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STATE OF MICHIGAN
IN THE SUPREME COURT

CANDI OTTGEN and
PATRICK OTTGEN,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

Supreme Court No.: 163216
Court of Appeals No.: 350767
Ingham CC No.: 2019-266-NH

MICHIGAN ASSOCIATION FOR JUSTICE's *AMICUS CURIAE* BRIEF

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STATEMENT OF QUESTIONS PRESENTED

I. Whether *Scarsella v Pollack*[1] Should Be Reversed?

Plaintiffs-Appellants answer, "Yes."

Defendants-Appellees answer, "No."

The MCOA did not address this issue

Amicus Curiae MAJ answers, "Yes."

[1] *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 547 (2000).

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STATEMENT OF INTEREST

The mission of the Michigan Association for Justice ("MAJ") is

> to promote a fair and effective justice system. We aim to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in Michigan's courtrooms, even when taking on the most powerful interests.

In courtrooms across this State, MAJ is the voice of the injured and damaged, who often have no other public voice.

As members of Michigan's bar, and as officers of the court, we recognize our responsibility to help the Court develop the State's jurisprudence; it is our mission to assist the Court in reaching decisions that promote access to justice, where all voices are heard and represented.

The Supreme Court invited the Michigan Association for Justice to file a brief *amicus curiae* in its Order granting leave. This case involves the harsh consequence of dismissal where Plaintiffs, through administrative clerical error, failed to file an executed MCL 600.2912d Affidavit of Merit with their Complaint. The Court of Appeals concluded that such a clerical error is necessarily fatal, citing *Scarsella v Pollak*. The Court of Appeals' Opinion, and *Scarsella* itself, improperly reads requirements into MCL 600.2912d which do not textually exist to impose the harshest of penalties for mere clerical error. The Court of Appeals and *Scarsella* should be reversed.

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INTRODUCTION[2]

This Court granted oral argument on Plaintiffs-Appellants' Application for leave to address whether *Scarsella v Pollack* was correctly decided and whether Plaintiffs' Complaint, filed without an affidavit of merit due to clerical error, should have been dismissed without prejudice. MAJ submits that the Court of Appeals erroneously dismissed Plaintiff's viable medical malpractice claim with prejudice due to a technical deficiency caused by an administrative error. MAJ further submits that the Court of Appeals' strict adherence to *Scarsella* to dispositively (eliminate or eradicate) a properly pled and expert supported medical malpractice lawsuit demonstrates precisely how unjust *Scarsella* is, and why it should be overruled.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

MAJ accepts the following facts and description of proceedings to be true as set forth in the Court of Appeals' Opinion of May 20, 2021, and/or as substantiated by documents found in Plaintiffs-Appellants' Appendix.[3]

Plaintiff Candi Ottgen underwent surgery performed by Defendant Katranji on two dates, May 1, 2017, and July 23, 2017. *Ottgen* at 1. Plaintiffs submitted their MCL 600.2912b Notice of Intent on September 27, 2018.[4] *Id* at 5. An Affidavit of Merit

[2] Neither the parties nor their counsel contributed monetarily or to the authorship of this brief. No monetary contributions have been made by any party or entity in the preparation of this brief.
[3] *Ottgen v Katranji*, unpublished per curium opinion of the Court of Appeals, issued May 20, 2021 (Docket No. 350767).
[4] If Plaintiffs waited just 34 days before filing their Notice of Intent, MCL 600.5856(c) tolling of the statute of limitations would have applied and the case would have been dismissed without prejudice. This underscores the arbitrary nature of Opinion below, which punishes Plaintiffs for acting in a timely fashion to bring their claims.

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supporting Plaintiffs' allegations was obtained and signed on January 30, 2019. *Id* at 4. Plaintiffs filed their Complaint on April 11, 2019; it was unaccompanied by an Affidavit of Merit due to an administrative clerical error. *Id* at 2, 4. The Complaint was received by Defense Counsel no later than April 24, 2021, which is before the statute of limitations expired as to both surgical claims. P-AT App 89a, ¶15. The record below does not describe or include any communication between Counsel about the missing affidavit before the filing of a dispositive motion.

On May 9, 2019, Defendants moved for summary disposition, asserting a statute of limitations defense (MCR 2.116(C)(7)), relying on *Scarsella*. *Ottgen, supra,* at 2. Plaintiffs filed a First Amended Complaint on May 13, 2019, accompanied by the previously unfiled Affidavit of Merit, which had been obtained prior to suit being filed. *Id*. The trial court denied dispositive relief to Defendants because the Affidavit of Merit had been timely obtained, and the failure to file it with the Complaint was due to administrative error. *Id*. As well, "[t]he trial court reasoned the interest of justice should allow for the late filing of the affidavit of merit and that there was no undue delay, bad faith, or dilatory motive on the part of plaintiffs." *Id*.

The Court of Appeals reversed in part the trial court's order. The Court of Appeals, rigidly applying *Scarsella,* reasoned that because the Complaint was filed without an Affidavit of Merit, it was a nullity. The Court of Appeals dismissed the claim arising out of the first surgery with prejudice, and the claim arising out of her second without prejudice. This Court subsequently granted leave. Having reviewed the parties' briefing and the Court of Appeals' Opinion, MAJ submits the instant Brief *Amicus Curie*.

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STANDARD OF REVIEW

Scarsella involved questions of statutory interpretation. This Court reviews the interpretation and application of statutes *de novo*. *In re Ferranti*, 504 Mich 1, 14; 934 NW2d 610 (2019). While this Court generally adheres to principles of *stare decisis*, it will re-examine precedent where legitimate questions have been raised about the correctness of the decision. *Bezeau v Palace Sports & Entm't*, 487 Mich 455, 466; NW2d (2010), citing *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000).

LEGAL ARGUMENT

> There may be reasons *Scarsella* reached the correct result, and even if not, *stare decisis* might counsel retaining it. I do not, of course, decide those questions here. **But given its shaky legal foundation and the continuing dislocations in our law it has caused, I would reconsider that decision in an appropriate future case**.
> Viviano, J., concurring, in *Castro v Goulet*, 501 Mich 884, 890; 901 NW2d 614 (2017) [with emphasis added].

I. *Scarsella v Pollack* Should Be Reversed.

At the time of its issuance, *Scarsella* misapplied the underlying law upon which it relied. Since its issuance, *Scarsella* has been used as the basis to distort Michigan law to the unjust point illustrated by this case, where a timely filed and expert-supported case was dismissed due to clerical error. *Scarsella* should be reversed, and a new, just interpretation of the underlying law applied to malpractice cases going forward.

Scarsella was issued several years following the medical malpractice tort reform legislation which was codified by 1993 PA 78. That legislation created MCL 600.2912d, the affidavit of merit statute, which reads in pertinent part that, "the plaintiff in an

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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." MCL 600.2912d(1). Nowhere in the plain text of MCL 600.2912d did the Legislature prescribe that a plaintiff's failure to file an affidavit of merit rendered a complaint a nullity, as held by *Scarsella*. The statutory text likewise fails to address the consequences of such a failure, nor does it carve out an exception to MCL 600.5856(a), which by its language tolls the statute of limitations at the time of filing of a complaint. Recognizing this, the Supreme Court took a conservative and textually-supported approach when faced with a plaintiff who failed to file the requisite affidavit, and dismissed the matter *without* prejudice. *See, e.g., Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26; 594 NW2d 455 (1999), and *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998).

Dorris and *VandenBerg* were consistent with the history of the statute which they interpreted, thus respecting legislative intent. The initially introduced bill did not even require an affidavit in its current form, but rather a certificate of compliance. It contained the following provision about the statute of limitations in MCL 600.2912d(1):

> IF THE COMPLAINT IS NOT ACCOMPANIED BY THE CERTIFICATE REQUIRED UNDER THIS SUBSECTION, THE COMPLAINT DOES NOT TOLL THE STATUTE OF LIMITATIONS AS PROVIDED IN SECTION 5856(1)[5].
> 1993 Senate Introduced Bill 0270, Sec. 2912d(1).

The nascent bill similarly carved out an exception to the statute of limitations for failure

[5] MCL 600.5856(1) became MCL 600.5856(a) in the enacted version of the statute.

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to file a §2912d document:

> (1) The statutes of limitations are tolled ~~when~~ IF:
> (A)(1) ~~the~~ SUBJECT TO SECTION 2912D(1), THE complaint is filed and a copy of the summons and complaint are served on the defendant.
> 1993 Senate Introduced Bill 0270, Sec. 5856 (1).

While the certificate requirement gave way solely to the affidavit of merit requirement in the enrolled bill, missing was any provision stating that the filing of a complaint unaccompanied by an MCL 600.2912d(1)-required document was a nullity, or that this would fail to toll the statute of limitations. Had the Legislature intended for that to be the case, it could have modified or kept the language from the introduced bill when it submitted the enrolled bill and in enacting the legislature. No such language was ever added back to the statute, nor has the statute been amended to reflect that in the years following. This was noted by Justice Michael F. Cavanagh in his Concurrence to *Kirkaldy v Rim*:

> Specifically, I believe that *Scarsella* was incorrectly decided, so I cannot agree with the majority's statement, ante at 585, that under the statutes at issue, "the period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendant." Rather, I would hold that under the plain language of MCL 600.5856(a), the period of limitations is tolled when a complaint is filed, regardless of whether an affidavit of merit is filed with the complaint….Clearly, the Legislature did not instruct that the period of limitations for a medical malpractice action would be tolled only when a complaint and an affidavit of merit are filed. In fact, as plaintiffs and their amici curiae point out, the Legislature considered and rejected a formulation of MCL 600.2912d that would have read, "If the complaint is not accompanied by the certificate required under this subsection, the complaint does not toll the statute of limitations as provided in §5856(1) [sic]." See SB 270 as introduced on January 28, 1993. Moreover, the Legislature amended MCL 600.5856 in the same public act used to enact the affidavit of merit requirement, 1993 PA 78, so it could have easily adjusted the language of MCL 600.5856(a) had it so desired. It did neither. This Court is not free to add language to a statute or to interpret a statute on the basis of this Court's own sense of how the statute should have been written.

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> Because the language of MCL 600.5856(a) is quite plain, I would hold that a period of limitations is tolled when a complaint is filed. And under that rule, I would conclude that when plaintiffs filed their complaint in this matter, the period of limitations was tolled.
> *Kirkaldy v Rim*, 478 Mich 581, 586-587; 734 NW2d 201 (2007) (Cavanaugh, J., Concurring)

The *Scarsella* Court went on to do precisely what the Legislature declined to do—assess a dispositive penalty for failure to file an affidavit of merit while eliminating the tolling afforded by MCL 600.5856. As this Court is well aware, the primary task in construing a statute is to give effect to the intent of the Legislature. *See, e.g., People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003); *Sun Valley Foods Co v Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999). "The Legislature is presumed to have intended the meaning it plainly expressed. Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 102; 693 NW2d 170 (2005), with internal citations omitted. "[P]rovisions not included by the Legislature should not be included by the courts, *Polkton, supra* at 103, citing *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998). Historical legislative evidence of the process supports the conclusion that the Legislature started with dispositive language, then omitted it.

It is mindful of this history that this *amicus curiae* points out how members of this Honorable Court have repeatedly highlighted *Scarsella*'s questionable legal framework:

- "I agree with the Court that *Scarsella* can be distinguished here. But I respectfully disagree that we should not take the final step this case implies and overrule it. As this case shows, not only is the Court leery of *Scarsella*'s reasoning, we also cannot expect its influence to stay cabined to medical malpractice actions and

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MCL 600.2912d. How *Scarsella*'s reasoning can be extended is limited only by a litigant's imagination, no matter how trivial a "mandatory" condition for maintaining suit might be. Rather than resolve these future questions case by case, I would hold today that unless clearly stated otherwise, a statute of limitations or repose is tolled "[a]t the time the complaint is filed," as MCL 600.5856(a) says." *Progress Mich v AG*, 506 Mich 74, 105-106; NW2d (2020) (McCormack, CJ., Concurring, and Viviano, J., Concurring).

- "I write separately because I continue to question whether *Scarsella* was correctly decided. *See Castro v Goulet*, 501 Mich 884, 889; 901 NW2d 614 (2017) (Viviano, J., concurring) (stating my belief that under a plain reading of the statutory scheme, "the AOM has no effect on commencing a lawsuit for purposes of the statute of limitations")." *Wade v McCadie*, 503 Mich 1024; 926 NW2d 577 (2019), (Viviano, J., Concurring).

- "*Scarsella*'s contrary conclusion has given rise to a series of workability problems. The present case, for example, would not have raised even a colorable question without *Scarsella*'s holding….This holding gives effect to the statute's plain meaning. But the outcome would be beyond dispute if *Scarsella* were not on the books. *Castro*, 501 Mich at 889 (Viviano, J., Concurring)

- "I write separately to note my concern that the issue in *Scarsella* has never received a full hearing from this Court. As Justice Cavanagh points out in his concurrence, meritorious arguments exist indicating that the Court misread MCL 600.5856(a) seven years ago when it acted peremptorily in *Scarsella.* Whether the filing of a complaint without an affidavit of merit tolls the running of the statutory period of limitations should be again, and more thoroughly, considered by this Court. *Kirkaldy*, 478 Mich at 588 (Kelly, J., Concurring).

It is in accordance with these judicious legal observations, and for the reasons herein and as set forth in Plaintiff-Appellee's Brief on Appeal, that the MAJ urges that the Court return to pre-*Scarsella* jurisprudence. MAJ is not asking this Court to invalidate affidavits as a whole, but rather to address their absence as they did pre-*Scarcella*, via dismissal *without* prejudice.

Amicus curiae is not unsympathetic to Defendants' argument of reliance on *Scarsella* and *stare decisis,* echoed by the Defense *Amici*. MAJ members have likewise been subject to decisions which changed the playing field in a manner which was not

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just disruptive, but devastating and dispositive. *See, e.g., Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). *See* also *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000). But reliance on a flawed opinion is not a sound reason to keep it in place. As this Court noted in *Robinson* at 464, "We must also recognize that *stare decisis* is a "principle of policy" rather than "an inexorable command," and that the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned." *Scarsella* was always poorly reasoned and has led to unworkable and unjust results, as here. The effect of overruling *Scarsella* would be that where, as here, a clerical error occurs, a dispositive strategy of waiting out the statute of limitations would no longer deprive a plaintiff from going forward with an expert-supported medical malpractice cases.[6]

Scarsella's impact has been disproportionately ruinous to injured parties. That is because while corollary language to MCL 600.2912d appears in MCL 600.2912e's affidavit of meritorious defense statute, corollary punishment *cannot* be automatically imposed by courts as it is against a plaintiff. "We therefore hold that MCL 600.2912e neither prohibits nor requires a default when the defendant fails to timely file its affidavit of meritorious defense." *Kowalski v Fiutowski*, 247 Mich App 156; 635 NW2d 502 (2001). *See* also *Wilhelm v Mustafa,* 243 Mich App 478, 484; 624 NW2d 435 (2000)(affirming trial court's denial of sanctions, including default, where defendant failed to file an affidavit of meritorious defense until trial was underway, and noting

[6] Overruling *Scarsella* would not relieve any plaintiff from his or her obligation to file an Affidavit of Merit and have expert support at trial.

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that "the Legislature eliminated the language providing that the court could strike the defendant's answer and enter a default against the defendant if the defendant failed to comply with the requirements of that section of the statute." Justice requires equal treatment under the law, and reversal of *Scarsella* would be a step towards achieving that mandate.

CONCLUSION

Since being issued, *Scarsella* has been rigidly applied and used as a cudgel to dismiss timely and supported medical malpractice cases, causing "continuing dislocations in our law." *Castro,* 501 Mich at 890 (Vivano, J., Concurring). This case provides the opportunity for legal distortions to be corrected in the interests of justice without sacrificing the meanings of the underlying statutory framework which it purported to address. *Scarsella*, as well as the Court of Appeals herein, should be reversed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022, I electronically filed the foregoing using the TrueFiling/MiFile System, which will send notification of this filing to all registered Counsel of record.

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