

STATE OF MICHIGAN  
IN THE SUPREME COURT

MARY KIRKALDY and  
WILLIAM KIRKALDY,

Plaintiffs-Appellants,

-vs-

RAINA M. ERNSTOFF, M.D., and  
RAINA M. ERNSTOFF, M.D., P.C.  
CHOON SOO RIM, M.D., and RIM &  
SOL, M.D., P.C., Jointly and Severally,

Defendants-Appellees,

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Supreme Court No. 129128

Court of Appeals No. 225735

Lower Court No. 98-839111 NH

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF IN  
SUPPORT OF THEIR APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

*129128  
Reply/suppl*

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In July 2005, plaintiffs Mary and William Kirkaldy filed an application for leave to appeal in this Court. In that application plaintiffs raised two important issues pertaining to this Court's decision in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). First, plaintiffs argued the *Scarsella* ruling compelled the conclusion that a medical malpractice action which is filed along with an affidavit of merit, which is later deemed to be inadequate or defective, must still be considered "commenced" for purposes of the tolling principle contained in MCL 600.5856(a). Thus, plaintiffs argued in their application that, if the affidavit of merit which accompanied their complaint was defective under MCL 600.2912d<sup>1</sup>, the appropriate disposition of this case should be a dismissal *without* prejudice, with plaintiffs being allowed to refile their case and being able to claim the tolling period provided in MCL 600.5856(a) during the entire pendency of the earlier filed case. *See Scarsella*, 460 Mich at 551; *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26; 594 NW2d 455 (1999).

In their application, plaintiffs also asked the Court to review the question of whether *Scarsella* was correctly decided insofar as that opinion ruled that a medical malpractice action filed *without* an affidavit of merit could not be considered commenced at all for purposes of MCL 600.5856(a) and would, therefore, be barred by the statute of limitations if that period of limitations has expired.

Since the application for leave was filed, this Court has issued two decisions which directly impact on the issues which plaintiffs have raised with respect to the Court's ruling in *Scarsella*

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<sup>1</sup>Plaintiffs have also argued in their application for leave that the affidavit of merit submitted with their complaint fully complied with MCL 600.2912d because plaintiff's counsel had a reasonable belief that the physician signing that affidavit was qualified to do so under MCL 600.2169. That issue is not the subject of this Supplemental Brief.

ruling. It is most important that the Court consider these two recently decided cases in assessing either why this case deserves the Court's full consideration on why the Court of Appeals ruling should not be summarily reversed.

**I. THE IMPACT OF THIS COURT'S DECISION IN *SAFFIAN V SIMMONS*, \_\_\_ MICH \_\_\_; \_\_\_ NW2d \_\_\_ (2007), ON THE QUESTION OF WHETHER A PLAINTIFF WHO FILES A MEDICAL MALPRACTICE ACTION WHICH IS ACCOMPANIED BY A DEFECTIVE OR INADEQUATE AFFIDAVIT OF MERIT MAY CLAIM THE TOLLING EFFECT OF MCL 600.5856(a).**

This case raises the important question of how the courts of this state are to treat a medical malpractice action which is commenced with an affidavit of merit, when that affidavit is later deemed to be defective or inadequate. Plaintiffs have argued, based on this Court's decision in *Scarsella*, that such a case is to be dismissed *without* prejudice to the plaintiffs' right to institute a second case, and that the plaintiff in that later action may claim the tolling effect of MCL 600.5856(a) during the pendency of the earlier filed case.

In *Scarsella*, this Court ruled that where a medical malpractice action is filed *without any affidavit of merit*, such a case is not commenced at all for purposes of MCL 600.5856(a). Thus, in *Scarsella* this Court clearly ruled that where a medical malpractice action is filed *in the absence of* an affidavit of merit, such a case would not be deemed commenced for statute of limitations purposes and, if the applicable limitations period has expired before an affidavit of merit is filed, such a case is subject to a dismissal with prejudice on limitations grounds. In other words, this Court ruled in *Scarsella* that a plaintiff who files a malpractice complaint without an affidavit will not be allowed to claim the benefit of MCL 600.5856(a)'s tolling principle, because a malpractice case filed in the absence of an affidavit of merit is not considered "filed" under that tolling statute.

This Court in *Scarsella* made a clear distinction for purposes of §5856(a)'s tolling effect

between a malpractice complaint filed without *any* affidavit of merit and one which is filed with an affidavit of merit which is later determined to be inadequate or defective. In *Scarsella*, this Court reached the conclusion that a malpractice action filed without any affidavit of merit was not commenced largely on the basis of language contained in MCL 600.2912d(1), which provides that an affidavit of merit must be filed in any medical malpractice action:

MCL 600.5856(a); MSA 27A.5856(a) provides that a period of limitation is tolled “[a]t the time the complaint is filed and a copy of the summons and complaint are served on the defendant.” In the present case, the plaintiff did file and serve a complaint within the limitations period. The issue thus arises whether that filing and service tolled the limitation period, so that it still had not expired when the affidavit was filed the following spring.

As explained by the Court of Appeals in the opinion we are adopting today, ***such an interpretation would undo the Legislature’s clear statement that an affidavit of merit “shall” be filed with the complaint.*** MCL 600.2912d(1); MSA 27A.2912(4)(1).

461 Mich at 552 (emphasis added).

This reasoning, which led the Court in *Scarsella* to conclude that a malpractice complaint filed in the absence of an affidavit of merit was not commenced at all, *does not apply where the plaintiff submits an affidavit of merit with the complaint, but that affidavit is later found to be defective.* In the latter situation, the plaintiff has complied with the mandatory language of §2912d(1).

As plaintiffs have argued in their application, that is precisely the conclusion which this Court appeared to reach in *Scarsella*. The Court in *Scarsella* specifically indicated that its holding as to the inapplicability of §5856(a)’s tolling principle to a case where *no* affidavit of merit was filed cannot extend to a case in which an affidavit of merit accompanies a complaint, but that affidavit is determined to be defective in some respect. Thus, this Court ruled in *Scarsella*:

Today, we address only the situation in which a medical malpractice plaintiff wholly omits to file the affidavit required by M.C.L. §600.2912d(1); MSA 27A.2912(4)(1). In such an instance, the filing of a complaint is ineffective, and does not work a tolling of the applicable period of limitation. ***This holding does not extend to a situation in which a Court subsequently determines that a timely filed affidavit is inadequate or defective.*** [FN7]

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[FN7] We do not decide today *how* well the affidavit must be framed. Whether a timely filed affidavit that is grossly nonconforming to the statute tolls the statute is a question we save for later decisional development.

461 Mich at 553 (emphasis added).

As the Court of Appeals' majority in this case recognized, the clear distinction which this Court drew between a malpractice case filed without any affidavit of merit and one filed with an affidavit of merit found to be defective has been completely obliterated in subsequent Court of Appeals' decisions. Beginning with its decision in *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003), and continuing in a number of later cases, the Court of Appeals has ruled that a malpractice case in which a *defective* affidavit of merit is filed is to be treated in precisely the same way as one in which *no* affidavit of merit is filed. In either circumstance, the *Geralds* Court ruled that such an action was never commenced at all for limitations purposes.

As a result of the ruling in *Geralds* and later Court of Appeals' decisions, a plaintiff who files a malpractice complaint with a *defective* affidavit of merit, like a plaintiff who files such a case without any affidavit of merit, would not be able to claim the benefit of §5856(a) tolling. Thus, the *Geralds* panel ruled in a case in which the plaintiff filed a complaint with an affidavit of merit, but that affidavit was found to be defective: "*We hold that plaintiff's affidavit was **defective** and did not constitute an effective affidavit for the purpose of MCL 600.2912d(1) and, therefore, plaintiff filed a complaint without an affidavit of merit sufficient to commence a medical malpractice action.*" 259

Mich App at 240 (emphasis added).

On February 6, 2007, this Court issued its decision in *Saffian v Simmons*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2007), a case which completely undermines the reasoning employed by the Court of Appeals in *Geralds* and subsequent cases with respect to the resolution of a malpractice case in which the plaintiff submits a *defective* affidavit of merit.

In *Saffian*, the plaintiff filed a dental malpractice action against a general dentist arising out of the performance of an allegedly negligent root canal. With her complaint, the plaintiff filed an affidavit of merit signed by a dentist whose practice was limited solely to root canals. When the defendant failed to file a timely answer to the complaint, a default was entered against him.

Following the entry of a default judgment, the defendant appealed. In that appeal, the defendant made several arguments, one of which is of particular importance here. The defendant in *Saffian* contended that the expert who signed plaintiff's affidavit of merit was a specialist in endodontics and, as a result, was unqualified under MCL 600.2169(1) to sign such an affidavit in a case involving a general dentist. *See Decker v Flood*, 248 Mich App 75; 638 NW2d 163 (2001). The defendant further asserted in *Saffian* that, because the affidavit of merit accompanying plaintiff's complaint was defective, *plaintiff's cause of action was never commenced* and, as a result, the defendant was not called upon to file a responsive pleading. Thus, the defendant in *Saffian* argued that, because plaintiff's case was never commenced under the reasoning of the Court of Appeals' post-Scarsella cases, plaintiff's claim was barred by the statute of limitations and the default entered in the case had to be set aside.

In making his argument, the defendant in *Saffian* relied upon *Geralds* and other Court of Appeals decisions which have held that a medical malpractice action which is accompanied by a

*defective* affidavit of merit is not commenced, and is, therefore, subject to dismissal on limitations grounds if the statute of limitations has expired. The defendant in *Saffian* was unsuccessful in this argument in both the circuit court and the Court of Appeals.

In the application for leave to appeal which the defendant in *Saffian* submitted to this Court, he made his position clear. He claimed that under the Court of Appeals' various post-*Scarsella* decisions, a medical malpractice action could not be considered commenced unless a complaint and an affidavit of merit which fully complied with MCL 600.2912b and MCL 600.2169 were filed before the period of limitations expired. Thus, the defendant in *Saffian* argued before this Court:

In this case, the trial court and the Court of Appeals erred by ignoring the clear and unambiguous language of the statute. The Affidavit in this case was not executed by a properly qualified general dentist. It was executed by a specialist. As a result, it does not in any way comply with the clear and unambiguous language of MCLA 600.2169. Nor does it comply with the clear requirements of MCLA 600.2912d(1). The statute of limitations could not be tolled, as *the filing of a complaint without an actual, valid affidavit of merit that fully complies with the statute does not, and cannot, commence an action for any purpose. Roberts [v Mecosta County General Hospital, 466 Mich 57; 642 NW2d 663 (2002)].*

Defendant/Appellant would point out that a default could not be entered against the Defendant/Appellant in this case where the action never commenced, given that Plaintiff/Appellee's Affidavit does not in any way comply with the statutes. Where an action has not been commenced, it is common sense that a default cannot be entered. This is particularly true where the statute of limitations expired on September 16, 2001, before defendant was required to answer the Complaint on September 28, 2001. The default was not entered until October 4, 2001.

Defendant/Appellant's Application for Leave to Appeal,  
*Saffian v Simmons*, Supreme Court No. 129263,  
<http://courts.michigan.gov/supremecourt/Clerk/11-06/129263/129263Appellant.pdf>, p. 17 (emphasis added).

Thus, the central component of the defendant's appellate argument in *Saffian* was that the circuit court's entry of a default was inappropriate because the plaintiff had never commenced a medical malpractice action in the first place, because plaintiff never filed an affidavit of merit which

fully complied with §2912d and §2169. The defendant's arguments in *Saffian*, therefore, completely tracked the Court of Appeals' determination in *Geralds*, where that Court concluded, "plaintiff's affidavit was defective and did not constitute an effective affidavit for the purpose of MCL 600.2912d(1) . . . plaintiff filed a complaint without an affidavit of merit *sufficient to commence a medical malpractice action.*" 259 Mich App at 240 (emphasis added).

After granting oral argument on the defendant's application, this Court issued a decision in *Saffian* rejecting the defendant's arguments against the imposition of a default. In reaching that conclusion, the Court addressed the defendant's assertion that plaintiff's cause of action was never commenced because the affidavit of merit accompanying the complaint was defective:

In response to these arguments, defendant counters that *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000), can only be interpreted to provide that, when the affidavit of merit is technically deficient, the action is never "commenced" and, thus, no duty to answer the complaint arises. Accordingly, he concludes that any default entered in that circumstances is void *ab initio*.

***We believe that defendant misunderstands Scarsella. In Scarsella, supra, at 550, we concluded that a medical malpractice complaint not accompanied by an affidavit of merit does not "commence" a medical malpractice cause of action and thus the defendant need not file an answer to preclude a default. Scarsella did not address the problem of a defective affidavit of merit. In that situation, as the Court of Appeals pointed out, the defendant must file an answer to preclude the entry of a default.***

*Saffian* (Slip Opinion), pp. 5-6

In *Saffian*, this Court reaffirmed the rule it previously announced in *Scarsella* - a medical malpractice complaint which is *not* accompanied by an affidavit of merit does not commence an action. But, this Court in *Saffian* expressly rejected the defendant's contention that a malpractice complaint filed with a *defective* affidavit of merit has not been "commenced." *Saffian*, therefore, represents a clear repudiation of the central basis for the Court of Appeals' ruling in *Geralds* and in

this case that a medical malpractice plaintiff who submits a defective affidavit of merit may not claim the tolling effect of MCL 600.5856(a) because such a case was never filed for purposes of that statute.

This Court must examine the conclusion reached by the Court of Appeals in *Geralds* and in this case in light of its recent ruling in *Saffian*. Under *Scarsella* and *Saffian*, if plaintiff's affidavit of merit is found to be defective, this case must be remanded to the circuit court for a dismissal *without* prejudice and plaintiff must be allowed the right to refile a timely cause of action with all appropriate affidavits of merit, while claiming the benefit of the tolling provision applicable under MCL 600.5856(a).

**II. THE IMPACT OF THIS COURT'S DECISION IN *COSTA V COMMUNITY EMERGENCY MEDICAL SERVICES*, 475 MICH 403; 716 NW2d 236 (2006), ON THE QUESTION OF WHETHER THE *SCARSELLA* COURT'S INTERPRETATION OF MCL 600.5856(a) DIRECTLY CONFLICTS WITH THE LITERAL LANGUAGE OF THAT STATUTE.**

A second issue which plaintiffs have raised in their application is that the *Scarsella* Court's ruling that a malpractice complaint filed without an affidavit of merit does not give rise to tolling under §5856(a) is inconsistent with the literal text of that statute and, for that reason, should be overruled. Plaintiffs have pointed out that tolling under §5856(a)'s unequivocal text is triggered "at the time the complaint is filed and a copy of the summons and complaint are served on the defendant." MCL 600.5856(a) specifies that tolling takes place upon the filing of *complaint*. The statute says nothing about tolling being dependent on the filing of both a complaint *and* an affidavit of merit. Despite this fact, the Court in *Scarsella* reached the conclusion that a malpractice complaint filed without an affidavit of merit was insufficient to allow for tolling under §5856(a).

The *Scarsella* Court was driven to this nontextual reading of §5856(a) on the basis of MCL

600.2912d, the statute which mandates that an affidavit of merit *shall* be filed with a medical malpractice complaint. 461 Mich at 552. Thus, in concluding that tolling under §5856 would be unavailable where a malpractice plaintiff failed to file an affidavit of merit, this Court in *Scarsella* fixed on the mandatory character of §2912d's requirement of an affidavit of merit. However, as demonstrated in this Court's more recent decision in *Costa v Community Emergency Medical Services*, 475 Mich 403; 716 NW2d 236 (2006), the Court's focus in *Scarsella* on the language of §2912d in arriving at the conclusion that it did completely overlooks equally mandatory language contained in §5856a.

In *Costa*, the question before this Court was whether agents of a governmental entity sued in a medical malpractice action were required to submit an affidavit of meritorious defense under MCL 600.2912e. That statute, like §2912d, contains mandatory language; it provides that a defendant *shall* file an affidavit of meritorious defense in any malpractice action. The defendants in *Costa* were sued in malpractice, but they failed to file an affidavit of meritorious defense as MCL 600.2912e requires. Thus, the plaintiff in *Costa* relied on the mandatory character of the language contained in §2912e in demanding that a partial judgment be entered against these defendants who had not complied with that statute.

The majority of this Court in *Costa* rejected the plaintiffs' arguments premised on §2912e's mandatory language. In a footnote responding to the dissenting opinion's reference to the mandatory language contained in that statute, the *Costa* majority explained why reliance on §2912e's text was unavailing:

The dissent is quick to point out that the word "shall", as used in MCL 600.2912e, indicates a mandatory directive, *Post* at 420. However, *the dissent fails to explain why the Legislature's directive in MCL 691.1407(2), that a governmental employee "is immune" from liability, is not equally mandatory.* The dissent offers no

explanation regarding why the Legislature's determination that something "shall" be is more imperative than its determination that something "is." This case would be a much easier one if there were not these apparently conflicting provisions.

475 Mich at 410, n. 2 (emphasis added).

Thus, what this Court found in *Costa* was that the seemingly mandatory language of §2912e had to give way to the *equally mandatory* language contained in the government tort liability act, which specifies that a governmental employee *is* entitled to immunity. Thus the majority in *Costa* found equally mandatory language in the immunity statute based on a form of the verb "to be."

The reasoning employed by this Court in *Costa* is of more than passing interest here since §5856(a), the statute which the *Scarsella* Court rewrote, has the "equally mandatory" language referenced in the *Costa* majority opinion. MCL 600.5856 specifies that statutes of limitations or repose *are* tolled under any of the circumstances described in that statute, including the situation in which a prior *complaint* is filed against the same party. Thus, §5856(a) contains precisely the same sort of mandatory language - "are" - that this Court relied upon in *Costa* in rejecting plaintiffs' argument based on the seemingly mandatory language - "shall" - of §2912e.

The analysis employed by the majority in *Costa* demonstrates rather dramatically why the ruling in *Scarsella* must be reexamined. In *Scarsella*, this Court ruled that the mandatory language in the affidavit of merit statute allowed the literal language of §5856(a) to be ignored. Yet, in *Costa*, the very same mandatory language contained in §2912e had to give way in the face of "equally mandatory" language contained in the immunity statute. But, in reaching this result in *Costa*, the Court has exposed why *Scarsella* is wrong, since §5856(a), like the immunity statute, has the "equally mandatory" language identified in *Costa*.

Plaintiffs have argued in their application that the part of *Scarsella* which addressed whether

§5856(a)'s tolling period applied should be overruled as inconsistent with the clear, literal text of that statute. This Court's ruling in *Costa* provides yet another reason why the *Scarsella* Court's ruling must be reversed.

The analysis employed by this Court in *Costa* casts doubt on yet another aspect of this Court's ruling in *Scarsella*. In *Scarsella*, the Court adopted the view that a malpractice complaint filed without an affidavit of merit is not "commenced". But, the statute which governs how a cause of action is "commenced" is MCL 600.1901, and that statute simply states that, "a civil action is commenced by filing a complaint with the court."

Similar to §5856(a)'s tolling provision, MCL 600.1901 provides for the commencement of a cause of action based on one act - the filing of a *complaint*. MCL 600.1901 makes no mention of the necessity for the filing of both a complaint *and* an affidavit of merit to effectuate the commencement of a cause of action.

Moreover, MCL 600.1901 and its provision as to how a case is formally commenced contains the same "equally mandatory" verb from that this Court identified in *Costa*. Just like the immunity act provision cited in *Costa*, MCL 600.1901 contains the verb "is", language which the majority opinion in *Costa* characterized as "imperative."

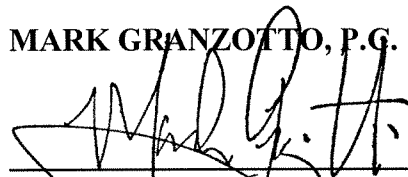
The decision reached by this Court in *Scarsella* cannot be harmonized with the text of §5856(a), nor can it be harmonized with the literal text of §1901. Based on the text of these two statutes and this Court's recent ruling in *Costa*, the Court should revisit and reverse its ruling in *Scarsella*.

**RELIEF REQUESTED**

Based on the foregoing, plaintiffs-appellants, Mary Kirkaldy and William Kirkaldy, respectfully request that this Court grant leave to appeal and give full consideration to the important legal issues presented herein. In the alternative, plaintiffs would request that this Court summarily reverse the Court of Appeals' decision affirming the dismissal of this case and remand this matter to the Wayne County Circuit Court for further proceedings.

Respectfully submitted,

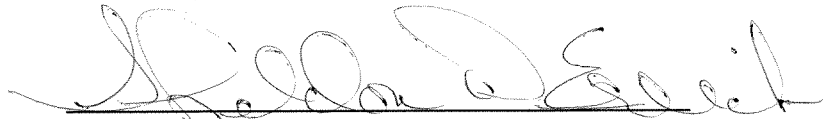
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Dated: March 8, 2007

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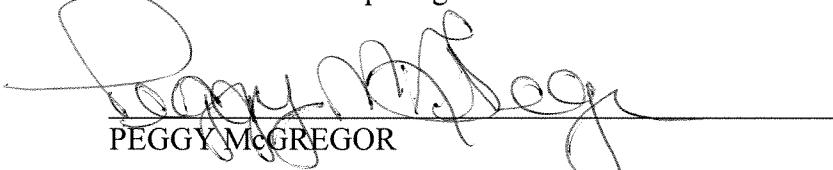
**CERTIFICATE OF SERVICE**

PEGGY McGREGOR, hereby certifies that on the 8<sup>th</sup> day of March, 2007, she mailed a copy  
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by placing said documents in the United States mail with postage affixed thereto.

  
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