

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,

Supreme Court No. 129128

Court of Appeals No. 225735

Lower Court No. 98-839111 NH

**AMICUS CURIAE BRIEF ON BEHALF OF
CITIZENS FOR BETTER CARE**

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STATEMENT OF BASIS OF JURISDICTION

This Motion and accompanying Brief are being filed within the time limit under MCR 7.215(1) for the party whose position is being advocated, namely in this case, plaintiffs-appellants.

STATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE FILING OF A MEDICAL MALPRACTICE COMPLAINT WITH AN AFFIDAVIT OF MERIT THAT CONTAINS A DEFECT CAN TOLL THE STATUTE OF LIMITATIONS, THUS REVERSING *GERALDS v. MUNSON HEALTHCARE*, WHERE MCL § 600.5856(a) DOES NOT REQUIRE THE FILING OF AN AFFIDAVIT OF MERIT TO EFFECTUATE TOLLING?

Plaintiffs-Appellants answer yes.

Defendants-Appellants argue no.

Amicus Citizens for Better Care says yes.

2. WHETHER A DEFECT IN AN AFFIDAVIT OF MERIT FILED WITH A MEDICAL MALPRACTICE COMPLAINT CAN BE CURED WITHOUT REFILEING THE COMPLAINT, WHERE MICHIGAN LAW PROVIDES FOR THE LIBERAL AMENDMENT OF PLEADINGS WHICH RELATE BACK TO THE DATE OF THE ORIGINAL PLEADING?

Plaintiffs-Appellants answer yes.

Defendants-Appellees argue no.

Amicus Citizens for Better Care says yes.

STATEMENT OF FACTS

Citizens for Better Care accepts the Statement of Facts asserted by Plaintiffs-Appellants.

DESCRIPTION OF THE AMICUS CURIAE

Citizens for Better Care came into existence in 1969. Its function as a consumer advocacy and information agency exists for the sole and exclusive purpose of improving the overall quality of care for all of Michigan's nursing home residents. Citizens for Better Care is actively concerned with court decisions which impact the rights of nursing home residents in Michigan.

INTRODUCTION

This Honorable Court has scheduled oral argument on the Application for Leave, requesting that the parties include among the issues to be addressed, (1) whether filing a medical malpractice complaint with a defective affidavit of merit can toll the statute of limitations; (2) whether a defect in an affidavit of merit filed with a medical malpractice complaint can be cured without refiling the complaint; and (3) whether *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003), lv den 470 Mich 873; 687 NW2d 292 (2004), was correctly decided.

Amicus Curiae joins the majority opinion of the Court of Appeals, as well as the Plaintiff-Appellant, in their respectful request that this Honorable Court reexamine *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000) and its progeny, *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003) and *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003).

ARGUMENT

I. THE FILING OF A MEDICAL MALPRACTICE COMPLAINT WITH AN AFFIDAVIT OF MERIT THAT CONTAINS A DEFECT CAN TOLL THE STATUTE OF LIMITATIONS; THUS *GERALDS v. MUNSON HEALTHCARE* WAS INCORRECTLY DECIDED

If a statute's language is clear and unambiguous, it is assumed that the Legislature intended its plain meaning, and the statute should be enforced as written. *People v. Stone*, 463 Mich 558, 562, 621 NW2d 702 (2001). In reviewing the language of a statute, every word should be given meaning, and a construction that renders any part of the statute surplusage or nugatory should be avoided. *Altman v. Meridian Twp*, 439 Mich 623, 635, 487 NW2d 155 (1992). The paramount rule of statutory interpretation is to discern and give effect to the Legislature's intent as expressed in the statutory language. *DiBenedetto v. West Shore Hospital*, 431 Mich 394, 402, 605 NW2d 300 (2000). If the language is unambiguous, it is presumed that the Legislature intended the meaning clearly expressed; no further judicial construction is required or permitted, and the statute must be enforced as written. *Id.*

MCL § 600.5856 clearly and unambiguously states that a statute of limitations is 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.” Although a plaintiff in a medical malpractice case is required to file an affidavit of merit with the complaint, there is nothing in MCL § 600.2912d that overrides the tolling provision of § 5856; therefore, there is no conflict among these statutes. Instead, these statutes can and should be read harmoniously. *Farrington v. Total Petroleum, Inc.*, 442 Mich 201,

209, 501 NW2d 73 (1993).

Similarly, § 2912d does not govern how an action is commenced; instead, it is MCL § 600.1901 that clearly and unambiguously provides that **“a civil action is commenced by filing a complaint with the court.”** Again, because there is no conflict among these statutes, they should be read harmoniously.

Additionally, this Court recently recognized in *Costa v. Community Emergency Medical Services*, 475 Mich 403, 716 NW2d 236 (2006), that the phrases **“are tolled”** (§ 5856) and **“is commenced”** (§ 1901), are equally as mandatory as **“shall file”** (§ 2912d).

In addition to the specific language employed in the statutes at issue in this case, it is important to recognize the language that the Legislature deliberately chose **not** to use in these statutes. For example, in drafting § 2912d, the Legislature repeatedly rejected “dismissal” as either a mandatory or permissive penalty for a complaint that is not accompanied by a certificate or affidavit. SB 270; 1986 PA 178. Because this penalty was explicitly rejected by the Legislature, it would be erroneous for this Court to explicitly authorize such a result. *In Re MCI Telecommunications Complaint (Ameritech Michigan v. Public Service Comm)*, 460 Mich 396, 415, 596 NW2d 164 (1999). More importantly, where the Legislature has rejected dismissal as an appropriate remedy for a complete failure to file an affidavit of merit, it would be unwarranted and illogical to hold that where an affidavit of merit is actually filed, but is later found to have a defect, regardless of how minor, dismissal would be an appropriate sanction.

Despite these above clear and unambiguous statutes and evidence that the

Legislature specifically rejected the sanction of dismissal, the Court in *Scarsella v. Pollak*, 461 Mich 547, 607 NW2d 711 (2000) **rewrote § 5856(a)** in holding “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.**” This Court reasoned that in such an instance, the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation.

More importantly, however, this Court in *Scarsella* also recognized that “[t]his holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is *inadequate or defective.*” *Id.* at 553, 607 NW2d at 715. For this Court to now extend the holding of *Scarsella* to such a situation would be inconsistent with the clear and unambiguous statutory language set forth above. In fact, this Court recently had the opportunity to determine whether to extend its *Scarsella* holding in *Saffian v. Simmons*, 477 Mich 8, 727 NW2d 132 (2007). However, this Court declined to do so, confirming that *Scarsella* “**did not address the problem of a defective affidavit of merit.**” *Id.* at 13-14, 727 NW2d at 136. As a result, this Court rejected the defendant's argument that when an affidavit of merit is “technically deficient” the action is never commenced and thus no duty to answer the complaint arises. *Id.* at 13, 727 NW2d at 136.

Therefore, for all of the reasons stated above, the decision of the court in *Geralds v. Munson Healthcare*, 259 Mich App 225, 673 NW2d 792 (2003) to impermissibly rewrite § 5856(a) to read that “a defect in an affidavit of merit, regardless of how minor, results in a mandatory dismissal of the plaintiff's complaint without the

benefit of tolling," is entirely inconsistent with the holding of *Scarsella* and *Saffian*, as well as the clear and unambiguous language of § 5856 and § 1901, and the undeniable legislative intent behind these statutes. Therefore, *Geralds* was wrongly decided. The filing of a medical malpractice complaint with an affidavit of merit that is later found to contain a defect can and should toll the statute of limitations.

**II. A DEFECT IN AN AFFIDAVIT OF MERIT FILED WITH A MEDICAL
MALPRACTICE COMPLAINT CAN BE CURED WITHOUT REILING THE
COMPLAINT**

The right to amend pleadings is based on statute. MCL § 600.2301 **mandates** that courts disregard any error or defect in the proceedings which do not affect the substantial rights of the parties. This statute applies to any “process,” “pleading” or “proceeding.” § 2301.

Moreover, Michigan's liberal rule of amended pleadings is well established under MCR 2.118(C)(2). In addition, MCR 2.118(D) provides that amendments of pleadings and proceedings relate back to the date of the original complaint. See *Labar v. Cooper*, 376 Mich 401, 137 NW2d 136 (1965).

Finally, it should be noted that the Legislature clearly chose to impose a requirement that a plaintiff obtain a medical expert at two different stages of the litigation: at the time the complaint is filed and at the time of trial. § 2912d, MCL § 600.2169. In imposing such a requirement, however, the Legislature recognized that **an affidavit of merit is filed before any discovery has taken place**. See *Grossman v. Brown*, 470 Mich 593, 685 NW2d 198 (2004). As a result, the Legislature chose to impose less stringent requirements when an affidavit is filed without the benefit of discovery. *Id.* Therefore, it is inappropriate for this Court to demand perfection at the affidavit of merit stage where the Legislature has expressly stated the opposite.

Whether or not it is proper to permit the amendment of a pleading where a plaintiff entirely fails to file an affidavit of merit is not the question before this Court. Instead, this Court must decide whether an affidavit of merit that has been filed, but was

later found to be defective, can be amended. Michigan law clearly supports the position that a defect in an affidavit of merit can be cured by amending the affidavit, rather than by refiling the complaint. Therefore, a defect in an affidavit of merit filed with a medical malpractice complaint can be cured without refiling the complaint.

RELIEF REQUESTED

Citizens for Better Care, on behalf on perhaps the most vulnerable members of our society--nursing home residents and those in long-term care settings--respectfully request that this Honorable Court reverse the holding of *Geralds* and hold that the filing of an affidavit of merit with a complaint, regardless of whether the affidavit of merit is later found to be defective, is sufficient to effectuate tolling of the statute of limitations.

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