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STATE OF MICHIGAN
IN THE SUPREME COURT

KENNETH M. MOGILL and MOGILL, POSNER & COHEN,

Appellants,

v.

ESTATE OF DIANA LYKOS VOUTSARAS, by KATHLEEN M. GAYDOS, Personal Representative,

Appellee.

SC: 159107

COA: 340714

Ingham CC: 16-000263-NM

APPELLANTS KENNETH M. MOGILL AND MOGILL, POSNER & COHEN'S REPLY IN SUPPORT OF THEIR SUPPLEMENTAL BRIEF

<u>ORAL ARGUMENT REQUESTED</u>

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Appellee's supplemental brief demonstrates a failure to appreciate that "in damages suits against witnesses, the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Briscoe v LaHue*, 460 US 325, 332-333; 103 SCt 1108 (1983). Because Appellants have already written at length about this critical policy consideration, this reply serves only to briefly respond to Appellee's citation to two out-of-state cases in support of her argument that this Court should overrule the broad immunity granted in *Maiden v Rozwood*, 461 Mich 109, 134; 597 NW2d 817 (1999).

In Appellee's first case, *LLMD of Michigan, Inc v Jackson-Cross Co*, 559 Pa 297, 304-306; 740 A2 186 (1999), the Pennsylvania Supreme Court referenced an appellate court decision, *Panitz v Behrend*, 429 Pa Super 273, 280 (1993), which held that important public policy reasons support extending immunity to retained experts:

> *There also is no reason for refusing to apply the privilege to friendly experts hired by a party. The policy of encouraging frank and objective testimony, without fear of civil liability therefor, obtains irrespective of the manner by which the witness comes to court. The primary purpose of expert testimony is not to assist one party or another in winning the case but to assist the trier of the facts in understanding complicated matters. [Internal quotation marks and citation omitted.]*

The Pennsylvania Supreme Court generally agreed:

> *It is imperative that an expert witness not be subjected to litigation because the party who retained the expert is dissatisfied with the substance of the opinion rendered by the expert. An expert witness must be able to articulate the basis for his or her opinion without fear that a verdict unfavorable to the client will result in litigation, even where the party who has retained the expert contends that the expert's opinion was not fully explained prior to trial. Application of the witness immunity doctrine in Panitz was consistent, therefore, with the two-fold policy of the doctrine: to ensure that the path to the truth is left as free and unobstructed as possible and to protect the judicial process. [LLMD of Michigan, Inc, 559 Pa at 306.]*

In a split decision, however, the *LLMD of Michigan, Inc* majority distinguished an allegedly incompetent expert opinion from an allegedly inadequate opinion and noted, without explanation, that "policy concerns are [not] furthered by extending the witness immunity doctrine" to the former. *Id.* at 306-307. The strong dissent, on the other hand, objected to this distinction as "unworkable and [a] radical departure from our accepted law regarding witness immunity." *Id.* at 307-309 (Cappy, J., dissenting). Consistent with this dissent, this Court in *Maiden, supra* affirmed broad immunity for the defendant medical examiner whose "incompetent medical findings and testimony" were alleged to have caused the plaintiff to be wrongly charged with and jailed for the murder of his family members. *Maiden*, 461 Mich at 133. As discussed in Appellants' prior briefs, this immunity for allegedly incompetent opinions is supported by fundamental policy considerations that should not be disturbed.

In Appellee's other case, *Marrogi v Howard*, 805 So2d 1118, 1133 (La 2002), the Louisiana Supreme Court found that a retained expert may be sued for alleged negligence in "formulating his opinion." This holding followed the Louisiana law that witness immunity "should be narrowly construed" and "the privilege applies only to statements communicated to third persons; thus, it is a defense only to a claim of defamation." *Id.* at 1127, 1131. The plaintiff therefore successfully argued that witness immunity should not bar his suit because his claims "focuse[d] only on the formulation of defendant Howard's opinion, rather than the communication of that opinion to third persons." *Id.* at 1129. Patently, the *Marrogi* Court's application of Louisiana's "narrowly construed" witness immunity doctrine is not instructive as to whether Michigan's broad and "liberally construed" witness immunity doctrine [*Maiden*, 461 Mich at 134] – which has been applied to bar not only claims involving defamation [*Couch v Schultz*, 193 Mich App 292; 483 NW2d 684 (1992)], but also claims of gross professional negligence [*Maiden,*

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supra], false imprisonment and battery [*Dabkowski v Davis*, 364 Mich 429; 111 NW2d 68 (1961)] and tortious interference [*Meyer v Hubbell*, 117 Mich App 699; 324 NW2d 139 (1982), and which has been applied to bar not only liability for communications to third parties [*Couch, supra*], but also liability for "related evaluations," [*Maiden*, 461 Mich at 134] – applies to retained experts sued for professional negligence.

The *Marrogi* Court also noted that, unlike in Michigan, a retained expert in Louisiana owes a separate duty to the litigant who retained him or her: "the retained expert's function is not only to assist the court or fact-finder in understanding complicated matters, but also to render competent assistance in supporting his client's action against the client's opponent." *Marrogi*, 805 So2d at 1132. Put differently, "the expert retained for litigation is hired to present truthful and competent testimony that puts his client's position in the best possible light." *Id.* That simply is not the law in this State, where an expert witness is not an advocate for the retaining party, but is rather a wholly objective guide on matters within his or her area of expertise, who provides that expertise without regard to the consequences to the retaining party. *See* MRE 702. Indeed, every expert witness in Michigan has a duty to impartially assist the trier of fact, and that duty is owed to the court, not to any litigant. *Maiden*, 461 Mich at 133-134.

Rather, because Michigan's broad witness immunity doctrine bars suits against retained experts for their allegedly incompetent opinions and related evaluations, and because of the strong policy considerations underlying that law, Appellants respectfully request that this Court grant leave to appeal the Court of Appeals' January 3, 2019 published decision reversing the Circuit Court's grant of Appellants' motion for summary disposition as to claims arising out of an expert engagement of Appellants. Alternatively, Appellants ask the Court to enter an order pursuant to

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MCR 7.305(H)(1) peremptorily reversing the Court of Appeals decision and reinstating the trial court decision.

Respectfully submitted,
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/s/ Kathleen H. Klaus

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Dated: February 13, 2020

PROOF OF SERVICE

I hereby certify that on **February 13, 2020**, the following pleadings were electronically e-filed with the State of Michigan Supreme Court using the Court's electronic filing system: **(1) Appellants Kenneth M. Mogill and Mogill, Posner & Cohen's Reply in Support of its Supplemental Brief; and (2) this Proof of Service**.

Respectfully submitted,
MADDIN HAUSER ROTH & HELLER, P.C.

/s/ Kathleen H. Klaus

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