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STATE OF MICHIGAN
IN THE SUPREME COURT

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiff-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-Appellants,

Supreme Court No. 163216

Court of Appeals No. 350767

Ingham County Circuit Court
Case No. 19-000266-NH

Brief of *Amicus Curiae*
Insurance Alliance of Michigan

Filed under AO 2019-6

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Statement of Interest

Insurance Alliance of Michigan is the principal state government affairs and public information association consisting of insurers, groups, and related organizations operating in Michigan. Its members include property/casualty insurers representing approximately 94% of the Michigan auto insurance market, 90% of the Michigan home insurance market, and 50% of the Michigan commercial insurance market. Its purpose is to serve the industry and consumers by providing educational, media, legislative, and public information on significant issues affecting the insurance business in this state.[1]

[1] None of the parties or their counsel contributed monetarily or to the authorship of this brief. The Insurance Alliance of Michigan made the only monetary contribution to preparing this brief.

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Statement of Question Presented

> Michigan's affidavit-of-merit statute states that medical-malpractice plaintiffs "shall file with the complaint an affidavit of merit" from an expert. The Ottgens didn't. In *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), this Court held that a medical-malpractice complaint filed without an affidavit of merit doesn't toll limitation periods. While the Legislature has amended the tolling statute to abrogate other decisions, it hasn't touched *Scarsell*'s holding. Should this Court nevertheless overrule *Scarsella*?

The trial court didn't directly answer this question; it attempted to distinguish *Scarsella*.

The Court of Appeals didn't directly answer this question; it applied *Scarsella*.

Plaintiff-appellee answers, "yes."

Defendant-appellant answers, "no."

Amicus Curiae The Insurance Alliance of Michigan answers, "no."

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Introduction

What is the consequence for not filing an affidavit of merit with a medical-malpractice complaint—it's dismissal, but is it with or without tolling? In *Scarsella v Pollack*, this Court held that it was the latter. This Court is considering overruling that precedent. The issue is legislative intent.

First, the obvious. The affidavit-of-merit statute, MCL 600.2912d, doesn't use the word tolling. And the tolling statute, MCL 600.5856, doesn't mention affidavits of merit. A 2004 amendment (four years after *Scarsella*) gives the latter point heightened importance. The Legislature amended the tolling statute and abrogated two of this Court's opinions. *Scarsella* wasn't one of them. That is a loud expression of legislative intent. This Court shouldn't do what the Legislature chose not to do.

Second, overruling *Scarsella* would effectively negate the statute. The affidavit requirement deters frivolous claims by moving a dispositive issue (expert support) to the start of the case. A dismissal without prejudice but with tolling would allow a plaintiff to refile a complaint without an affidavit of merit and not lose a single day in the limitation period. Defendants would face either a stream of refiled complaints without affidavits or acquiescing to litigate claims lacking expert support through discovery. The statute would be negated without *Scarsella*.

Third, the unique facts of this case—an attorney errantly omits the affidavit—should not be the basis for overturning precedent and deviating from the plain language of the statute. Outside of criminal and child-protective proceedings that implicate due-process considerations, an attorney's error is not a basis for relief. There is no statutory basis for distinguishing an errant omission from a purposeful omission. And, in this civil context, plaintiffs have a remedy—a legal-malpractice claim.

This Court's focus is on jurisprudential significance. Consider the more common case that the affidavit requirement deters—a claim without expert support. Before the affidavit requirement, those doomed claims forced medical providers to shoulder unnecessary defense costs, which

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translated to more expensive healthcare. Dismissing those claims without prejudice but with tolling doesn't deter them. *Scarsella* does.

Because the Legislature chose not to abrogate *Scarsella* and overruling it would make the affidavit requirement meaningless, this Court should affirm, or deny leave as improvidently granted.

Statement of Facts

IAM accepts the facts stated in the Court of Appeals' opinion, which the parties don't appear to dispute in any material fashion.

Discussion

A. Michigan's affidavit-of-merit statute

Michigan's affidavit-of-merit requirement is part of tort-reform measures first enacted in 1986 and then revamped in 1993. 1986 PA 178; 1993 PA 78. The affidavit requirement reduces healthcare costs. It deters frivolous medical-malpractice actions, which reduces defense costs that translate to healthcare costs. See *King v Reed*, 278 Mich App 504, 515-516; 751 NW2d 525 (2008); *Zdrojewski v Murphy*, 254 Mich App 50, 80-81; 657 NW2d 721 (2002), citing House Legislative Analysis, SB 270 and HB 4033, 4403 and 4404, April 20, 1993, pp 1-2.

The affidavit requirement accomplishes its purpose by moving a dispositive issue to the entry point of medical-malpractice litigation. The vast majority of medical-malpractice cases require expert standard-of-care testimony. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). And they all require expert causation testimony. *Estate of Taylor v University Physician Group*, 329 Mich App 268, 276; 941 NW2d 672 (2019). So medical-

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malpractice plaintiffs must produce expert support. If they don't, their claims fail.

Instead of forcing defendants to litigate unsupported claims through discovery, medical-malpractice plaintiffs must produce expert support to start the litigation:

> [T]his 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." *Barlett v North Ottawa Community Hosp*, 244 Mich App 685, 695; 625 NW2d 470 (2001). 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 the action is commenced. [*King*, 278 Mich App at 515-516.]

The affidavit-of-merit statute, MCL 600.2912d, establishes the requirement in plain terms. Its states that plaintiff "shall file with the complaint an affidavit of merit" signed by an expert witness:

> 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

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> an expert witness under section 2169. [MCL 600.2912d(1) (emphasis added).]

The Legislature anticipated that, for various reasons, some plaintiffs may need extra time. So it allowed courts to give a 28-day extension for good cause:

> 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).

The Ottgens agree that summary disposition is the appropriate remedy when a plaintiff doesn't file an affidavit of merit with the complaint. (Appellants' Brief on Appeal, p. 14). The dispute is whether a medical-malpractice complaint filed without the required affidavit of merit tolls the limitation period. It's an issue of legislative intent.

B. Principles of statutory interpretation

The fundamental principles of statutory interpretation are well known. First and foremost, a court's "task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). So statutory analysis "begin[s] by examining the most reliable evidence of that intent, the language of the statute itself." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

Courts must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley*, 460 Mich at 237, quoting *Baley v United States*, 516 US 137 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). The language "must be read and

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understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley*, 460 Mich at 237.

"[E]ffect should be given to every phrase, clause, and word in the statute." *Id.* "[C]ourts 'must … avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

The language of the relevant statutes is simple. The affidavit-of-merit statute requires medical-malpractice plaintiffs to file an expert's affidavit with the complaint. MCL 600.2912d(1). The tolling statute, MCL 600.5856, provides for tolling under three circumstances:

> 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.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

The affidavit-of-merit statute doesn't use the word tolling. And the tolling statute doesn't mention affidavits of merit. So neither statute

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directly says what happens when a plaintiff files a medical-malpractice complaint without the required affidavit of merit.

C. The Ottgens rely on the absence of a carve-out that no one suggests is necessary for another procedural requirement.

The Ottgens argue that tolling applies because there's no carve-out in the tolling statute for complaints filed without an affidavit of merit. (Appellants Brief on Appeal, p. 12). They point out that the same act that added the affidavit requirement also added a tolling provision related to another procedural requirement for medical-malpractice claims—notices of intent to sue. See MCL 600.2912b; MCL 600.5856(c). But that fact cuts against their argument.

The Legislature provided that compliance with the notice statute can toll the limitation period. MCL 600.5856(c). There's no dispute that a medical-malpractice complaint filed with an affidavit of merit tolls the limitation period. The Legislature did not provide that failure to serve a notice tolls the limitation period. There's no dispute that it wouldn't. Likewise, the Legislature did not provide that failure to file an affidavit of merit with the complaint tolls the limitation period. So it doesn't. *Scarsella* recognized that rule. The Ottgens don't explain why a carve-out is necessary to effectuate it.

D. A 2004 statutory amendment abrogated two tolling decisions but not *Scarsella*.

The Ottgens don't address the fact that the Legislature amended the tolling statute in 2004—four years after *Scaresella*. The 2004 amendments abrogated *two* of this Court's decisions. *Scarsella* wasn't one of them.

Defendants already addressed one of the cases that the 2004 amendments abrogated, *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002). (See Appellees Brief on Appeal, pp. 22-26). Because it involved another procedural requirement for medical-malpractice claims, the Legislature's decision to respond to *Roberts* while not responding to

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Scarsella speaks loudly of its intent. Its decision to abrogate another decision (still not *Scarsella*) amplifies the point.

The 2004 amendment abrogated *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003). In *Gladych*, the plaintiff filed a negligence claim one day before the three-year limitation period expired but he didn't serve or place the summons with an officer for service until after the limitation period expired. This Court held that tolling under MCL 600.5856 didn't start until the plaintiff served the complaint, so the claim was time barred. *Gladych*, 468 Mich at 607, overruling *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971).

The Legislature's 2004 amendment of MCL 600.5856 was passed less than a year after *Gladych*. It was a direct response to *Gladych*. See *Nichols v Moore*, 334 F Supp 2d 944, 950 (ED Mich 2004) ("This current text of § 5856 was made effective April 22, 2004, in direct response to the Michigan Supreme Court's decision in *Gladych*."); *Hall v Wayne Co Dept of Pub Servs*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2005 (Docket No. 252162); 2005 WL 1160594, *1 n. 1 ("*Gladych* was abrogated by 2004 PA 87, which amended MCL 600.5856 ….").

Again, the issue is legislative intent. Four years after *Scarsella*, the Legislature amended the tolling statute to abrogate two of this Court's decisions on tolling. "It is a well-established principle of statutory construction that the Legislature is presumed to act with knowledge of statutory interpretations by the Court of Appeals and this Court." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 506; 475 NW2d 704 (1991). The Legislature *chose* not to abrogate *Scarsella*.

This Court shouldn't repudiate the Legislature's decision to leave *Scarsella* in place. *Geering v King*, 320 Mich App 182, 191; 906 NW2d 214 (2017) ("When statutory provisions are construed by the court and the Legislature reenacts the statute, it is assumed that the Legislature acquiesced to the judicial interpretation." (citation omitted; cleaned up)); *Perez v Chrysler Corp*, 36 Mich App 9, 13–14; 193 NW2d 390 (1971) ("If the legislature disagreed with the interpretation given to that statute in *Peplinski*, they could have changed the language at that time. Since they

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did not elect to do so, we must assume that the legislature agrees with the interpretation given to the statute by the Supreme Court.").

E. Overruling *Scarsella* would negate the affidavit-of-merit requirement.

Defendants and other amicus have made the point that overruling *Scarsella* would make the provision for a 28-day extension in the affidavit-of-merit statute surplusage. MCL 600.2912d(2). It's a compelling point. After all, "courts 'must … avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *Johnson*, 492 Mich at 177, quoting *State Farm Fire & Cas*, 466 Mich at 146.

This Court should also consider whether overruling *Scarsella* leaves any aspect of the affidavit-of-merit statute operable. The statute deters frivolous claims by moving a dispositive issue to the start of the case—does the plaintiff have expert support? See *King*, 278 Mich App at 515-516; see also *Elher*, 499 Mich at 21 (medical-malpractice claims generally required expert standard of care testimony); *Estate of Taylor*, 329 Mich App at 276 (medical-malpractice claims require expert causation testimony).

Before the affidavit-of-merit statute, a plaintiff could file a medical-malpractice complaint and force a defendant to litigate through discovery without ever having expert support. The defendants were forced to shoulder the expense of litigating those doomed claims. And those expenses translated to higher healthcare costs. *Zdrojewski*, 254 Mich App at 80-81, citing House Legislative Analysis, SB 270 and HB 4033, 4403 and 4404, April 20, 1993, pp 1-2.

The affidavit-of-merit requirement makes expert support a threshold issue. *King*, 278 Mich App at 515-516. Failure to support a claim with expert testimony normally leads to summary disposition of the "with prejudice" variety. Dismissal without prejudice robs meaning from the affidavit requirement. So, while this Court evaluates *Scarsella*, it should also evaluate *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26; 594 NW2d 455 (1999), which held that "dismissal without prejudice would be the appropriate sanction for plaintiff's failure to comply with [the affidavit-of-

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merit statute]." *Id.* at 48. *Dorris* never explained *why* dismissal without prejudice was the remedy. Normally, a plaintiff's failure to provide expert support when it's required results in dismissal with prejudice. *Dorris*'s deviation from the norm deserves scrutiny.

If this Court sticks with dismissal without prejudice as the remedy, allowing a medical-malpractice complaint filed without an affidavit of merit to toll would render the affidavit requirement meaningless. Justice Viviano previously observed that "[n]o one has yet offered a convincing argument why it would be inconsistent to mandate the AOM filing in § 2912d(1) while at the same time permitting § 5856(1) to toll the running of the statutory limitations period." While defendants explained that searching for inconsistency is misfocused, (Appellee Brief on Appeal, p. 28), the answer to Justice Viviano's concern is, the affidavit-of-merit requirement loses all meaning with tolling. The plaintiff can refile the complaint without an affidavit and not lose a single day of the limitation period. See *Haksluoto v Mt Clemens Reg'l Med Ctr*, 500 Mich 304, 317-318; 901 NW2d 577 (2017). He forces repetitious litigation and unnecessary defense costs on the defendant. Defendants must choose between a stream of refiled complaints or acquiescing to litigate claims lacking expert support through discovery. In short, there would be no consequence to violating the affidavit-of-merit statute, making it surplusage. This Court must avoid that result. *Johnson*, 492 Mich at 177.

F. The unique facts of this case do not justify overruling *Scarsella*.

Scarsella's rule is easily applied. In fact, its holding only reached this Court for review through error. The Ottgens' attorney errantly omitted an affidavit when filing the complaint. And the trial court errantly tried to distinguish that type of omission from a purposeful one. But there is no statutory basis for that distinction. A complaint errantly filed without an affidavit of merit violates the affidavit-of-merit statute the same as a complaint purposefully filed without an affidavit of merit. MCL 600.2912d(1).

Equally important, an attorney's error is not a basis for relief in a civil proceeding. The ineffective assistance of counsel is a basis for relief in

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criminal, paternity, and child-protection proceedings. *Haller v Haller*, 168 Mich App 198, 199; 423 NW2d 617 (1988). But in those proceedings, the affected party has the right to counsel, which is the basis for protections against ineffective assistance of counsel. *Id*.

There is no right to counsel in a medical-malpractice case (or any other personal-injury case). So an attorney's error, like omitting an affidavit of merit when filing a complaint, isn't a basis for relief. *Limbach v Oakland Cnty Bd of Cnty Rd Comm'rs*, 226 Mich App 389, 393; 573 NW2d 336 (1997) ("While her counsel's tactical error prejudiced her rights, such conduct does not warrant relief from the order."). Rather, if the Ottgens' claim had merit, their remedy is a legal-malpractice claim. See *Estate of Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002).

Simply put, the unique facts of this case don't implicate a basis for relief from *Scarsella*'s rule and they don't merit overruling its straightforward application of the statutory text.

Conclusion

The issue in this case is legislative intent. And the Legislature's decision to leave *Scarsella* untouched while abrogating two other decisions is a loud legislative endorsement of *Scarsella*'s holding.

Scarsella's rule also isn't broken. It's easily applied and gives meaning to the affidavit-of-merit requirement. Plus, *Scarsella* isn't alone. See *Ortega v Bismarck*, 927 NW2d 872, 876 (ND, 2019); *Quinlan v Five-Town Health Alliance, Inc*, 207 Vt 503, 513-514; 192 A3d 390 (2018); *Wheble v Eighth Judicial Dist Ct of State ex rel Co of Clark*, 128 Nev 119, 123; 272 Ped 134 (2012); *Donjuan v McDermott*, 266 P3d 839, 843 (Utah 2011); *White v Tariq*, 299 SW3d 1, 5 (Mo, 2009) (recognizing that a claim, though dismissed without prejudice, was barred by the limitation period); *Koester v Ryan*, unpublished opinion of the United States District Court for the District of Delaware, issued Nov. 5, 2018 (Docket No. 17-144); 2018 WL 5795463, *3 n. 3 (applying Delaware law and holding that, "without a proper affidavit, a

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complaint sounding in medical negligence is insufficient and the statute of limitation will not be tolled.").

This case reached this Court through unique facts—an inadvertent omission. But, if the Ottgens' claim had merit, they have a remedy. See *Estate of Mitchell*, 249 Mich App at 676. So this Court shouldn't let the unique facts obscure the broader issue. It should consider the class of cases that the affidavit-of-merit statute addresses—frivolous claims for which the plaintiff doesn't produce expert support despite a 182-day notice period and the availability of a 28-day extension. The affidavit requirement, as applied in *Scarsella*, deters those claims, which is exactly what the statute is intended to do.

This Court should either affirm or vacate the order granting leave and then deny leave to appeal.

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Certificate of Compliance

I certify that the Brief of Amicus Curiae The Insurance Alliance of Michigan complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this brief. This brief uses a 12-point proportional font (Book Antiqua), and the word count for this brief is 3,097.

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