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STATE OF MICHIGAN

IN THE SUPREME COURT

CANDI OTTGEN and PATRICK OTTGEN,

Plaintiffs-Appellants,

v

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

Defendants-Appellees.

SC No. 163216
COA No. 350767
LC No. 19-000266-NH
(Ingham Circuit Court)

DEFENDANTS-APPELLEES' ANSWER TO APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 1

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

WHETHER THIS COURT SHOULD GRANT APPELLATE REVIEW OF AN ISSUE NEVER RAISED IN THE TRIAL COURT WHICH SEEKS TO DISLODGE TWO DECADES OF ESTABLISHED MICHIGAN SUPREME COURT CASE LAW IN *SCARSELLA v POLLAK,* 416 Mich 547; 607 NW2d 711 (2000), WITHOUT ANY PROFFERED JUSTIFICATION UNDER THE RULE OF *STARE DECISIS* AND WHERE THE RELIEF SOUGHT BY THESE PLAINTIFFS WAS READILY AVAILABLE BUT NOT IMPLEMENTED BY A TIMELY MOTION TO FILE A LATE AFFIDAVIT OF MERIT?

Defendants-Appellees say "no."

Plaintiffs-Appellants say "yes."

The trial court was not presented with and thus did not rule on this issue.

The Michigan Court of Appeals was presented with but did not directly rule on this issue (disagreeing with Plaintiffs' proffered "equitable considerations" to avoid *Scarsella*).

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COUNTER-STATEMENT OF ORDER BEING APPEALED FROM AND RELIEF REQUESTED

A. Introduction.

This is a medical malpractice case in which the case specific issue presented is whether the failure of a plaintiff to altogether file an affidavit of merit ("AOM") with the complaint, as required by MCL 600.2912d(1), can be excused because the AOM allegedly existed and was in the possession of counsel for Plaintiffs-Appellants,[1] notwithstanding this Court's decision of *Scarsella v Pollak, MD*, 461 Mich 547; 607 NW2d 711 (2000). Upon Defendants' motion for summary disposition based on Plaintiff's failure to file an AOM, and the asserted concomitant expiration of the relevant two-year statute of limitations for medical malpractice actions, the Honorable Clinton Canady, III of the Ingham County Circuit Court denied the motion. The trial court acknowledged the holding of *Scarsella* - where a plaintiff wholly omits filing the required affidavit, the complaint does not commence the lawsuit for limitation purposes, or operate to toll the statute of limitations – and then distinguished *Scarsella* on the basis that here the AOM was represented to be in *existence* and in the possession of counsel for Plaintiff at the time the complaint was filed, excusing that it was admittedly *never filed* with the complaint.

Reasoning neither *Scarsella* nor any case law from this Court acknowledges such an exception to *Scarsella,* nor ratifies the basis upon which the trial court distinguished

[1] For ease of reference, hereafter "Plaintiff," in the singular, is used in this Answer. The claim of Patrick Ottgen is for loss of consortium and thus derivative of the main claim.

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Scarsella from the facts of this case, Defendants-Appellees sought and obtained leave to appeal. In a per curium opinion, the Michigan Court of Appeals affirmed in part and reversed in part. (**Exhibit 1**). Applying *Scarsella*, the Court of Appeals determined that Plaintiff's complaint admittedly filed without the requisite AOM was ineffective and did not work to toll the applicable period of limitation because Plaintiff's wholly omitted to file the affidavit required by MCL 600.2912d(1). Court of Appeals Opinion, p 4, citing *Scarsella*, 461 Mich at 553. The Court held that the April 11, 2019 complaint was ineffective, that any amended complaint filed May 13, 2019 could not relate back, and determined that the applicable two-year medical malpractice statute of limitations expired with respect to the claim arising from the patient's first surgery on May 1, 2017. *Id*. at 4-5, 8. The Court of Appeals determined that, with respect to surgery performed on July 23, 2017, the statutory period of limitations was tolled by the filing of an amended complaint ***with*** the accompanying AOM, filed May 13, 2019 (filed 12 days after the claim expired on the May 1, 2017 claim but filed within the two years of expiration of the July 23, 2017 claim). *Id*. at 8.

Realizing the dispositive effect of *Scarsella* under the specific facts presented, Plaintiff does not defend the trial court's ruling, nor directly attack the Court of Appeals Opinion. Instead, Plaintiff asks this Court to overrule that portion of *Scarsella* that renders the medical malpractice complaint ineffective when filed unaccompanied with an AOM, and to graft on *Scarsella* a court-devised AOM tolling provision allegedly supported by

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MCL 600.1901 [commencement of a civil action] and authorized by MCL 600.5856(a) [filing of complaint tolling]. In so arguing, Plaintiff ignores the legislative mandate that the AOM "shall" be filed with the complaint, and leaves unexplained the Legislature's statutory-leeway to obtain a 28-day extension to file the AOM, displacing any perceived need for tolling.

Defendants request this Court deny leave to appeal. Plaintiff asks this Court to resolve an issue that was never presented to nor resolved by the trial court, and one which was presented to but not addressed by the Court of Appeals: does a medical malpractice complaint filed without the statutorily-required AOM under MCL 600.2912d(1) toll the statute of limitations, measured from the time that the complaint was filed through some undetermined date (presumably when the amended complaint was filed with an AOM)? Plaintiff concedes as she must that under the existing law of this Court is that there is no tolling effect of the complaint filed without the AOM (and no argument is presented that the AOM is somehow defective or can be amended, but acknowledging that it was wholly omitted from the filing of the original complaint). Neither of the provisions cited by Plaintiff, MCL 600.1901, defining commencement of an action by the filing of the complaint, nor MCL 600.5856(a), allowing tolling between the time a complaint is filed and service of process is accomplished, trumps the Legislature's mandate that the AOM "shall" be filed with the complaint at the time of filing. Nor does Plaintiff explain let alone justify her failure to seek a timely extension to file the AOM, as

specifically provided by statute, MCL 600.2912d(2), providing the significant equivalent of a limited 28-day tolling provision to allow compliance with the "shall" mandate of filing the AOM with the complaint. Finally, Plaintiff does not address *stare decisis* when seeking to overrule *Scarsella*.

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COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. The allegations.

This action arises from care and treatment rendered to Plaintiff Candi Ottgen ("Plaintiff" or "Ms. Ottgen") by Dr. Abdalmaijid Katranji ("Dr. Katranji") for bilateral thumb pain, numbness, and tingling in Ms. Ottgen's fingers, which she was experiencing in 2016 and 2017. (**Apx 000021a**, #1, ¶ 4).[2] Plaintiff was referred to Dr. Katranji, a hand surgeon. Dr. Katranji performed surgery on Ms. Ottgen's fingers on two dates, May 1, 2017 and July 23, 2017 (**Apx 000024a**, *Id*. at ¶ 29). In her complaint, Plaintiff alleged that Dr. Katranji committed professional malpractice on May 1, 2017 by removing her trapezium,[3] which she contends has caused a decreased range of motion in her thumb, decreased strength, and difficulties when performing activities of her daily life. (**Apx 000021a-000024a**, #1, Counts I and II). The only factual assertions of professional negligence relate to the performance of the May 1, 2017 arthroplasty on the patient's right thumb and removed of the trapezium (**Apx 000023a**, ¶¶ 19-24).[4]

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[2] Appendix references in this Answer refer to Defendants' Appendix filed in the Court of Appeals. The Appendix is not re-submitted here because the sole issue on application is purely legal in nature, with Plaintiff accepting the facts found in the Court of Appeals Opinion, which in turn reflects the facts and proceedings found in that Appendix. Of course, Defendants will provide the Appendix if the Court so requests.

[3] The trapezium is the bone below the base of the thumb. Removal of the trapezium is a known method of relieving nerve pressure.

[4] The only reference to the July 23, 2017 carpel tunnel release surgery is in ¶ 14, without any reference to negligence, and in ¶ 29, in which Plaintiff asserts both the May 1, 2017

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B. Plaintiff's complaint filed without an affidavit of merit.

Plaintiff's original Complaint was filed on April 11, 2019. (Ingham County Case Events, Entry 1). Plaintiff did not file an AOM with that Complaint. (*Id*.). Plaintiff did send a notice of intent to Dr. Katranji and the other Defendants on or about September 27, 2018. (**Apx 000220a**, p 6; #1). The notice of intent did not have any tolling effect because the period of limitations would not have otherwise expired during the notice of intent waiting period, measured either from May 1, 2017 or July 23, 2017. (**Apx 000014a**, p 6, fn 4). Accordingly, the two-year statute of limitations with respect to the May 1, 2017 procedure expired on May 1, 2019, and the two-year period for the July 23, 2017 procedure expired on July 23, 2019. MCL 600.5838a(1).

C. Defendants' motion for summary disposition.

Given the lack of an AOM, Defendants moved for summary disposition on or about May 9, 2019. (**Apx 000005a-000030a**). They argued that dismissal was required because Plaintiff's complaint without an AOM was a nullity under this Court's decision of *Scarsella,* and that the May 1, 2017 surgery claim was barred by the statute of limitations, and thus dismissal with respect to that surgery should be entered "with prejudice." (See generally **Apx 000005a-000030a**).

Plaintiff filed a response on June 3, 2019, in which she ***admitted*** that the AOM was

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and the July 23, 2017 surgeries caused the patient damage (**Apx 000022a, 000024a**, ¶14, ¶ 29).

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not filed with the complaint, explaining the AOM had been obtained earlier, on January 30, 2019, and was simply omitted from Plaintiff's filing of her April 11, 2019 complaint and jury demand "due to a clerical error." (**Apx 000151a-000211a**, ¶ 8). In that response, Plaintiff also asserted she had filed an amended complaint on May 13, 2019, with the AOM, and asserted that the amended complaint related back to the original filing date of April 11, 2019, citing MCR 2.118(D). (*Id*. **Apx 000152a**). Attached to that response was Plaintiff's unfiled AOM, dated January 30, 2019 (**Apx 000179a-000181a**), the original Complaint and Summons, dated April 11, 2019 (**Apx 000183a-000191a**), and the First Amended Complaint and Jury Demand, dated May 13, 2019 (**Apx 000197a-000206a**). Notably, there is no indication that Plaintiff obtained an order granting leave to file a first amended complaint. Nor was the first amended complaint filed within 28 days, the extension time granted in MCL 600. 2912d(2).

D. Plaintiff's out-of-time motion to file late affidavit of merit.

Plaintiff also filed an emergency motion to file a late AOM, on May 14, 2019. (**Apx 000031a-000033a**). She explained in a subsequently-filed amended brief in support of that motion, dated May 16, 2019, that leave should be granted to file a late AOM because *Scarsella* was erroneously decided and should be overturned, and that "but for a scrivener's error," the AOM would have been filed with the original complaint on April 11, 2019. (**Apx 000070a-000073a**, pp 7-10).

Defendants opposed that motion in their Response in Opposition to Plaintiffs'

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Emergency Motion to File a Late Affidavit of Merit, May 15, 2019. (**Apx 000034a-000063a**). In that document, Defendants explained that *Scarsella* remains good law in Michigan, that the AOM statute provides that an AOM "shall" be filed with the complaint, citing MCL 600.2912d, and that the filing of a medical malpractice complaint without an AOM does not toll the applicable limitation period. (**Apx 000037a-000040a**; *Id*. at pp 4-7). Defendants also argued that the statute, MCL 600.2912d(2), allows only for a 28-day extension after the date the complaint is filed, and that the first amended complaint was filed on May 13, 2019 – 32 days after the original complaint was filed. (**Apx 000041a**; *Id*. at 8).

E. Motion to dismiss Plaintiff's First Amended Complaint.

Yet another round of motions was filed with the trial court. On May 28, 2019, Defendants filed their Motion to Dismiss Plaintiffs' First Amended Complaint. (**Apx 000121a-000150a**). They argued that a party may file an amended pleading within 14 days of being served with a responsive pleading, but that an AOM is not considered to be a pleading. Accordingly, an AOM could not be amended "of right." (**Apx 000123a**; *Id*. at ¶ 9). Defendants further argued that, given the failure to file an AOM with the original complaint, there was no "action to amend," and accordingly no relation back. (**Apx 000123a**; *Id*. at ¶¶ 10-11).

Plaintiff responded on June 4, 2019. (**Apx 000212a-000272a**). She argued – once again – that *Scarsella* was erroneously decided and should be overturned (**Apx 000221a-**

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000226a; *Id*. at 7-12), and that Plaintiff's first amended complaint related back to the time of the filing of the original complaint (**Apx 000226a**; *Id*. at 12).

Each of these motions was pending when the trial court scheduled oral argument for August 7, 2019. (**Apx 000273a-000296a**; Tr. 8/7/2019).

F. The trial court's decision and reasoning.

On August 7, 2019, Judge Canady heard oral argument from the attorneys. (**Apx 000273a-000296a**, Tr. 8/07/2019). Review of that transcript reveals no debate on the material facts underlying the legal question of whether there is an exception to *Scarsella* when an AOM has been prepared and is in the possession of the plaintiff's attorney, but is not filed with the complaint. Reasoning that *Scarsella* does not discuss such circumstances here – the AOM *existed* and was in the possession of the attorney – the trial court found *Scarsella* distinguishable and thus not binding. The trial court then decided this case could proceed because the failure to file the AOM with the original complaint was found to be clerical error. (**Apx 000293a**)

The transcript reveals the following statements of the court. First, the trial court acknowledged the defense position that there are no exceptions to *Scarsella*. (**Apx 000289a**; *Id*. at 17). Then the trial court distinguished *Scarsella* on its facts:

> "[I]n *Scarsella*, the Court sort of agreed with the Defense, that if I file your complaint and you don't have an affidavit of merit in existence, that you could not file one later. But we don't have that situation here. We have a situation where an affidavit of merit was in existence, and was inadvertently not attached."

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(**Apx 000289a-000290a**; *Id*. at 17-18).

The trial court continued that "*Scarsella* is not on point with this case, because there was an affidavit of merit in existence, and in the possession of Plaintiff's attorney." (**Apx 000290a**; *Id*. at 18). Finding here that the AOM was in existence at the time of the filing of the original complaint, the trial court then found the failure to provide the AOM with the original complaint resulted from "the inadvertent clerical error of Plaintiffs' attorney" (**Apx 000292a**; *Id*. at 20), and reasoned that there was "no bad faith or dilatory motive on the part of the movant." On this basis, the trial court denied the respective motions filed by Defendants. (**Apx 000293a-000294a**; *Id*. at 21-22).

Notably, the trial court admitted that if no AOM was in existence at the time of the filing, "I probably would have agreed with you. But we don't have that situation here." (**Apx 000291a**; *Id*. at 19).[5]

After the trial court stayed further proceedings to allow an appeal to move forward (**Apx 000294a**; *Id*. at 22), and dismissed certain entities without prejudice through the consent of the parties (**Apx 000294a**; *Id*.), the trial court entered its September 3, 2019 Order denying summary disposition and denying the motion to dismiss Plaintiff's First Amended Complaint. Defendants' Application followed.

[5] As the Court of Appeals so recognized, this comment isolates the trial court's error: the ***existence*** of an AOM, rather than the actual ***filing*** of that affidavit with the complaint, governs the AOM requirement.

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G. The Michigan Court of Appeals Opinion.

On February 19, 2020, a panel of the Michigan Court of Appeals granted leave to appeal. (**Apx 000299a**; Court of Appeals Order). In its ensuing May 20, 2021 unpublished opinion, the Court of Appeals found dispositive this Court's decision in *Scarsella*, reasoning that the mere filing of a complaint without an AOM that may have existed but was never filed constitutes a "wholly omitted" affidavit under *Scarsella* and rendered the complaint ineffective. (**Exhibit 1**, Opinion at pp 3-5). In this regard, the Michigan Court of Appeals reversed the trial court's ruling. *Id*. It then examined whether the nullification of the complaint under *Scarsella* rendered untimely the complaint with respect to the claims arising out of the May 1, 2017 surgery (time-barred) and the July 23, 2017 carpel tunnel release surgery (timely), determining that the two-year medical malpractice statute of limitations expired with respect to the first surgery before Plaintiff filed the amended complaint with an AOM, but had not expired with respect to the latter surgery. *Id*. at 8-9. Important for purposes of the pending Application, the Court of Appeals also noted – and Plaintiff did not contest – that Plaintiff's motion to file a late AOM was filed after the statutory 28-day provision of MCL 600.2912d(2).[6]

The Court of Appeals thus held that dismissal with prejudice with regard to the May 1, 2017 surgery was appropriate, and that Plaintiff's claims concerning the July 23,

[6] Complaint filed on April 11, 2019, 28-day period expired May 9, 2019, Plaintiff's motion to file late AOM filed on May 14, 2019.

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2017 surgery could move forward. *Id*. at 8-9.

H. Plaintiff's Supreme Court Application.

On July 1, 2020, Plaintiff filed her Application with this Court. Although Plaintiff presented two arguments on appeal at the Court of Appeals level,[7] only one is presented for Supreme Court review: *Scarsella* should be reversed and the filing of a medical malpractice complaint which "wholly omits" an AOM has tolling effect under MCL 600.5856(a) ("the statutes of limitations or repose are tolled in any of the following circumstances: (a) At the time the complaint is filed… ") by reason of MCL 600.1901 ("A civil action is commenced by filing a complaint with the court."). Plaintiff admits that this relief requires a change in case law, specifically this Court abandoning the *Scarsella* "wholly omitted" AOM rule while rendering the filing of the complaint as ineffective and a nullity. Notably, the Court of Appeals found that Plaintiff's only pending argument here was not raised before the trial court, Opinion p 5.

[7] Plaintiff argued at the Court of Appeals level that Defendants had not timely provided medical records under notice of intent statute, MCL 600.2912b(5), and accordingly the AOM here could be filed within 91 days after the filing of the complaint, MCL 600.2912d(3). This argument was not presented at the trial court level. The Michigan Court of Appeals agreed and found this argument unpreserved. Opinion, p 5. It nonetheless addressed the issue and found that the Defendants did allow claimant access to all medical records. *Id*. at 5-6. This Court need not review the merits of that decision because it is not presented as a Question or otherwise as an issue in Plaintiff's pending Application.

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ARGUMENT

THIS COURT SHOULD NOT GRANT APPELLATE REVIEW OF AN ISSUE NEVER RAISED IN THE TRIAL COURT WHICH SEEKS TO DISLODGE TWO DECADES OF ESTABLISHED MICHIGAN SUPREME COURT CASE LAW IN *SCARSELLA v POLLAK,* 416 Mich 547; 607 NW2d 711 (2000), WITHOUT ANY PROFFERED JUSTIFICATION UNDER THE RULE OF *STARE DECISIS* AND WHERE THE RELIEF SOUGHT BY THESE PLAINTIFFS WAS READILY AVAILABLE BUT NOT IMPLEMENTED BY A TIMELY MOTION TO FILE A LATE AFFIDAVIT OF MERIT.

A. Standards of review and supporting authority.

This argument triggers several standards of review. First, the grant of Michigan Supreme Court review is left to the sound discretion of this Court. *Armstrong v Commercial Carriers, Inc*, 341 Mich 45; 67 NW2d 194 (1954); *Sweitzer v Littlefield*, 297 Mich 356; 297 NW 522 (1941); MCR 7.305(B) (grounds needed to support Supreme Court review) and (H)(1) (the Court may grant or deny the application for leave to appeal, enter a final decision, direct argument on the application, or issue a peremptory order). Second, questions of statutory interpretation are questions of law that are reviewed *de novo*. *Martin v Beldean*, 469 Mich 541, 546; 677 NW2d 312 (2004). Third, consideration and application of *stare decisis* is decided *de novo*. See e.g. *Robinson v City of Detroit*, 462 Mich 539, 463-464; 613 NW2d 307 (2000).

B. Introduction – summary.

Plaintiff requests this Court upset well-established medical malpractice case law holding the filing of a complaint without the requisite AOM is a nullity for statute of limitations purposes, upon which litigants and the courts have relied for 22 years. This

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Court is asked to redefine if not nullify the statutory mandate that an AOM "shall" be filed with the complaint, MCL 600.2912d(1), when Plaintiff had the ability but did not timely seek the statutorily-permitted extension of time to file the AOM allowed under section 2912d, MCL 600.2912d(2). This argument was never presented to or ruled on by the trial court, which denied Defendants' motion of summary disposition, but only presented as an alternative argument to the Court of Appeals on leave granted, and never ruled upon by that Court for lack of preservation. At the onset, this is the wrong case in which to present an argument rearranging Michigan law with a statutory interpretation argument that nullifies the requirement that an AOM be filed with the complaint, and one in which *stare decisis* is not discussed.

C. The relevant case law and statutes.

Plaintiff contends this Court erred in 2010 when stating in its *Scarsella* opinion:

> "[F]or 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."

Scarsella, 461 Mich at 549. Plaintiff also takes issue with the *Scarsella* holding rejecting tolling of the statute of limitations for the mere filing of a medical malpractice complaint without the requisite AOM:

> "Because plaintiff's complaint without an affidavit of merit was insufficient to commence his action, the period of limitations expired in October 1995. Accordingly, the trial court correctly concluded that plaintiff's claim, as completed in April 1996, was time-barred. Furthermore, because the complaint without an affidavit was insufficient to commence plaintiff's malpractice action, it did not toll the period of limitations."

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Id. at 550 (footnote omitted).

Plaintiff requests tolling without hardly a glance at the Legislature's mandate that "the plaintiff in an action alleging medical malpractice … *shall file with the complaint an affidavit of merit* …" of MCL 600.2912d(1) (emphasis supplied). Nor does Plaintiff acknowledge the significance of her failure to timely seek an extension of time to file the AOM in this case, as the Legislature has provided the equivalent of tolling in MCL 600.2912d(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)."

Instead, Plaintiff assails the 22-year old *Scarsella* opinion upon which medical malpractice litigants and practicing attorneys have relied since its issuance, without regard to the doctrine of *stare decisis*, not mentioned let alone justified as ignored in Plaintiff's Application. Rather, Plaintiff seeks to cumulate extensions of time to file an AOM, first by the 28-day extension period of § 2912d(2), conspicuously unexercised here, and then by an additional tolling period of undefined length under MCL 600.5856(a), that statute designed only to address the time needed to serve a defendant with process:

> "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 a summons and complaint are served on the defendant within the time set forth in the supreme court rules."

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D. Argument.

1. The legislative mandate of MCL 600.2912d(1) must be honored.

When seeking to discard *Scarsella*, Plaintiff omits any meaningful analysis of the terms of § 2912d(1). In that provision, the Legislature provided that a complaint "shall" be accompanied by an AOM with respect to a medical malpractice action. If, as Plaintiff contends, tolling effect is given to a medical malpractice complaint absent an accompanying AOM, the "shall" in this provision is rendered discretionary, not mandatory. Under MCL 8.3a, all words and phrases shall be construed and understood according to their common and approved usage of the language. "Shall" is not a technical word or phrase that should be defined otherwise. Instead, "shall" denotes a mandatory rather than a discretionary action. *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) (courts should give the ordinary and accepted meaning to the mandatory word "shall" unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole). A litigant cannot simply ignore the terms of a statute or any individual word used by the Legislature when considering the effect and scope of that statute. "In reviewing the statute's language, every word should be given meaning, and we [the court] should avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

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Plaintiff relies on this Court's *Progress Michigan v Attorney General*, 506 Mich 74; 954 NW2d 475 (2020), in which a party analogized an unverified non-medical malpractice complaint to a medical malpractice complaint without an AOM, an analogy this Court rejected. Plaintiff makes a quantum leap that *Scarsella*, decided in the medical malpractice context, is somehow discredited by the *Progressive Michigan* Court's rejection of this analogy. As stated in *Progress Michigan*, "*Scarsella* does not apply in this context." 506 Mich at 81. Unlike the medical malpractice context by which an AOM must accompany a complaint to be valid, in *Progress Michigan* the Court found that there was nothing in the Court of Claims Act or the Freedom of Information Act that "prescribes different practices or procedures governing the commencement of an action or the tolling of a limitations period." *Id*. at 94. The Court further explained that, "by its own terms, *Scarsella* does not apply here," citing specifically § 2912d(1) and the requirement that a medical malpractice plaintiff "shall file with the complaint an [AOM] signed by a health professional." *Id*. at 96. "Limiting our holding to the AOM requirement in that statute, we held that the plaintiff's failure to file the affidavit rendered the complaint 'ineffective,' in that it would 'not work a tolling of the applicable period of limitations." *Scarsella*, 461 Mich at 553; 607 NW2d 711." *Id*. Then, the *Progress Michigan* Court stated:

> "We note the obvious that the complaint at issue here [in *Progress Michigan*] does not allege a claim of medical malpractice and, hence, does not fall within the *Scarsella's* express holding.[15]"

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Id. at 96. In footnote 15, the *Progress Michigan* Court noted that the complaint in *Scarsella* omitted the requisite AOM, distinguished from the complaint in *Progress Michigan* where the complaint was "inadequate or defective."

At best, *Progress Michigan* stands for the limited proposition within the two acts analyzed that an adequate or defective complaint may have tolling effect, to be distinguished from a complaint with a totally missing component, namely a medical malpractice complaint without an AOM.[8]

2. Commencement of a medical malpractice action requires the filing of an AOM.

The predicate for requesting this sweeping change in the case law notwithstanding the Legislature's instruction that an AOM "shall" be filed with the complaint is Plaintiff's interpretation of MCL 600.1901, providing that "a civil action is commenced by filing a complaint with the court." Relying rotely upon MCL 600.1901, Plaintiff argues that since a civil action is commenced by the filing of a complaint with the court, there is no need in the medical malpractice context to have an AOM contemporaneously filed to allow the action to be commenced. In turn, according to Plaintiff the filing-of-complaint tolling provision, MCL 600.5856(a) would apply, thereby tolling the statute of limitations for

[8] In *Progress Michigan*, footnote 15, the Court noted that *Scarsella* was limited to a wholly omitted AOM context and it did not address the problem of a defective AOM, citing *Saffian v Simmons*, 477 Mich 8, 13-14; 727 NW2d 132 (2007).

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some unstated period of time – presumably when a plaintiff eventually files an AOM.[9] Reduced to its base level, Plaintiff argues that § 1901 takes precedent over § 2912d(1) in the medical malpractice context, without regard to the well-established rule that the more specific statute governs. *Donkers v Kovich*, 277 Mich App 366, 371; 745 NW2d 154 (2007). "[T]he rules of statutory construction also provide that a more recently enacted law has precedence over the older stature." *Travelers Ins v U-Haul of Mich, Inc*, 235 Mich App 273, 280; 597 NW2d 235 (1999). "This rule is particularly persuasive when one statute is both the more specific and the most recent." *Id*. Applied here, § 2912d(1), the more specific and more recently enacted statute, takes precedent over the general and earlier enacted § 1901. The AOM statute is tailor-made for medical malpractice actions, and as noted in the very case cited by Plaintiff, *Progress Michigan*, it applies in a specific type of civil action, namely a medical malpractice action.

The generalized statement by the Legislature on the commencement of a civil action is capable of specification and indeed modified by § 2912d(1), enacted decades after § 1901 and with presumed full legislative knowledge, requiring an AOM to be filed "with the complaint." Merely providing that a civil action is commenced by the filing of

[9] The open-ended aspect of tolling as suggested by Plaintiff demonstrates its fallacy. If the filing of a medical malpractice complaint without an AOM were tolled simply by the filing of the complaint, only, then arguably it would be tolled through the entire time until an AOM is eventually filed with the court. Under Plaintiff's tolling proposition, there is no "end point" to the tolling. This flies in the face of common sense, the purpose of an AOM for an initial demonstration of merit to the claim and creates an absurd proposition of law. These points are discussed *infra* in the text.

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the complaint found in § 1901 does not eliminate the Legislature's ability to specify further or add other requirements to commence a specific type of civil action, such as the filing of an AOM with the complaint. No case law is cited by Plaintiff to the contrary.

3. Tolling under MCL 600.5856(a) is specific and limited to service of process.

Next, Plaintiff unduly relies upon the tolling provision of § 5856(a). As applied to Plaintiff's argument, the unaccompanied medical malpractice case would toll the applicable medical malpractice statute of limitations until – when? Section 5856(a) specifically provides tolling in the context of the time between the filing of the complaint and the time set forth in the court rules to timely serve and thus obtain jurisdiction over the defendant. This is evident from the very terms of § 5856(a) (tolling occurs 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"). Obviously, this tolling provision has a limited purpose and is provided in a defined, narrow situation: to prevent expiration of the statute of limitations between the time the complaint is filed, and when jurisdiction is obtained over the defendant, presumably through service of process. Defendants do not contest the operation of this statute in a medical malpractice case, limited to the very words used in the circumstances envisioned by the Legislature. However, § 5856(a) tolling is applicable by its very terms only in the service of process situation. There is no indication of application outside that limited context, and certainly

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not specifically or even by implication in the medical malpractice context. Plaintiff's argument is both curious and convoluted whose mother was undoubtedly necessity.

4. AOM tolling would be open-ended, neither justified nor workable.

Under Plaintiff's argument, the unaccompanied medical malpractice case would toll the applicable medical malpractice statute of limitations indefinitely. In contrast, § 5856(a) is limited to the service of process context, discussed supra, and has a defined endpoint, specifically providing through the time of service is allowed under the Court Rules (tolling occurs 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"). No such endpoint is provided for AOM tolling nor does one logically exist. See footnote 9, supra.

5. AOM tolling would render nugatory the statutory extension of time provision to file an AOM under MCL 600.2912d(2).

The AOM tolling requested by Plaintiff carries an open-ended tolling period between the time a complaint is filed an AOM is then obtained and filed – explained earlier to extend indefinitely under Plaintiff's tolling proposition. Such tolling would vitiate altogether *the need* to obtain a 28-day extension of time to timely file an AOM. Restated, Plaintiff's tolling provision would render nugatory MCL 600.2912d(2) because there would be no need to file such a motion for a 28-day extension. Thus, the logical conclusion drawn from Plaintiff's argument is that the Michigan Legislature enacted a specific 28-day grace period when one was not needed, all because a civil action is

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commenced by the filing of the complaint and when that complaint has tolling effect indefinitely, based on a statute that provides tolling in a limited situation.

Plaintiff does not reconcile her request for tolling under § 5856(a) with the Legislature's allowance of a 28-day extension of time to file an AOM upon a showing of good cause. See MCL 600.2912d(2). Tolling is not the answer to circumventing what Plaintiff alleged to be the devastating impact of failing to file an AOM with the complaint. Rather, all a plaintiff must do to obtain a 28-day extension of time is to file the complaint and then demonstrate good cause for filing an AOM within the ensuing 21 days. Here, the 28-day provision was available but not used by Plaintiff, which undercuts any equitable argument now being presented to the Court.

6. AOM tolling would effectively stack tolling provisions, generally prohibited under Michigan law.

The practical effect of Plaintiff's requested AOM tolling is to stack tolling provisions available, the first being the 28-day extension period provided by statute, MCL 600.2912d(2), and the second the requested AOM tolling. There has been no showing that multiple extensions of time to timely file an AOM are required or beneficial to the timely progress of the lawsuit. Thus, in addition to the other difficulties previously discussed regarding AOM tolling, including its evisceration of the "good cause" extension provision and the open-ended nature of the requested tolling, the adoption of such tolling would accumulate run afoul of the general prohibition on stacking tolling provisions. The Michigan Legislature has demonstrated it is averse to such stacking, as evidenced by the

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notice of intent statute, MCL 600.2912b(6),[10] and the disability statute, MCL 600.5851(4).[11]

7. Plaintiff fails to consider *stare decisis.*

Although Plaintiff acknowledges that *Scarsella* is well-established law that has been on the books for over 20 years, she provides this Court with no analysis of *stare decisis*. Thus, for the sake of argument if Plaintiff is correct on the merits, the Court must consider *stare decisis* as a factor before overruling *Scarsella*. *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). "[T]he mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." 462 Mich at 565 (footnote omitted). The Court must examine the effects of overruling a decision, including most importantly "the effect on reliance interests and whether overruling would work an undue hardship because of that reliance." *Id*. As to the reliance interests, the Court must ask whether a previous decision "has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just the adjustments but practical real-world dislocations." *Id*. at 466 (footnote omitted).

[10] "After the initial notice is given to the health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified."

[11] "A person shall not tack successive disabilities. The court shall recognize only those disabilities that exist at the time the claim first accrues and that disable the person to whom a claim first accrues for the purpose of modifying the period of limitations."

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The medical/legal community has relied upon the *Scarsella* rule for the last 22 years. It carries "practical workability" because of its certainty: an AOM must be filed with the complaint or otherwise that complaint is ineffective and considered a nullity. There is no guesswork and, although it places an affirmative burden on a plaintiff with respect to dismissal, it also carries a significant consequence for a defendant who fails to file an affidavit of meritorious defense: subject to default. MCL 600.2912e(1). In each instance, the attorney for the relevant litigant understands and abides by the law.

As with Plaintiff's failure to reconcile open-ended tolling with the 28-day extension period granted by the Legislature to file a late AOM, so too this allowance/grace period provided by the Legislature bodes against overruling *Scarsella* which, by no stretch of the imagination, can be classified as "wrongly decided," but rather in Plaintiff's view, "better decided" with the injection of AOM tolling. *Stare decisis* considerations bode against the overruling of *Scarsella* as requested by Plaintiff.

E. Conclusion.

Plaintiff's misunderstanding of the doctrinal framework of AOM, *Scarsella*, and tolling is erroneous. This Court should deny leave to appeal and otherwise leave intact *Scarsella* and its holding.

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RELIEF

WHEREFORE, Defendants-Appellees request this Court deny leave to appeal and enter any other relief the Court deems appropriate.

Respectfully submitted,

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