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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. _____

Court of Appeals No. 350767

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

_____/

PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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ORDER BEING APPEALED FROM AND RELIEF REQUESTED

Plaintiffs-Appellants, Candi Ottgen and Patrick Ottgen, seek leave to appeal from the Michigan Court of Appeals decision dated May 20, 2021. A copy of that decision is Exhibit C to this application. That decision reversed in part a circuit court decision denying the defendants' motion for summary disposition, which was predicated on this Court's decision in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 547 (2000).

Plaintiffs request that this Court grant leave to appeal to consider an important legal question presented in this application. Alternatively, plaintiffs request that the Court summarily reverse the Court of Appeals May 20, 2021 opinion and remand this matter to the Ingham County Circuit Court for further proceedings.

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STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THE COURT GRANT LEAVE TO APPEAL TO CONSIDER THIS QUESTION OF WHETHER THE COURT SHOULD REVISIT AND OVERTURN ITS 2000 DECISION IN *SCARSELLA V POLLAK*, 461 MICH 547; 607 NW2D 711 (2000), SINCE THE HOLDING ANNOUNCED IN THAT CASE WITH RESPECT TO THE TOLLING OF THE STATUTE OF LIMITATIONS CANNOT BE RECONCILED WITH TWO MICHIGAN STATUTES, MCL 600.1901 AND MCL 600.58569(a)?

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In mid-2016, Candi Ottgen began experiencing bilateral thumb pain as well as numbness and tingling in her fingers. Ms. Ottgen first saw a doctor for her symptoms in December 2016. The doctor whom Ms. Ottgen initially saw recommended conservative treatments. When non-operative management proved ineffective, Ms. Ottgen was referred to Dr. Abdalmaijid Katranji, an orthopedic surgeon. Dr. Katranji performed two surgeries on Ms. Ottgen. The first of these surgeries occurred on May 1, 2017. Complaint, Exhibit A to this application, ¶24.

Prior to the May 1, 2017 surgery, Dr. Katranji told Ms. Ottgen that the surgery would only involve removal of some osteophytes and a carpal tunnel release. *Id.*, ¶12. Instead, during this surgery, Dr. Katranji performed a different procedure, an arthroplasty, in which he removed her trapezium bone. *Id.,* ¶13.

Slightly over two months later, on July 23, 2017, Dr. Katranji performed a second surgery on Ms. Ottgen, the carpal tunnel release. *Id.*, ¶14.

Following both surgeries, Ms. Ottgen reported the onset of persistent numbness and tingling in the thumb and index fingers. *Id.*, ¶15. Ms. Ottgen currently has a decreased range of motion in her thumb, decreased strength, and has difficulty doing activities of daily living. *Id.*

Ms. Ottgen retained an East Lansing law firm to investigate a possible medical malpractice claim against Dr. Katranji. As part of that investigation into a potential malpractice suit, Ms. Ottgen's counsel consulted with a Missouri orthopedic surgeon, Dr. Martin Boyer.

After performing an investigation, Ms. Ottgen's attorney mailed a Notice of Intent to Dr. Katranji and several related parties on September 27, 2018. In January 2019, several months before filing suit, Ms. Ottgen's counsel obtained an Affidavit of Merit that was signed by Dr. Boyer.

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Ms. Ottgen and her husband, Patrick (hereinafter: "plaintiffs"), filed a complaint in the Ingham County Circuit Court on April 11, 2019. *See* Exhibit A. In their complaint, plaintiffs mentioned both the May 1, 2017 and July 23, 2017 surgeries that Dr. Katranji performed on Ms. Ottgen. Complaint (Exhibit A), ¶¶12, 14. But, the principal claims asserted by the plaintiffs were associated with the first of these two surgeries, in which Dr. Katranji, without previously informing Ms. Ottgen, removed her trapezium bone. *Id*., ¶¶23-27.

Due to a clerical error, Dr. Boyer's affidavit of merit, which had been signed three months before, was not attached to plaintiffs' complaint when it was filed.

On May 9, 2019, the defendants filed a motion for summary disposition in which they argued that plaintiffs' case should be dismissed with prejudice because of the failure to file an affidavit of merit with their complaint. In their motion, defendants contended that, based on this Court's decision in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 547 (2000), plaintiffs' cause of action was subject to dismissal because their original filing did not toll the statute of limitations. And, because the limitations period had since expired, defendants further asserted on the basis of *Scarsella* that plaintiffs' cause of action had to be dismissed with prejudice.

Within days of the filing of defendants' motion for summary disposition, plaintiffs took several steps. On May 13, 2019, plaintiffs filed a First Amended Complaint. Attached to that amended complaint was a copy of the affidavit of merit that Dr. Boyer had executed in January 2019. Two days later, plaintiffs filed an Emergency Motion to File a Late Affidavit of Merit.

The circuit court held a hearing on the parties' pending motions on August 7, 2019. A copy of the transcript of that proceeding is Exhibit B to this application. At that hearing, the circuit court expressed the view that plaintiffs should not be deprived of their right to pursue their claim on the basis of an inadvertent error on the part of their attorney's office that did not

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result in any prejudice to defendants:

> Should Plaintiff be barred her day in court because of a clerical error on the part of her attorneys? And we've had other statutes concerning that. And historically, other areas, the Court of Appeals, especially in even the Supreme Court has been liberal when there are clerical errors, so that a litigant is not denied their opportunity to have their case heard, due to an inadvertent error.
>
> Tr. 8/7/19 (Exhibit B), at 18.

The circuit court concluded that this case was to be distinguished from *Scarsella* because in that case, the plaintiff had not secured an affidavit of merit when he filed his complaint. Here, as the circuit court pointed out, plaintiffs' counsel obtained an affidavit of merit months before the complaint was filed, but by mistake did not attach it to the complaint when it was filed. *Id*., at 20-21.

On September 3, 2019, the circuit court signed an order denying defendants' motion for summary disposition based on the plaintiffs' failure to file an affidavit of merit with their original complaint and the defendants' motion to dismiss plaintiffs' amended complaint.

The defendants filed an application for leave to appeal in the Court of Appeals, seeking interlocutory review of the circuit court's September 3, 2019 order. On February 19, 2020, a panel of the Court of Appeals granted defendants' application.

A panel of the Court of Appeals issued its decision in the case on May 20, 2021. A copy of the Court of Appeals decision is Exhibit C to this application. Based on this Court's decision in *Scarsella*, the panel rejected the circuit court's rationale for distinguishing that ruling:

> The *Scarsella* Court's mandate is clear: when a complaint is filed without an affidavit of merit, the lawsuit is not commenced and the statute of limitations is not tolled. We do not find that an exception to this mandate exists, such as a plaintiff being in possession of an affidavit of merit but erroneously does not file the affidavit of merit with the original complaint.
>
> Opinion (Exhibit C), at 5.

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Thus, on the basis of *Scarsella*, the Court of Appeals concluded that dismissal with prejudice was appropriate as to the plaintiffs' claims of malpractice associated with Ms. Ottgen's May 1, 2017 surgery.[1]

[1]The Court of Appeals further ruled that, because plaintiffs filed an amended complaint on May 13, 2019 that *was* accompanied by Dr. Boyer's affidavit of merit, the limitations period was effectively tolled as of that date. Opinion (Exhibit C), at 8. The panel ruled, therefore, that any claim of malpractice that plaintiffs may have alleged based on the second surgery that Dr. Katranji performed on Ms. Ottgen in July 2017, would not be barred by the statute of limitations. *Id.*, at 8-9. But, as noted previously, the primary thrust of plaintiffs' claim of malpractice in this case is associated with the May 1, 2017 surgery in which Dr. Katranji removed Ms. Ottgen's trapezium bone, the portion of the case that the Court of Appeals ruled was subject to dismissal under *Scarsella*.

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ARGUMENT

I. THIS COURT SHOULD GRANT LEAVE TO ADDRESS THE QUESTION OF WHETHER *SCARSELLA*'S HOLDING WITH RESPECT TO THE TOLLING OF THE STATUTE OF LIMITATIONS WAS ERRONEOUS IN LIGHT OF TWO STATUTES, MCL 600.1901 AND MCL 600.5856(a).

The Court of Appeals held in this case that the primary claims of malpractice asserted by plaintiffs in this case, arising out of the May 1, 2017 surgery performed by Dr. Katranji, were barred by the statute of limitations under the reasoning employed by this Court in its 2000 decision in *Scarsella*. Plaintiffs would request that this Court take up a question that had been raised in a number of prior cases - whether the *Scarsella* Court was correct in its holding regarding the tolling of the statute of limitations.

At least four members of this Court have called for the overruling of this aspect of *Scarsella.* *See Kirkaldy v Rim*, 478 Mich 581, 586-587; 734 NW2d 201 (2007) (M. Cavanaugh J.; M. Kelley, J., concurring); *Castro v Goulet*, 501 Mich 884, 886; 901 NW2d 614 (2017) (Viviano, J., concurring); *Wade v McCadie*, 503 Mich 1024; 926 NW2d 577 (2019) (Viviano, J., concurring); *Progress Michigan v Attorney General*, 506 Mich 74, 99-106; 954 MW2d 475 (2020) (McCormack, CJ, concurring). In addition, at least two panels of the Court of Appeals have also requested that this Court revisit its ruling in *Scarsella.* *Kirkaldy v Rim*, 266 Mich App 626, 628; 702 NW2d 686 (2005) ("We respectfully voice our belief that *Scarsella* is inconsistent with the clear and unambiguous language of MCL 600.5856(a)"); *Young v Sellers*, 254 Mich App 447, 452; 657 NW2d 555 (2002).

The *Scarsella* holding with respect to the tolling of the statute of limitations in medical malpractice actions should be reconsidered because it is fundamentally irreconcilable with two

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Michigan statutes, MCL 600.2901 and MCL 600.5856(a). The unambiguous language of these two statutes, which *solely* govern when and how a cause of action is commended and when the statute of limitations is tolled, were disregarded by the Court in *Scarsella*. Plaintiffs would request that the Court take up the question of whether *Scarsella* should be overruled.

Scarsella was a medical malpractice action in which the plaintiff's complaint was not accompanied by an affidavit of merit required by MCL 600.2912d. The defendant moved for summary disposition on that basis. Shortly before a hearing on defendant's motion for summary disposition, plaintiff filed an affidavit of merit. The circuit court found that filing to be unavailing, concluding that the failure to file an affidavit of merit rendered the plaintiff's complaint null and void.

The Court of Appeals in *Scarsella* affirmed that determination based on the following reasoning:

> Generally, a civil action is commenced and the period of limitation is tolled when a complaint is filed. See MCR 2.101(B) and MCL 600.5856; MSA 27A.5856. However, medical malpractice plaintiffs must file more than a complaint; they "shall file with the complaint an affidavit of merit . . . ." MCL 600.2912d(1); MSA 27A.2912(4)(1). See also MCR 2.112(L). Use of the word "shall" indicates that an affidavit accompanying the complaint is mandatory and imperative. *Oakland Co v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997). We therefore conclude that, for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit.
>
> 461 Mich at 549.

Without granting leave to appeal or requiring further briefing from the parties[2], this

[2]There is much to regret about this Court's decision in *Scarsella*, including the procedure that led to the Court's ruling. This Court would have been well served if it had granted leave to appeal in that case, obtained further briefing, and conducted oral argument prior to addressing the significant issues presented. There is one other procedural point to be made about the ruling in *Scarsella.* The erroneous holding in that case with respect to the tolling of the statute of

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Court in *Scarsella* adopted as its own the decision of the Court of Appeals, *id*, at 548-550, including its determination that the filing of plaintiff's complaint was a nullity. *Id*., at 548-550. To the Court of Appeals determination that plaintiff's complaint was a nullity, this Court in

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limitations was not necessary to the disposition of the *Scarsella* case.

The reason for this lies in the fact that the Court had previously held in *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26, 47-48; 594 NW2d 455 (1999), that the appropriate disposition of a case in which the plaintiff fails to file an affidavit of merit with a malpractice complaint is the dismissal of that case *without* prejudice. *Dorris*, 460 Mich at 47-48. That is all that the Court required to dispose of the issue presented to it in *Scarsella*. The plaintiff in *Scarsella* did not file an affidavit with his complaint and, under the dictates of *Dorris*, the appropriate judicial response was to dismiss the plaintiff's case *without* prejudice.

A dismissal *without* prejudice, as the Court had already decided in *Dorris*, is obviously a dismissal that does not prohibit the plaintiff from refiling a later case. It is in such a subsequently filed case that the question of whether the plaintiff could claim tolling under MCL 600.5856(a) during the pendency of his originally filed case would have been relevant. This is true because any *subsequently filed* case filed by the plaintiff in *Scarsella*, following dismissal of his original action, would be timely for limitations purposes only if the plaintiff could claim the benefit of §5856(a)'s tolling effect. Thus, under the facts in *Scarsella*, it is only in a later-filed case following a dismissal without prejudice of plaintiff's original case that tolling under §'5856(a) would be at all relevant. But, notably, the *Scarsella* case itself had not reached the stage where tolling under §5856(a) was relevant. The plaintiff in *Scarsella* did not have his case dismissed without prejudice for filing his complaint without an affidavit of merit and then refiled the case. Rather, the plaintiff had filed only a single complaint (without an affidavit of merit) and it is that cause of action that worked its way to this Court.

What the Court's majority was doing in *Scarsella* when it addressed the issue of tolling under §'5856(a) was *anticipating* the rule of law that would apply *if* the plaintiff in that case had, following dismissal without prejudice of his original action, refiled his cause of action. But, in *anticipating* an issue that was not germane to the case before it, the *Scarsella* majority's holding with respect to tolling should be classified as dictum. This Court has recognized that "any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case at hand are, however, illuminating, but obiter dictum, and lack the force of an adjudication." *McNally v Board of Convassers of Wayne County*, 316 Mich 551, 558; 25 NW2d 613 (1997); *Wold Architects & Engineers v Strat*, 474 Mich 223, 232, n. 3; 713 NW2d 750 (2006). The tolling ruling announced in *Scarsella* might have been relevant in a potential case that Mr. Scarsella might later file; it was not relevant to the case that was actually in front of this Court in *Scarsella.*

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Scarsella added that, as a nullity, the complaint was not sufficient to toll the statute of limitations. For that reason, even though the Court had previously recognized in *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 47-48; 594 NW2d 455 (1999), that the appropriate judicial response to the filing of a medical malpractice action without an affidavit of merit was dismissal of the case *without* prejudice, the *Scarsella* Court determined that the plaintiff in that case could not refile his cause of action because the statute of limitations, which was not tolled by the filing of the complaint, had now expired. *Id.*, at 552.

There were two main components to this Court's ruling in *Scarsella*. First, the Court held that a medical malpractice action filed without the affidavit of merit required by MCL 600.2912d is subject to dismissal. Plaintiffs have no disagreement with this aspect of *Scarsella*. On this point, *Scarsella* broke no new ground since the Court had held the year before in *Dorris* that dismissal without prejudice was the appropriate result where no affidavit of merit was filed with a medical malpractice complaint.

It is in the second aspect of its ruling that the *Scarsella* Court went seriously wrong. The Court ruled that the plaintiff's malpractice complaint, filed without an affidavit of merit, was a nullity, it was effectively not filed. And because that filing was a nullity, the plaintiff's complaint did not act to toll the statute of limitations.

The fundamental error in *Scarsella* is that the Court was presented with two concepts – whether a case has been filed and whether the statute of limitations has been tolled – and decided these two questions without any reference to the two Michigan statutes that expressly govern when and how a cause of action is filed and when and how statutes of limitations are tolled. In other words, the *Scarsella* Court failed to consider the two Michigan statutes that actually cover

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the legal issues presented in that case.

Michigan has a statute that provides when and how a cause of action is commenced. That statute is MCL 600.1901, which states in simple English: "A civil action is commenced by filing a complaint with the court." What MCL 600.1901 unequivocally provides is that what is necessary to initiate a case is the filing of *a complaint*. All that is necessary to make a case a reality (as opposed to a nullity) is the filing of *a complaint*. Even though it was not accompanied by an affidavit of merit, the medical malpractice action that Mr. Scarsella filed in September 1995 was unquestionably "commenced" for purposes of §1901.

And, Michigan also has a statute that governs when and how statutes of limitations are tolled. That statute is MCL 600.5856(a), which provides that statutes of limitations are tolled, "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).

Like §1901, the language of §5856(a) is clear and it is unequivocal. A statute of limitations is tolled when *a complaint* is filed provided that the summons and *complaint* are served on the defendant in a timely fashion as provided in the court rules.3 What is required to toll the statute of limitations under this statute that actually governs the tolling of the statute of limitations is the filing of a *complaint*. The statute says nothing about tolling being dependent on the filing of an affidavit of merit.

Thus, there is a Michigan statute that determines when a cause of action is filed and, contrary to the Court's holding in *Scarsella*, that statute is *not* §2912d. Rather, the statute that

3The second requirement for tolling under §5856(a) - timely service of the complaint - is not contested in this case. There is no question here that plaintiffs' complaint was served on the defendant within the time period provided in §5856(a).

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controls whether a case has been commenced, *i.e.* a case that is not a "nullity," is §1901. Similarly, there is a Michigan statute that dictates when and how a statute of limitations is tolled and that statute is *not* §2912d, it is §5856(a).[4]

In answering the question of whether the plaintiff's complaint was, in fact, filed or whether it was a nullity, the *Scarsella* Court should have found its answer in §1901, not as it did in §2912d. And, in determining whether the statute of limitations was tolled, the Court in *Scarsella* should have looked to the only Michigan statute the controls this tolling question, §5856(a), not §2912d.

Plaintiffs do not contest the fact that §2912d has something to say about whether a medical malpractice action has been *properly* instituted. A medical malpractice action filed without an affidavit of merit has not been *properly* filed and, on that basis, is subject to dismissal. But, the fact that such a complaint had not been *properly* filed does not negate the fact that, under §1901, it *was* filed. The affidavit of merit statute does nothing to negate the reach of the Michigan statute that governs *whether* a cause of action has been filed (§1901) or the statute the controls *whether* the statute of limitations has been tolled (§5856(a)).

This Court failed to apply the literal language of either §1901 or §5856(a) in *Scarsella*. The Court gave no consideration to the former statute. MCL 600.5856 was, in fact, mentioned in

[3]Properly viewed, the fundamental error in the Court's decision in *Scarsella* can be captured in one sentence that this Court adopted from the Court of Appeals opinion in that case, a sentence that actually cited to, but failed to heed, §5856(a). The Court of Appeals had ruled in *Scarsella*: "*Generally*, a civil action is commenced and the period of limitations is tolled when a complaint is filed. *See* MCR 2.101(B) and MCL 600.5856 . . ." 461 Mich at 549 (emphasis added). This statement was wrong. There is no "generally" about it. The period of limitations, by legislative decree in §5856(a), is *always* tolled when a complaint is filed and served within the time period allowed by the court rules. Similarly, a case is *always* (not "generally") filed under §1901 when a complaint is filed.

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the *Scarsella* decision, but rather than applying that statute as the Legislature wrote it, the *Scarsella* Court rewrote that statute. Under the interpretation of this provision adopted by the Supreme Court in *Scarsella,* §5856(a) has been rewritten to provide something like this:

> Sec. 5856. The statutes of limitations or repose are tolled:
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant. *Provided, however, that in an action alleging medical malpractice, statutes of limitation or repose are tolled when the complaint and an affidavit of merit called for by MCL 600.2912d are filed*.

The italicized language in the proceeding paragraph was somehow added to §5856(a) by the Court in *Scarsella.* This italicized language is nowhere to be found in §5856(a) as it was drafted by the Michigan Legislature. Instead, the language chosen by the Legislature is absolutely unequivocal. The tolling provision provided in that statute applies when *a complaint* is timely filed and that *complaint* is served on the defendant. MCL 600.5856(a) as written says nothing about tolling being dependent on the filing of affidavits of merit.

Without question, the Michigan Legislature could have written §5856(a) in such a way as to reach the result called for by the Court in *Scarsella.* One of the strange quirks of *Scarsella's* misinterpretation of §5856(a) is that the same 1983 public act that established the affidavit of merit requirement now found in §2912d, P. A. 1993, No. 78, also amended §5856. Thus, in 1993, at the same time the Legislature first established the affidavit of merit requirement in medical malpractice cases, it also amended §5856 to include a new tolling provision, what is now §5856©, allowing for a tolling period in a malpractice action during the presuit notice period mandated by MCL 600.2912b.

But, in establishing the affidavit of merit requirement and by amending §5856 in P.A.

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1993, No. 78, to add §5856© the Michigan Legislature made absolutely no changes to §5856(a) - the provision of the tolling statute that was misconstrued in *Scarsella*. Before the passage of P.A. 1993, No. 78, §5856(a) unequivocally provided that statutes of limitations would be tolled merely with the filing of a complaint and service of that complaint on the defendant. *After* P.A. 1993, No. 78 was passed, precisely the same tolling provision was contained in §5856(a).

This bit of history demonstrates dramatically that the Michigan Legislature had the opportunity in 1993 to rewrite §5856(a) to dictate the result reached seven years later by this Court in *Scarsella*. *See Progress Michigan v Attorney General*, 506 Mich 74, 102-103; 954 NW2d 475 (2020) (McCormack, CJ, concurring). The Michigan Legislature, when it formulated the affidavit of merit requirement in medical malpractice cases, could have altered §5856(a) to require that in a such cases there would be no tolling of the limitations period unless both a complaint and an affidavit of merit were filed. But the Legislature did not do so.

Properly applying §1901 and §5856(a) should have led to the following disposition of this case. Plaintiffs' original complaint was filed on April 11, 2019, twenty days before the expiration of the statute of limitations on their claim of malpractice associated with the professional negligence of Dr. Katranji committed during Ms. Ottgen's May 1, 2017 surgery.

That complaint was, however, subject to dismissal because it was not filed with an affidavit of merit as required by §2912d. That dismissal, under *Dorris*, had to be a dismissal *without* prejudice to plaintiffs' right to refile their case. But, contrary to the determination made by the Court in *Scarsella,* such a refiled action *could be* timely filed precisely because plaintiffs' original case was *not* a nullity; that case was unquestionably "commenced" under §1901 and,

since the case was unquestionably commenced, the statute of limitations was unquestionably tolled under §5856(a).

Since the statute of limitations was tolled with the filing of plaintiffs' April 11, 2019 complaint, when the defendants moved for summary disposition for plaintiffs' failure to file an affidavit of merit, that motion should have been granted, an order dismissing the case *without* prejudice should have been entered, and, because the limitations period had been tolled as of April 11, 2019, the plaintiffs would have then had the same amount of time as had been left on the limitations period as of April 11, 2019 (21 days) to refile their malpractice complaint this time *with* the affidavit of merit their expert had signed several months before.

The *Scarsella* Court resisted this application of the tolling principles that govern under §5856(a), suggesting that such an approach would somehow defeat the purpose behind §2912d's affidavit of merit requirement. The Court in *Scarsella* asserted that allowing a complaint that was not accompanied by an affidavit of merit to toll the statute of limitations, "would undo the Legislature's clear statement [in §2912d] that an affidavit of merit 'shall' be filed with the complaint." 461 Mich at 552. This statement as to why the literal text of §5856(a) should not have applied in these circumstances makes no sense.

As the foregoing discussion of how this case should have been treated under §1901 and §5856(a) demonstrates, what should have resulted in this case is the entry of an order dismissing the plaintiffs' cause of action *without* prejudice to the plaintiff's ability to refile their cause of action. Had plaintiffs refiled their malpractice complaint and had plaintiffs accompanied that refiled cause of action with Dr. Boyer's affidavit of merit that complied with §2912d, *the*

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"purposes" of §2912d would have been completely served. That refiled cause of action would have included *at its outset* an affidavit signed by a qualified professional attesting to the validity of the plaintiff's claim. The purpose of the affidavit of merit requirement is to deter frivolous medical malpractice actions. *Barnett v Hidalgo,* 478 Mich 151, 163-164; 732 NW2d 472 (2007). That purpose would be completely served without the nontextual interpretation that the Court in *Scarsella* gave to §5856(a).

One member of this Court has recognized the obvious error in this aspect of the *Scarsella* decision. Justice David Viviano, in an opinion concurring in the denial of leave to appeal in *Castro v Goulet*, 501 Mich 884; 901 NW2d 614 (2017), correctly identified the fundamental error made by the majority in *Scarsella* in concluding that tolling of the statute of limitations under §5856(a) was not appropriate*:*

> 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
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> 501 Mich at 886 (J. Viviano, concurring).

As noted at the outset of the argument section of this brief, *Castro* is but one of the decisions in which Michigan appellate judges have expressed disagreement with the holding in *Scarsella*. Of particular importance on this point is the Court's recent decision in *Progress Michigan.*

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That case was an action filed against the Attorney General brought under Michigan's Freedom of Information Act (FOIA), MCL 15. 231, *et seq*. The plaintiff in *Progress Michigan* timely filed its cause of action in the Court of Claims on April 11, 2017. Plaintiff's complaint, however, was not verified as required by two Michigan statutes, MCL 600.6431(1) and MCL 600.6434(2). The defendant moved for summary disposition based on the complaint's lack of verification. Plaintiff immediately responded to that motion by filing an amended complaint with the required verification. The amended complaint, however, was filed beyond FOIA's short 180-day period of limitation. MCL 15.240.

The plaintiff in *Progress Michigan* asserted that the amended complaint, filed after the expiration of the limitations period, was timely under relation back principles. *See* MCR 2.118(D). The Attorney General argued that there was nothing to relate back to since the plaintiffs' original complaint, lacking the verification required by MCL 600.6431(1) and MCL 600.6434(2), was a nullity. The Attorney General argued that the plaintiff's original complaint, like the plaintiff's complaint in *Scarsella,* was effectively never filed.

The Court of Claims rejected the defendant's argument, but on appeal to the Court of Appeals, a panel of that Court reversed. Analogizing plaintiff's original filing of an unverified Court of Claims complaint to the malpractice complaint that was filed without an affidavit of merit in *Scarsella*, the Court of Appeals held in *Progress Michigan* that plaintiff's original complaint was a nullity and that the plaintiff's amended complaint was untimely because it could not relate back. *Progress Michigan v Attorney General*, 324 Mich App 659, 671-672; 922 NW2d 654 (2018). Thus, the Court of Appeals in *Progress Michigan* relied on *Scarsella* in

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concluding that the plaintiff's originally filed suit was a nullity that did not toll the statute of limitations.

This Court in *Progress Michigan* reversed, unanimously rejecting the Court of Appeals reliance on *Scarsella*. While an amicus curiae brief submitted in *Progress Michigan* had raised the question of whether *Scarsella'*s holding with respect to the tolling of the statute of limitations should be expressly overruled, five members of the Court declined to address that question, "because plaintiff has not asked us to do so and the case is distinguishable by its own terms." 506 Mich at 97, fn. 16.

The Court's majority in *Progress Michigan*, therefore, saw no reason to address directly the question of whether *Scarsella* was correctly decided because the case could be easily distinguished, 506 Mich at 96-97. But, in identifying the error in the Court of Appeals ruling granting summary disposition to the Attorney General in that case, the *Progress Michigan* majority identified precisely what is wrong with *Scarsella*'s reasoning as well. The Court's majority in *Progress Michigan* rejected the Court of Appeals conclusion that the plaintiff's original complaint was a "nullity" that did not toll the statute of limitations as directly at odds with the two statutes discussed previously in this brief, §1901 and §5856(a):

> The Revised Judicature Act (RJA), MCL 600.101 *et seq.*, governs practice and procedure in the Court of Claims because the [Court of Claims Act] is contained within the RJA. Relevant to this case, two provisions of the RJA prescribe the practice and procedure in the circuit court and, therefore, the Court of Claims: MCL 600.1901 and MCL 600.5856. MCL 600.1901 states that an action is commenced upon the filing of a complaint in a court. MCL 600.5856(a) states that the statutory period of limitations is tolled upon the filing of a complaint.

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> Nothing in the COCA or the FOIA prescribes different practices or procedures governing the commencement of an action or the tolling of a limitations period. *Accordingly, these statutes apply, and plaintiff's FOIA action was commenced when it filed the complaint on April 11, 2017; the filing of the original complaint tolled the 180-day limitations period under MCL 15.240, leaving six days remaining before the limitations period passed.*
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> 506 Mich at 94 (emphasis added).

The majority in *Progress Michigan* also noted that there was nothing in the Court of Claims verification statutes that defendant was relying on that dictated the conclusion that an unverified complaint was a nullity or that these verification statutes served to undermine the general statutory rules regarding commencement of a cause of action or the tolling of the statute of limitations found in §1901 and §5856(a):

> Further, nothing in MCL 600.6431 or MCL 600.6434 suggests that the failure to comply with the verification requirements renders a complaint "null and void." Nor does any other provision of the COCA or the FOIA.
>
> * * *
>
> Construing MCL 600.5434 as requiring that the complaint be verified, as we must under *McCahan*, *does not mean that an unverified complaint does not commence a civil action under MCL 600.5856*. Nothing in MCL 600.6434 (or any other provision of the COCA) suggests otherwise. *MCL 600.6434 says absolutely nothing that would contradict or override the general rules pertaining to commencing an action under MCL 600.1901 or tolling the limitations period under MCL 600.5856. Nor does MCL 600.6434 explicitly condition tolling on the verification requirement*. All MCL 600.6434 requires is that the complaint be verified. It is not inconsistent to require a plaintiff to comply with the verification requirement in MCL 600.6434 while at the same time permitting the action to be commenced under MCL 600.1901 and the limitations period tolled under MCL 600.5856(1).
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> 506 Mich at 97-98 (emphasis added).

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While the *Progress Michigan* majority may not have addressed directly whether *Scarsella* was correctly decided, its identification of the errors in the Court of Appeals decision in that case applies with equal force to this Court's decision in *Scarsella*. Like the Court of Claims verification statutes at issue in that case, there is nothing in the affidavit of merit statute that "prescribes different practices or procedures governing the commencement of an action or the tolling of a limitations period." 506 Mich at 94.

Similarly, §2912d "says absolutely nothing that would contradict or override the general rules pertaining to commencing an action under MCL 600.1901 or tolling the limitations period under MCL 600.5856." 506 Mich at 97-98.

The majority in *Progress Michigan* also embraced the views expressed by Justice Viviano in his concurring opinion in *Castro*, explaining why the application of §1901 and §5856(a) in these circumstances would not render the verification requirements of MCL 600.6431(1) or MCL 600.6434(2) "meaningless," since the plaintiff would still be required to comply with this requirement. 506 Mich at 98, fn. 17. As Justice Viviano explained in *Castro*, precisely the same can be said of the plaintiff's duty to comply with the affidavit of merit requirement of §2912d.

Two members of the Court in *Progress Michigan* would have overruled *Scarsella* outright. Chief Justice McCormack, in an opinion joined by Justice Viviano, noted the obvious that the majority's opinion refusing to extend *Scarsella* "should not be interpreted as an endorsement of *Scarsella*." 506 Mich at 102 (McCormack, CJ, concurring). The Chief Justice further recognized that the reasons offered by the majority for concluding that the plaintiff's

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original FOIA complaint was not a nullity applied with equal face to *Scarsella*:

> [T]he Court explains today that the Court of Claims Act "says absolutely nothing that would contradict or override" the statutory rules for when an action is commenced or when the limitations period is tolled. See MCL 600.1901; MCL 600.5856. And tolling the statute of limitations in a case such as this one would not render meaningless the Court of Claims Act's signature and verification requirements—a defective complaint might still be subject to dismissal, but the running of the imitations period would be tolled until that time.
>
> All true. *And of course, these same points apply to medical malpractice actions because there is no statutory provision that conditions tolling on the plaintiff's filing of an affidavit of merit*.
>
> *Id.* (emphasis added).

Chief Justice McCormack, therefore, advocated that the Court take "the final step this case implies" and overrule *Scarsella*. *Id.*, at 105.[5] Plaintiffs herein would ask this Court to now

[4]Justice Stephen Markman wrote a concurring opinion in *Progress Michigan*, expressing his disagreement with Chief Justice McCormack's view that *Scarsella* should be overruled. After joining a majority opinion whose entire analysis of §1901 and §5856(a) was contrary to the result reached in *Scarsella*, Justice Markman offered his view that *Scarsella* was correctly decided. Justice Markman offered this view largely on the basis of the mandatory language contained in §2912d(1) – in a medical malpractice action the plaintiff "shall file with the complaint an affidavit of merit . . ." According to Justice Markman, this mandatory language dictated the result reached by the Court's majority in *Scarsella,* that a malpractice complaint filed without an affidavit of merit was a nullity, incapable of tolling the statute of limitations. 506 Mich at 106-107.

Justice Markman's focus on the purportedly mandatory language of §2912d is less than convincing since the Court of Claims verification statutes at issue in *Progress Michigan* contained equally mandatory language. MCL 600.6431(2)(d) specifies that a Court of Claims complaint *must* contain "a signature and verification by the claimant before an officer authorized to administer oaths." Similarly, MCL 600.6434(2) specifies that a Court of Claims complaint "shall be verified."

In the opinion in which Justice Markman joined, the Court's majority in *Progress Michigan* held that this mandatory language in MCL 600.6431(2) and MCL 600.6434(2) was not sufficient to overcome the general rules regarding commencement of a cause of action or the tolling of a statute of limitations contained in §1901 and §5856(a). It is difficult to see how comparable "mandatory" language in §2912d could call for the different result that the Court reached in *Scarsella*.

take the final, small step foreshadowed by its decision in *Progress Michigan* and overrule its decision in *Scarsella*.

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Justice Markman's reliance on the mandatory language of §2912d overlooks one other significant point. The language in §2912d on which Justice Markman relies does not simply state that a plaintiff in a medical malpractice action shall file an affidavit of merit with the complaint. Rather, that statute specifies that the plaintiff in a malpractice action "shall file with the complaint an affidavit *signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.*" (Emphasis added).

Thus, the mandatory language in §2912d on which Justice Markman predicated his defense of *Scarsella* requires not only an affidavit of merit, but an affidavit of merit signed by a health care professional whom plaintiff's counsel believes meets the requirements of MCL 600.2169. What is significant about this mandatory language in §2912d is that in *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), the plaintiff filed a medical malpractice action with an affidavit of merit, but that affidavit was not signed by a doctor who was qualified to testify against the defendant under MCL 600.2169. Despite the fact that the mandatory language of §2912d compels the filing of an affidavit signed by a doctor who satisfies the requirements of §2169, Justice Markman joined the Court's opinion in *Kirkaldy* that held that plaintiff's original complaint was *not* a nullity and did, in fact, toll the statute of limitations. Again, it is difficult to understand how the mandatory language that, in Justice Markman's view, justified the holding in *Scarsella*, could call for a such a different result in *Kirkaldy*. The Court's ruling in *Kirkaldy,* therefore, serves to demonstrate that the "mandatory" character of the language contained in §2912d cannot account for the tolling ruling reached by the Court in *Scarsella.*

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RELIEF REQUESTED

For the foregoing reasons, plaintiffs-appellants, Candi Ottgen and Patrick Ottgen, request that this Court grant leave to appeal and give full consideration to the issue raised in this application. In the alternative, plaintiffs request that the Court summarily reverse the Court of Appeals May 20, 2021 opinion and remand this case to the Ingham County Circuit Court for further proceedings.

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Dated: July 1, 2021