be present and set it up.
>
> So, um, your position is that you are opposed to the termination of your parental rights?
>
> *Respondent-Father:* Yes, your Honor.

The trial court advised respondent-father that he could listen to the proceedings and question the witnesses, although the court added that it "may have to cut you off at some point" for the testimony of another witness appearing telephonically.

At the conclusion of the hearing, the trial court stated that it would take its decision "under advisement" and render a bench or written opinion within 28 days. Respondent-father asked the court if he could obtain a transcript of the hearing, and the court replied,

> [Y]ou would have to pay for the transcripts, unless I do-well, he would have to pay for the transcripts, wouldn't he, at this point, because you don't have court appointed counsel.
>
> If ... the court does a termination, you're ... entitled to receive court appointed attorney for an appeal. And at which case, your attorney would receive a transcript at that time.

In its November 7, 2007 written opinion, the trial court invoked MCL 712A.19b(3)(g) and (h) as grounds for terminating respondent-father's parental rights. Subsection (h) allows a court to terminate parental rights if

> [t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

II. Respondent-Father's Right to Appointed Counsel

The underpinnings of a respondent's right to appointed counsel in parental rights termination proceedings are statutory and constitutional. Our Legislature mandated the appointment of counsel for indigent parents in MCL 712A. 17c(5):

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> If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court *shall* appoint an attorney to represent the respondent. (Emphasis supplied).

In MCR 3.915(B)(1)(b), our Supreme Court reiterated the statutory right to appointed counsel. The court rule requires a trial court to appoint counsel in child protective proceedings if "the respondent requests appointment of an attorney," and the court determines that the respondent is "financially unable to retain an attorney." Notably, neither the Legislature nor the Supreme Court created any exceptions applicable to incarcerated prisoners, despite the existence of a statutory ground favoring termination of parental rights when a respondent is serving a prison sentence of more than two years. MCL 712A.19b(3)(h). Therefore, despite respondent-father's status as a prisoner, he had a right to representation during the child protective proceedings, as well as a right to appointed counsel if he lacked the resources to retain a lawyer.

***6** Furthermore, the Michigan Court Rules provide a specific mechanism for implementing a prisoner's right to counsel in child protective proceedings. MCR 2.004 applies to "actions involving ... the termination of parental rights," during which a party remains incarcerated under the jurisdiction of the Department of Corrections. The rule provides, in relevant part,

> (B) The party seeking an order regarding a minor child shall
>
> * * *
>
> (2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and
>
> (3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic hearing is required by this rule.
>
> (C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be served by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides.

This court rule establishes a system of dual responsibility for protecting a prisoner's due process right to counsel in child protective proceedings. The prosecutor must serve the prisoner with the petition, and must then file with the court a proof of service specifically stating in the case caption "that a telephonic hearing is required" by MCR 2.004. After the prosecutor accomplishes these tasks, the burden shifts to the trial court to issue an order permitting the prisoner to participate by telephone "in a hearing or conference, including a friend of the court adjudicative hearing or meeting."

The court rules also include an explicit explanation of the purpose of the prisoner's participation by telephone:

> (E) The purpose of the telephone call described in this rule is to determine
>
> (1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,
>
> (2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,
>
> (3) whether the incarcerated party is capable of self-representation, if that is the party's choice,
>
> (4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls, and
> ***7** (5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate. [MCR 2.004.]

Finally, MCR 2.004 establishes that violations of its procedures render subsequent proceedings invalid:

> (F) *A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule.* This provision shall not apply if the incarcerated party actually does participate in a telephone call, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child. [Emphasis supplied.]

The court rules and MCL 712A. 17c(5) must be

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interpreted in pari materia because these provisions share a common purpose and intent: to ensure that incarcerated, indigent parents are provided counsel and an opportunity to meaningfully participate in child protective proceedings affecting their parental rights. See *People v. Tolewitzke,* 332 Mich. 455, 457-458; 52 NW2d 184 (1952) (observing that relevant statutory and court rule provisions governing criminal procedure should be considered together). Additionally, these provisions plainly reflect harmonious conclusions by our Legislature and Supreme Court that the presence of counsel is necessary to ensure an accurate and just result.

In *Santosky v. Kramer,* 455 U.S. 745, 753; 102 S Ct 1388; 71 L.Ed.2d 599 (1982), the United States Supreme Court observed that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." This Court has explicitly recognized that the United States Constitution provides a right to counsel in parental rights termination cases. In *In re Powers,* 244 Mich.App 111, 121; 624 NW2d 472 (2000), this Court observed, "The constitutional concepts of due process and equal protection also grant respondents in termination proceedings the right to counsel." This Court has also recognized in another case arising from a child protective proceeding that "[t]he right to due process protects individuals who are allegedly incompetent and criminals ultimately convicted of the most heinous crimes." *In re AMB,* 248 Mich.App 144, 211; 640 NW2d 262 (2001). In *In re AMB,* the child's mother, KB, was possibly mentally retarded or had some form of developmental delay, and the child's putative father, JB, "was also KB's father." *Id.* at 150. This Court noted that "it is possible to infer that JB raped his mentally disabled daughter, KB, leading to [the baby's] incestuous conception." *Id.* Nevertheless, this Court held that both KB and JB "were entitled to procedural safeguards in this child protective proceeding," which included constitutionally protected rights to counsel and meaningful participation. *Id.*

II. Analysis

***8** Application of MCL 712A.17c(5), MCR 3.915(B)(1)(b) and MCR 2.004 to the facts of this case compels the conclusion that the trial court wrongfully denied respondent-father his rights to counsel, appointed counsel, and to participate meaningfully in the child protective proceedings. In my view, the "string of errors" that deprived respondent-father of these substantial rights "cast doubt on the fundamental fairness of the proceedings." *In re AMB, supra* at 235. For the same reasons that harmless error principles do not apply in criminal cases involving structural error, I respectfully disagree that harmless error analysis should be utilized here.

A. Fundamental Rights Denied

In September 2006, petitioner properly served respondent-father with the petition and filed a proof of service with the trial court. The trial court then ignored MCR 2.004(C), which required it to "issue an order requesting the department ... to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting." The trial court's failure to comply with MCR 2.004 deprived respondent-father of his right to *any* counsel, retained or appointed. One of the stated purposes of the court rule is "to assure that the incarcerated party's access to the court is protected." By deliberately failing to involve respondent-father at the outset of the proceedings, the trial court violated his right to have an attorney intercede on his behalf, or to communicate his ideas and opinions regarding his children's best interests.

The prosecutor shares some responsibility for the trial court's failure to follow MCR 2.004. The court rule obligates the prosecutor or petitioner to provide in the caption of the petition a statement that "a telephonic hearing is required." MCR 2.004(B)(3). According to my review of the record, no such statement ever appeared in petitioner's pleadings. The court rule explicitly sets forth that "the purpose of the telephone call" is to determine "whether counsel is necessary" and to "assure that the incarcerated party's access to the court is protected." MCR 2.004(E)(2). The inclusion of this provision within the court rule clearly and unambiguously signifies that trial courts conducting child protective proceedings must verbally afford an incarcerated prisoner the right to (1) counsel, (2) appointed counsel, and (3) telephonic attendance of the child protective proceeding, regardless whether the prisoner elects to be represented by counsel.

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By failing to follow MCR 2.004, the trial court automatically violated MCL 712A. 17c(5), the statute mandating the appointment of counsel when a respondent desires an attorney and lacks the resources to retain one, and MCR 3.915(B)(1)(b), which also creates an undeniable right to counsel when requested by indigent respondents in termination cases. By ignoring all of the pertinent mandates, the trial court deprived respondent-father of his right to participate in the proceedings involving his children until it was far too late for his participation to have any meaning.

B. Harmless Error

***9** Although I acknowledge that MCL 712A.19b(3)(h) creates a virtually irrebuttable presumption in favor of termination of respondent-father's parental rights, in my view the "commanding" liberty interests at stake here,[1] in conjunction with the statutory and court rule mandates for appointed counsel, are entirely stripped of meaning if this Court employs a harmless error analysis. I believe that the complete denial of counsel in a child protective proceeding should presumptively result in prejudice, regardless of a respondent's incarceration.

In the criminal law context, "[t]here are ... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic,* 466 U.S. 648, 658; 104 S Ct 2039; 80 L.Ed.2d 657 (1984). The single "[m]ost obvious" such circumstance, is, "of course, ... the complete denial of counsel." *Id.* at 659. In my view, "structural defects in the constitution of the trial mechanism," whether they occur in a criminal or a quasi-criminal setting such as this, "defy analysis by 'harmless error' standards." *Arizona v. Fulminante,* 499 U.S. 279, 309; 111 S Ct 1246; 113 L.Ed.2d 302 (1991). As the United States Supreme Court pointed out in *Fulminante,* errors occurring during the presentation of a case to a jury may be quantitatively assessed in the context of other evidence, but certain constitutional deprivations, including the right to counsel, "affect[ ] the framework within which the trial proceeds." *Id.* at 307, 309-310. In the absence of the "basic protections" afforded by constitutional provisions such as the right to counsel, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 310 (internal quotation omitted); see also *Penson v. Ohio,* 488 U.S. 75, 88; 109 S Ct 346; 102 L.Ed.2d 300 (1988), explaining that "actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice," and that "a pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can never be considered harmless error."

Although the instant case does not involve criminal punishment, it unquestionably implicates fundamental rights. *MLB v. SLJ,* 519 U.S. 102, 119; 117 S Ct 555; 136 L.Ed.2d 473 (1996). In *MLB,* the United States Supreme Court held that Mississippi could not constitutionally require indigent parents appealing the termination of their parental rights to pay record preparation fees. *Id.* at 127-128. In reaching this decision, the Supreme Court majority substantially relied on *Griffin v. Illinois,* 351 U.S. 12; 76 S Ct 585; 100 L.Ed.2d 891 (1956), which struck down a rule that conditioned appeals of criminal convictions on an indigent defendant's procurement of trial transcripts that he could not afford. *MLB, supra* at 110. Although the *MLB* dissenters argued that *Griffin* should not be extended to civil cases involving the termination of parental rights, the *MLB* majority rejected that argument for reasons that resound with equal energy here:

> ***10** [W]e have repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody. To recapitulate, termination decrees work a unique kind of deprivation. In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State to destroy permanently all legal recognition of the parental relationship. Our *Lassiter* and *Santosky* decisions, recognizing that parental termination decrees are among the most severe forms of state action have not served as precedent in other areas. We are therefore satisfied that the label "civil" should not entice us to leave undisturbed the Mississippi courts' disposition of this case. [*Id* . at 127-128 (internal quotation omitted.]

Further, the United States Supreme Court has never utilized harmless error analysis in the context of a deprivation of the right to counsel derived from the Fourteenth Amendment. In *Douglas v. California,* 372 U.S. 353, 355; 83 S Ct 814; 9 L Ed 811 (1963), the Supreme Court grounded an indigent appellant's rights to appointed counsel in the Fourteenth Amendment's Equal Protection Clause. In *Anders v. California,* 386 U.S. 738; 87 S Ct 1396; 18 L.Ed.2d 493 (1967), the Supreme Court held that a court could not deny appellate representation

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to a criminal defendant based on the appointed counsel's representation that an appeal lacked merit. Twenty-five years after deciding *Douglas,* the Supreme Court in *Penson* determined that application of harmless error review "would leave indigent criminal appellants without any of the protections afforded by *Anders." Penson, supra* at 86. The *Penson* Court rejected the notion that an appellate court's independent review of the record could substitute for the assistance of counsel because that result "would render meaningless the protections afforded by *Douglas* and *Anders." Id.*

In my view, the majority's application of harmless error review in this case renders meaningless Michigan's statutory and court rule imperatives that the trial court appoint counsel for parents embroiled in termination proceedings. Although respondent-father may be a despicable man inevitably destined to lose his parental rights, I believe that new proceedings must be initiated because the trial court denied him even the barest semblance of due process, and in doing so created a result that qualifies as inherently contaminated and fundamentally unfair.[2]

The appointment of counsel in termination proceedings is a procedural norm in this state. Counsel is required in every case in which the state seeks to terminate a parent's rights, despite that in a substantial number of termination proceedings reaching the appellate courts, the facts overwhelmingly support the petitioner. As appellate judges know, there are few "close calls" among the termination cases appealed. Although the results are often predictable, Michigan law requires the appointment of counsel in *all* parental rights termination cases, even those involving incarcerated prisoners, for multiple important reasons.

***11** First, it is beyond debate that even incarcerated parents enjoy a liberty interest in the care and custody of their children. "The fundamental liberty interest of parents with regard to their children permeates Michigan laws." *Ryan v. Ryan,* 260 Mich.App 315, 333; 677 NW2d 899 (2004). Our law recognizes that counsel is a necessity, not a luxury, when the state attempts to permanently deprive a parent of any aspect of this critically important liberty interest. Second, by protecting the right to counsel in termination cases with the double safeguards of both a statute and court rule, our law also ensures that every parent, even the most unsavory, receives a fair trial with inherent integrity.

In my view, an indigent Michigan parent's right to appointed counsel when facing termination of his or her parental rights is best protected by uniform and predictable enforcement of that right, which may be achieved only if trial courts adhere to statutory and court rule mandates. I would hold that as in criminal cases, the complete denial of counsel during a critical stage of the proceedings-the adjudication hearing and termination trial-requires reversal. This is, after all, the remedy prescribed in MCR 2.004(F):

> A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule.

This case is readily distinguishable from those involving an isolated failure of appointed counsel to attend a dispositional hearing or another similar, but limited, event in the course of the adjudicative process. Rather, the remedy set forth in MCR 2.004(F) should be reserved for cases such as this, in which the trial court failed to recognize respondent-father's right at the outset of the proceedings, failed to ever ascertain respondent-father's interest in and need for appointed counsel, and refused to appoint counsel during the termination hearing itself.[3]

I recognize that the remedy or result I propose probably has a foregone conclusion, and will also occasion some delay in placing the involved children for adoption. However, I believe this result compulsory. The trial court denied respondent-father the most rudimentary form of due process. It did so in a case that forever severed respondent-father's substantial and compelling liberty interest in future association with his children. In the criminal law arena, trial court errors of this magnitude yield automatic reversal, despite the risk that an unquestionably guilty defendant may go free. Here, no realistic risk exists that respondent-father will ever reunite with his children. Nevertheless, because the trial court's decision to terminate respondent-father's parental rights lacks any inherent integrity, in my view it should not stand affirmed.

All Citations

Not Reported in N.W.2d, 2008 WL 2751233

Footnotes

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1 At the time the order was entered, the three minor children were 15, 11, and 9 years of age.

2 The victim was not one of the parties' three minor children.

3 The trial court went beyond the best interest inquiry required by statute. *In re Trejo Minors, supra* at 357. The trial court was only required to decide whether termination was clearly not in the child's best interest. *Id.*

1 In *Lassiter v. Dep't of Social Services of Durham, North Carolina,* 452 U.S. 18, 27; 101 S Ct 2153; 68 L.Ed.2d 640 (1981), the United States Supreme Court recognized that "[a] parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is ... a commanding one."

2 The trial court assumed from the outset that respondent-father's presence was unnecessary "because of the fact that he's going to be in [prison] for many more years." This assumption ignored the potentially positive role that respondent-father or his counsel could nevertheless play in planning for his children or encouraging respondent-mother's compliance with the case service plan. Further, at the adjudication hearing the trial court acknowledged that it would "consider" whether the children would suffer "some emotional harm ... from not seeing" respondent-father, yet never did so due to its failure to include respondent-father as a participant in the proceedings.

3 I view the trial court's errors as egregious. At the termination hearing, the trial court advised respondent-father that "the only reason we've got you here by telephone today is because the prosecutor's secretary thought that you should be present and set it up." The majority's decision affirms that the trial court's profound and readily professed ignorance of the rules remains uncorrected.

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