

STATE OF MICHIGAN
IN THE SUPREME COURT

BETH HOFFMAN, Personal Representative of
the ESTATE OF EDGAR BROWN, Deceased

Plaintiff-Appellee,

vs.

DR. PETER BARRETT,

Defendant-Appellant.

S Ct No 144875
COA Docket No. 289011

Calhoun County Circuit Court
Case No. 03-3576-NH
Hon. James C. Kingsley

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144875

**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT'S APPLICATION
FOR LEAVE TO APPEAL**

PROOF OF SERVICE

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STATEMENT OF BASIS OF JURISDICTION

Plaintiff-Appellee agrees that this Honorable Court has jurisdiction to consider the instant application for leave to appeal.

STATEMENT OF STANDARD REVIEW

A trial court's grant or denial of summary disposition is reviewed *de novo* on appeal. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Where interpretation and application of Michigan statutes are at issue, such questions of law and statutory interpretation are also reviewed *de novo* on appeal. *Roberts v Mecosta Gen'l Hospital*, 466 Mich 57, 62; 642 NW2d 663 (2002).

STATEMENT OF QUESTIONS SENTED

- I. DID THE COURT OF APPEALS CORRECTLY RULE, PURSUANT TO *KIRKALDY V RIM*, THAT THE APPROPRIATE REMEDY FOR A NONCOMPLIANT AFFIDAVIT OF MERIT IS DISMISSAL WITHOUT PREJUDICE?

Plaintiff-Appellee answers "Yes."

Defendants-Appellants argue "No."

The Trial Court answered "Yes."

- II. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT PLAINTIFF'S NOTICE OF INTENT COMPLIED WITH THE PROVISIONS OF MCL 600.2912b?

Plaintiff-Appellee answers "Yes."

Defendants-Appellants argue "No."

The Trial Court answered "Yes."

- III. DID THE COURT OF APPEALS CORRECTLY RULE THAT THE PLAINTIFF'S EXPERT WHO SIGNED THE AFFIDAVIT OF MERIT WAS ONE THAT THE PLAINTIFF REASONABLY BELIEVED TO MEET THE REQUIREMENTS OF MCL 600.2169?

Plaintiff-Appellee answers "Yes."

Defendants-Appellants answer "No."

The Trial Court did not address the issue.

INTRODUCTION

Defendant now brings another application for leave to appeal in this matter, which has been before this Court three times now. As recognized by the most recent Court of Appeals decision in this matter, *Hoffman v Barrett*, _ Mich App _; _ NW2d _ (2012) (attached as Exhibit A), this case is in a unique posture, in that it was permitted to proceed under the decision in *Mullins v St Joseph Mercy Hospital*, 480 Mich 948; 741 NW2d 300 (2007), which removes it from the purview of the case ordinarily governing pre-2004 filings, *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). For this reason, the instant matter is not governed by this Court's ruling in *Lignons v Crittendon Hospital*, 490 Mich 61; 803 NW2d 271 (2011) because *Lignons* relies entirely on the applicability of *Waltz*. For this reason, the opinion of the Court of Appeals is correct under the unique circumstances of this case, and this Court should deny leave.

As he did in his last application, Defendant also argues that Plaintiff's Notice of Intent was nonconforming under MCLA 600.2912b, and that the decision in *Boodt v Borgess Medical Center*, 481 Mich 558; 751 NW2d 44 (2008) mandated a dismissal with prejudice of the entire lawsuit. Defendant also argues that Plaintiff's Affidavit of Merit was nonconforming under MCLA 600.2912d, and that it was signed by an incorrect expert under that statute, under *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006).

The Court of Appeals properly rejected these arguments in its previous opinion (*Hoffman v Barrett*, 288 Mich App 536; 794 NW2d 67 (2010)), and it rejects them properly again in its most recent ruling on the matter. (Exhibit A). Plaintiff's Notice of Intent contained all that is required under 2912b. Plaintiff's Affidavit of Merit is appropriate under 2912d, and was signed by the appropriate expert, given the qualifications of Defendant and the facts of the case. Accordingly, the remainder of the instant application for leave to appeal is without merit, and this Court should deny it in its entirety.

STATEMENT OF FACTS

Plaintiff's Decedent, Edgar Brown, had malpractice committed upon him when he was discharged from Battle Creek Health Systems in an unstable condition on January 24, 2001 (Exhibit B, Complaint). As a result, he died needlessly.

On January 13, 2001, Mr. Brown fell from a ladder and was brought to Defendant Battle Creek's emergency room. He was found to have multiple rib fractures and a right pneumo-thorax. Dr. Peter Barrett was assigned to care for Mr. Brown, and he was admitted to the hospital.

A chest tube was inserted, and was removed on January 19, 2001. Mr. Brown developed an ileus and a nasogastric tube was inserted. Between the time of his admission and his discharge, Mr. Brown continued to have diminished breath sounds and required oxygen to assist him with his breathing. His last chest x-ray was taken on January 20, 2001, four days before his discharge. This chest x-ray was abnormal.

Despite having persistent signs of abdominal problems, including a distended abdomen and pain, no other abdominal x-ray was taken after January 19, 2001.

On the day of his discharge, Mr. Brown was noted to have diminished breath sounds in the bases of both lungs, he still needed oxygen, and he had a distended abdomen. Nonetheless, he was discharged from the hospital in this unstable condition. A visiting nurse was ordered to see him and evaluate him in his home, but no nurse ever came to Mr. Brown's home. He was discharged without any orders for oxygen, and when he was having difficulty breathing at home, he had to use his disabled wife's oxygen.

Within less than 24 hours of his discharge from Battle Creek Health Systems, Edgar Brown became critically ill and was taken by ambulance back to the hospital. He went into respiratory arrest and died on January 25, 2001. The autopsy showed that he had 850 ml of pus and fluid in his pleural space. He had a torn, lacerated spleen and necrotic areas in his liver, due to lack of blood supply. His death was completely avoidable, and had he received appropriate evaluation and treatment while at Battle Creek Health Systems, his life would not have been cut short.

THE NOTICE OF INTENT

Defendant has challenged Plaintiff's Notice of Intent, which is set forth at Exhibit C. The key portions of it:

I. FACTUAL BASIS OF THE CLAIM

On January 13, 2001, Edgar Brown fell from a ladder and was brought to Battle Creek Health Systems Emergency Room. He was found to have multiple rib fractures and a right pneumothorax. Dr. Peter Barrett was assigned to care for Mr. Brown and he was admitted to the hospital.

A chest tube was inserted and was removed on January 19, 2001. Mr. Brown developed an ileus and a nasogastric tube was inserted. Between the time of his admission and his discharge, Mr. Brown continued to have diminished breath sounds. His last chest x-ray was taken on January 20, 2001 and his last abdominal x-ray was taken on January 19, 2001. Mr. Brown was discharged home on January 24, 2001. He had a distended abdomen and was still having difficulty breathing.

Within 24 hours of discharge, Mr. Brown became short of breath while talking, his abdomen remained distended and his daughter called for an ambulance. Mr. Brown went into full arrest in the ambulance. The cause of death was determined to be complications of multiple injuries from. On autopsy, Mr. Brown was found to have right pulmonary atelectasis and right empyema/pleuritis, as well as an intestinal ileus .

* * *

V. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY

As a proximate result of the defendants' conduct, Edgar Brown died prematurely from his injuries. (Exhibit C).

THE AFFIDAVIT OF MERIT

Plaintiff submitted the following Affidavit of Merit (Exhibit D), signed by board-certified general surgeon Frank Scarpa, MD, with her complaint:

Frank Scarpa, M.D., being first duly sworn, deposes and states as follows:

1. That I am a physician duly licensed to practice in the State of Connecticut and am board certified in surgery.

2. That I have reviewed Plaintiff's Notice of Intent to File Claim filed and all medical records supplied to me by Plaintiff's attorney concerning the allegations contained in said Notice relative to Edgar Brown, Deceased.

3. That in my opinion, a reasonable and prudent physician and/or hospital staff when caring for a patient in circumstances such as Edgar Brown would have:

- a. Monitored a patient such as Mr. Brown carefully and regularly, including, but not limited to, having performed full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.
- b. Performed full physical examinations of a patient in circumstances such as Edgar Brown, including respiratory and abdominal assessments on a regular basis.
- c. Adequately assessed and intervened for respiratory compromise in a patient such as Edgar Brown.
- d. Refrained from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make sure that his pulmonary status and gastrointestinal status were stable.
- e. Refrained from discharging a patient in the condition of Edgar Brown.
- f. Refrained from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.
- g. Provided appropriate treatment for a patient such as Edgar Brown who up

until the time of his discharge, continued to have respiratory distress and gastrointestinal problems. (emphasis provided)

4. The opinions expressed in this Affidavit are based upon documents and materials referred to in paragraph 2 above and are subject to modification based upon additional information which might be provided at some future date. (Exhibit D)

PROCEDURAL HISTORY

Defendant originally filed a motion for summary disposition, based on the decision in *Waltz v Wyse, supra*. This motion was granted by order of the Calhoun County Circuit Court on August 27, 2004 (Exhibit E). Plaintiff thereafter filed a timely motion for reconsideration on September 10, 2004. This was denied by order dated October 19, 2004 (Exhibit F).

Plaintiff's Claim of Appeal was filed on November 4, 2004. The matter was briefed to the Court of Appeals, which issued its opinion, without oral argument, dated May 22, 2007. (Exhibit G). Thereafter, Plaintiff filed an application to the this Court which, on the authority of *Mullins*, reversed the rulings of this Court and the Court of Appeals, and remanded the matter to the Calhoun County Circuit Court for discovery and jury trial. (Exhibit H). Immediately, Defendants brought their second Motion to Dismiss based upon a different alleged deficiency in procedure. The trial court denied their summary disposition motion as to alleged deficiencies in the Notice of Intent, but found that the Affidavit of Merit was nonconforming, and ordered that the matter be dismissed without prejudice. (Exhibit I). Plaintiff then refilled the matter in the Calhoun County Circuit Court, with a different Affidavit of Merit, while Defendant pursued the instant appeal as of right from the dismissal without prejudice of the original lawsuit,

Briefing and oral argument were then had before the Court of Appeals. In a published opinion dated June 3, 2010, the Court of Appeals affirmed the denial of the summary judgment on the grounds related to the Notice of Intent and the qualifications of the expert who signed the

Affidavit of Merit, and affirmed that the dismissal of the matter on the grounds that the Affidavit of Merit was nonconforming was properly without prejudice. (Exhibit J). Defendant applied for application for leave to appeal to this Honorable Court, which remanded the matter to the Court of Appeals in light of the decision in *Ligons v Crittendon Hospital*, 490 Mich 61; 803 NW2d 271 (2011). (Exhibit K). The Court of Appeals, by published opinion dated March 8, 2012, affirmed its previous ruling, holding that Ligons had no application to the instant matter, inasmuch as Ligons relied exclusively on the Waltz holding, and Mullins had already ruled that Waltz did not apply to the instant matter. (Exhibit A). Now Defendant again applies for leave to appeal to this Honorable Court. Because the Court of Appeals decision is correct, and because the matter is not one of jurisprudential significance, this Court should deny Defendant's application, and allow the matter to proceed to discovery in the Calhoun County Circuit Court.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT, UNDER KIRKALDY V RIM, THE APPROPRIATE REMEDY FOR A DEFECTIVE AFFIDAVIT OF MERIT IS DISMISSAL WITHOUT PREJUDICE

The trial court, in dismissing Plaintiff's complaint due to a noncompliant Affidavit of Merit, relied upon *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), which stands for the proposition:

a complaint and affidavit of merit toll the period of limitations until the validity of the affidavit is successfully challenged in "subsequent judicial proceedings." Only a successful challenge will cause the affidavit to lose its presumption of validity and cause the period of limitations to resume running.

Thus, if the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If that challenge is successful, the proper remedy is dismissal without prejudice. [citation omitted]. The plaintiff would then have whatever time remains in the period of limitations within which to file a complaint accompanied by a conforming affidavit of merit. (Id at 586).

Defendant, relying upon two cases – one of them unpublished, and the other one inapplicable, argues that the result in *Kirkaldy* does not govern the disposition of this matter. Defendant's arguments are unavailing. The Court of Appeals was bound to follow Supreme Court precedent. Once it found that the instant Affidavit of Merit was noncompliant, the sole remedy at its disposal was dismissal without prejudice, which it appropriately ordered.

The first case relied on by Defendant below, and which reliance is repeated in its brief to this Court, is the unpublished case of *Weathers-Taylor v Stapish*, unpublished, Nos 258682, 265511 and 267097 (December 2, 2008)[attached as Exhibit L]. However, the paragraph referenced at page 6 of *Weathers-Taylor* (at pp 10-11 of Defendant's Brief on Appeal) is not the holding of the case. Indeed, the *Weathers-Taylor* panel's holding was that both cases involved in the appeal were timely filed, as against a wide array of challenges brought by a number of defendants named in the two cases. Defendant's argument herein simply ignores the fact that this Court specifically ruled that the instant complaint was timely filed, despite the holding in *Waltz, supra*, because of the holding in *Mullins, supra*. The *Weathers-Taylor* panel issued the following holding re cases which would be dismissed under *Waltz*, but for the ruling in *Mullins*:

Our Supreme Court's recent decision in *Mullins v St. Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007) ("*Mullins II*") controls this issue. In that case, our Supreme Court reversed this Court's special panel decision holding that *Waltz* applies retroactively. See *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006) ("*Mullins I*") rev'd 480 Mich 948 (2007). In *Mullins II*, our Supreme Court stated:

[W]e...reverse the July 11, 2006 judgment of the Court of Appeals. MCR 7.302(G)(1). We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz, supra*, was decided in which the savings period expired, ie, two years had elapsed since the personal representative was appointed, sometime between the date the *Omlenchuk* was decided and within 182 days after *Waltz* was decided....

Therefore, our Supreme Court provided a timeframe within which *Waltz* does not apply into which the instant case squarely fits. (*Id* at 3-4).

Not only does the instant case also fit into the same timeframe as the *Weathers-Taylor* case, this Court specifically ruled as such in the previous appeal of the instant case. (Exhibit H). Therefore, Defendant's efforts to make *Waltz* applicable to a case which this Court specifically ruled it was not applicable to must necessarily fail. Therefore, since the instant case was timely filed, by dint of *Mullins*, and by order of this Court, the remedy to be applied when the Affidavit of Merit in such timely filed case is found to be noncompliant is governed by the holding in *Kirkaldy*, *supra*. The trial court correctly applied the *Kirkaldy* holding and dismissed the complaint without prejudice, and the Court of Appeals appropriately upheld this ruling. There is no error present such that this Court should grant the instant application.

Of course, in the instant appeal, the principal case relied upon by Defendant herein is *Ligons v Crittendon Hospital*, 490 Mich 61; 803 NW2d 271 (2011). The Court of Appeals set out the appropriate analysis explaining why, under the unique circumstances in the instant matter, *Ligons* is not the controlling authority:

On July 29, 2011, our Supreme Court decided *Ligons II*, in which it determined that dismissal with prejudice was required in circumstances similar to the instant case. In that case, the plaintiff filed two AOMs both of which were defective. *Ligons II*, 490 Mich at 77-79. He failed to commence his lawsuit within the limitations period, but filed his complaint and accompanying AOMs within the savings period provided by MCL 600.5852. *Id* at 89. Because the AOMs were defective, however, and the plaintiff was unable to amend the AOMs retroactively, dismissal with prejudice was required. *Id* at 79-90. The Court stated:

Although the timely filing of a defective AOM tolls the limitations period until a court finds the AOM defective, an AOM filed during the savings period after the limitations period has expired tolls nothing, as the limitations period has run and *the savings period may not be tolled*. In this case, because the limitations period had run before the complaint was filed, plaintiff cannot amend his defective AOMs retroactively. Given that the savings period has expired, plaintiff's case had to be dismissed with prejudice. [*Id* at 90

(emphasis added)].

As the highlighted language in the preceding paragraph indicates, *Waltz* was applicable in *Lignons*. Thus, pursuant to *Waltz*, the plaintiff's filing of the AOMs did not toll the savings period. *Lignons II*, 490 Mich at 74-76, 89-90. In this case, however, *Waltz* is not applicable. *Hoffman I*, 480 Mich at 981; *Mullins II*, 480 Mich at 948. Accordingly, as stated previously in *Hoffman II*, 288 Mich App at 542, plaintiff's filing of her notice of intent tolled the savings period and the filing of her complaint and AOM would have tolled the running of the additional time provided under the savings provision. Because there remained time within which plaintiff could refile her suit, the trial court properly dismissed the action without prejudice. (slip op, Exhibit A, at 4).

Accordingly, no matter how this Court resolves the *Lignons* issue, because this case is under the umbrella of *Mullins* and *Omelenchuk*, the filing of the case is per se timely, and no additional challenge which relies on *Waltz* (or *Lignons*, which is based squarely on the rule set forth in *Waltz*) can lie as to this matter. This Court should deny Defendant's application, and remand the matter to the trial court for discovery and trial.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT PLAINTIFF'S NOTICE OF INTENT COMPLIED WITH THE PROVISIONS OF MCL 600. 2912b

As pointed out in the slip opinion in this matter, Defendant on remand repeated the previously made challenges to the plaintiff's notice of intent and to the qualifications of the expert who signed the original defective AOM. The Court of Appeals noted simply that "Because *Lignons II* does not implicate these issues, and our Supreme Court vacated this Court's entire opinion in *Hoffman II*, we adopt verbatim our previous analysis of those issues." (slip op, Exhibit A, at 4). Defendant has submitted the same arguments it did in its previous application in support of both of the remaining issues. Plaintiff believes that these issues were correctly decided at all times throughout this case's travels up and down the appellate system, and so also repeats her arguments previously made to this Court as to why the Court of Appeals most recent resolution of these issues is correct, and should not be disturbed.

In the trial court, at the Court of Appeals, and in its brief in support of its application, Defendant placed principal reliance on the Supreme Court decision in *Boodt v Borgess Medical Center*, 481 Mich 558; 751 NW2d 44 (2008). The Court of Appeals properly rejected that argument, noting that the instant Notice of Intent (Exhibit C) meets the criteria of MCL 600.2912b, unlike the Notice of Intent under scrutiny in *Boodt*. (set forth at pp 4-7 of the slip op). Specifically, the instant Notice of Intent sets out the manner in which the injuries were caused by the alleged malpractice, where the *Boodt* Notice did not.

In *Boodt*, the notice of intent submitted by plaintiff therein contained nothing specifically linking the alleged malpractice to the resulting injuries. The entirety of the explanation of the manner of causation alleged in the entire Notice of Intent consisted of the statement that “if the standard of care had been followed, [David] Waltz would not have died on October 11, 2001.” *Id* at 560. Although this statement appeared in the final section of the *Boodt* notice, the Supreme Court was careful to note that it examined the entirety of the document (*Id*; see also fn 1, p 561).

Defendant incorrectly cited below to that which appears in the final portion of Plaintiff’s Notice of Intent herein, as though that was the sole portion of the document which relates the manner in which the malpractice caused the injuries. That statement, first of all, is superior to that of *Boodt* because it affirmatively states that it was because of the previously stated breaches that Plaintiff died prematurely from his injuries. Then, relating back to the section where those injuries were described, Section I, Plaintiff affirmatively sets out that “Within 24 hours of discharge, Mr. Brown became short of breath while talking, his abdomen remained distended and his daughter called for an ambulance. Mr. Brown went into full arrest in the ambulance. The cause of death was determined to be complications of multiple injuries from.” And those multiple injuries were set forth earlier in Section I as “multiple rib fractures and a right pneumothorax. Dr. Peter Barrett was assigned to care for Mr. Brown and he was admitted to the hospital. A chest tube was inserted and

was removed on January 19, 2001. Mr. Brown developed an ileus and a nasogastric tube was inserted. Between the time of his admission and his discharge, Mr. Brown continued to have diminished breath sounds.” The failure to take appropriate action in the face of these injuries is set out in depth and in detail in Sections II-IV, and the result is spelled out in Section V. (Exhibit C).

The Court of Appeals agreed, specifically finding that “All of the required information is plainly apparent from reading the notice of intent as a whole.” (Exhibit A, slip op at 9). So, far from lacking a statement of the manner in which the malpractice led to the Plaintiff’s death, the instant Notice of Intent, read as a whole, properly sets out in depth and in detail exactly how Plaintiff’s death came to occur as a result of the breaches of the standard of care as set out therein. Accordingly, under the standard articulated in *Ligons* and *Boodt*, Plaintiff’s Notice of Intent is sufficient, and Defendant’s motion must be denied.

III. THE COURT OF APPEALS CORRECTLY FOUND THAT PLAINTIFF’S EXPERT’S QUALIFICATIONS MATCH DEFENDANT’S IN THE RELEVANT AREA OF MEDICINE, AND DEFENDANT’S SUBSPECIALTY PLAYS NO PART IN THE EVENTS UNDERLYING THIS CASE.

As pointed out in the slip opinion in this matter, Defendant on remand repeated the previously made challenges to the plaintiff’s notice of intent and to the qualifications of the expert who signed the original defective AOM. The Court of Appeals noted simply that “Because *Ligons II* does not implicate these issues, and our Supreme Court vacated this Court’s entire opinion in *Hoffman II*, we adopt verbatim our previous analysis of those issues.” (slip op, Exhibit A, at 4). Defendant has submitted the same arguments it did in its previous application in support of both of the remaining issues. Plaintiff believes that these issues were correctly decided at all times throughout this case’s travels up and down the appellate system, and so also repeats her arguments previously made to this Court as to why the Court of Appeals most recent resolution of these issues is correct, and should not be disturbed.

Defendant’s other argument is that, because Dr. Barrett has a subspecialty board certification

in cardiothoracic surgery in addition to his certification in general surgery, Plaintiff's board certified general surgeon expert does not "match up". The Court of Appeals rejected this argument, by analyzing the circumstances of the decedent's death, holding that "a significant portion of the decedent's injuries did *not* fall under the thoracic category...the claims against defendant do not appear to require any specialized testimony pertaining to thoracic surgery." (Exhibit A, slip op at 10; emphasis in original). Therefore, under *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), subspecialty certifications which are not relevant to the medical area at issue in the lawsuit are not to be looked to when determining whether the Plaintiff's expert's qualifications are appropriate.

Remember, the original condition for which Edgar Brown sought treatment was multiple rib fractures caused by a fall from a ladder. In the end, the condition that was caused his death, as shown by the autopsy, was 850 ml of pus and fluid in his pleural space, as well as a torn, lacerated spleen and necrotic areas in his liver. No cardiothoracic surgery was performed on Edgar Brown. None was ever contemplated. Therefore, since cardiothoracic surgery played no part in the events of this case, only general surgery is relevant, and under *Woodard*, Plaintiff's Affidavit of Merit was signed by an appropriately credentialed physician.

To determine whether it is appropriate for the plaintiff's standard of care witness to testify, the plaintiff's expert witness must match the relevant specialty "engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty." *Woodard*, at 560; see also *Gonzalez v St. John Hospital*, 275 Mich App 290, 302-303; 739 NW2d 392 (2007); *McIntyre v Mohan*, unpublished decision, No 274462, March 13, 2008 (attached as Exhibit M). Because the relevant specialty herein is general surgery, rather than the more specific, but irrelevant, subspecialty of cardiothoracic surgery, the Plaintiff's expert is board certified in the appropriate specialty to fit this case.

Even were this Court to rule that Dr. Scarpa's credentials somehow were not correct, there can be no doubt that his credentials were sufficient such that plaintiff could have a reasonable belief that he was the appropriate expert. Such issue would be governed by the Supreme Court decision in *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004), where this Court stated, "Under MCL 600.2912d(1), a plaintiff is required to file with the complaint an affidavit of merit signed by an expert who the plaintiff's attorney *reasonably believes* meets the requirements of MCL 600.2169." (emphasis in original). The Grossman case was recently interpreted in the unpublished *Weathers-Taylor* opinion, Exhibit L, *supra*, at 7-8. That panel found sufficient basis for reasonable belief such that later claims regarding the expert's credentials were insufficient to serve as a basis for summary disposition.

The same basis for reasonable belief exists in this matter. The credentials of Dr. Scarpa fully match those of the defendant in the relevant area of medicine. There is no interpretation of Woodard that proves conclusively that an unrelated subspecialty must be taken into account. Therefore, plaintiff's attorney had reasonable belief that Dr. Scarpa is the appropriate expert in this matter (which he is, for the reasons set out above.).

Finally, even if all these arguments are somehow unavailing, again, for reasons set out in Section I, *supra*, and the Affidavit of Merit is found to be noncompliant, the sole remedy available to the defendants in such circumstances is a dismissal without prejudice. *Kirkaldy, supra*.

CONCLUSION

For these reasons, Plaintiff respectfully requests that this Honorable Court affirm the decisions of the Calhoun County Circuit Court, and allow the matter to proceed in the Calhoun County Circuit Court.

CHARFOOS & CHRISTENSEN, P.C.

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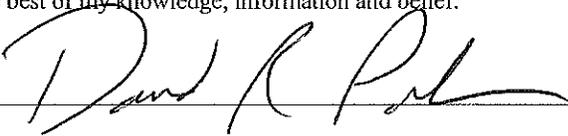
Dated: April 23, 2012

PROOF OF SERVICE

The undersigned certifies that on April 23, 2012, a copy of the foregoing Response to Defendant's Application for Leave to Appeal was served upon all attorneys of record in the above-entitled cause of action, at their business locations as disclosed by the pleadings of record herein, vja the following:

U.S. Mail Hand Delivery
 Facsimile Overnight Mail

I declare under penalty of perjury that the above statement is true to the best of my knowledge, information and belief.



David R. Parker