STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

RUBEN CASTRO, and
KRISTY CASTRO
Plaintiffs / Appellees.

v.

Supreme Court No. 152383
Court of Appeals No. 316639
Lower Court No. 13-000136-NH
Hon: David S. Swartz

JAMES ALAN GOULET, M.D., and
JAMES ALAN GOULET, M.D., P.C.,
Defendant/Appellants

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PLAINTIFFS' – APPELLEES', THE CASTROS', SUPPLEMENTAL BRIEF DIRECTED TO BE PREPARED BY THE MICHIGAN SUPREME COURT BY ORDER OF JUNE 10, 2016

"ORAL ARGUMENT REQUESTED"

Respectfully submitted:

By: _____

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APPELLEE'S STATEMENT OF QUESTIONS PER ORDER OF JUNE 10, 2016

Question

Does the filing of a Motion for an Extension of Time to File an Affidavit of Merit, which is subsequently granted sufficient to toll the Statute of Limitations?

The Defendant /Appellant said: "No."

The Lower Court said; "No."

The Majority of the Court of Appeals said: "Yes."

The Supreme Court Inquires by Order of June 10, 2016.

The Plaintiffs / Appellees say: "Yes under the facts of this case."

APPELLEES' / STATEMENT OF FACTS

(a) Nature of the Action

The Michigan Supreme Court issued an 'Order' on June 10, 2016, which ordered the Parties to prepare and file 'Supplemental Briefs' addressing whether the filing of a Motion for an Extension of Time to File an Affidavit of Merit, which is subsequently granted, is sufficient to toll the Statue of Limitations.

(b) The Character of Pleadings and Proceedings

The Plaintiffs / Appellees filed, and served their Medical Malpractice Action with a Motion to Extend the Time for filing their Affidavit of Merit pursuant to **MCL 600.2912d(1), which is subject to MCL 600.2912d(2), as set forth in said Statute without ambiguity** prior to the running of the two (2) year Statute of limitations with the Notice of Hearing therefore within the twenty-eight (28) day extension period. The Hearing on the Motion for the Extension, the entry of the Order Granting said Motion, and the service and filing of the Affidavit of Merit were all within the twenty (28) day extension period. **(NOTE: February was a twenty-eight (28) day month in 2013.).**

Subsequently the Defendants / Appellants herein served and filed a Motion for Summary Disposition, which was granted by the Circuit Court. A timely Appeal as of Right was filed by the Plaintiffs / Appellees herein. The Court of Appeals by majority correctly reversed the Circuit Court granting of a Summary Disposition.

The Defendants / Appellants herein have now filed their Application for Leave to Appeal herein. The majority opinion in the Michigan Court of Appeals was not a decision that was clearly erroneous, and that will cause material injustice, nor does said decision conflict with Supreme Court decisions, or other decisions of the Court of Appeals under **MCR 7.305(B)(5)(b)**, when the specific facts of previous decisions of this Honorable Court and the Court of Appeals are reviewed in light of the specific facts of this case verses the facts of published cases.

(c) Substance of Proof

The Plaintiffs / Appellees herein filed their Medical Malpractice Action February 4, 2013, with their Motion pursuant to **MCL 600.2912d(2),** and on February 5, 2013, the same were personally served upon the Defendants / Appellees herein. The two (2) year Statute of Limitations was to end on February 9, 2013.

On February 27, 2013, the Circuit Court granted the Plaintiffs' / Appellants' Motion pursuant to **MCL 600.2912d(2)**, and subsequently the Order was entered on March 8, 2013. granting the requested twenty (28) day extension from February 9, 2013 to March 9, 2013. The Plaintiff's / Appellees' 'Affidavit of Merit was field and served on February 26, 2013.

On April 12, 2013, the Defendants' / Appellants' herein filed their Motion for Summary Disposition, which was granted by Order entered May 17, 2013.

(d) The Dates of Important Instruments (Papers)

The dates regarding the Plaintiff's / Appellees' filing of papers in the Circuit Court are set forth above under **(c)**.

The Court of Appeals issued its majority decision for publication on August 20, 2015, in this case reversing the Summary Disposition granted by the Circuit Court under Order entered May 17, 2013. Said majority decision sent this case back to the lower Court for further proceedings.

(e) and (f) Majority Decision for Publication by the Court of Appeals

The Defendants / Appellants herein make much ado about the dissenting opinion written by Appellate Judge Kurtis T. Wilder, however it is the Plaintiffs' / Appellees' herein opinion the majority decision was, and is the correct decision in this case. The Court of Appeals released its said decision for publication, and the same is now published at **312 Mich App 1; 877 NW 2d 161 (2015).**

(g) Other Statements of Fact Believed Necessary to Point Out

In this case the Defendants / Appellants represented to the Plaintiff / Appellee that his Erectile Dysfunction from the use of a 'Perineal Traction Post' during the operative procedure would subside and go away in time. Said representations were one (1) of the reasons it was necessary to extend the time for the filing of the 'Affidavit of Merit'. The Plaintiffs / Appellees were being responsible knowing the claimed legislative intent of **MCL 600.2912d(1) and (2)** was to discourage the filing of frivolous medical malpractice claims.

An **unintended consequence** of the Legislature adding the requirement of an 'Affidavit of Merit' was an individual claiming medical malpractice would have an extremely difficult time in finding, and incur a large expense in retaining a qualified professional in the State of Michigan willing to provide an Affidavit of Merit contradicting licensed physicians with privileges in the University of Michigan Medical Health System, including its practices and procedures to support a medical malpractice claim.

It is the Plaintiffs' / Appellees' position, and belief **MCL 600.2912d(1)** was drafted **to be subject to MCL 600.2912d(2)** well knowing the effect of the requirement of an 'Affidavit of Merit' would place a virtually impossible burden upon those claiming medical malpractice in Michigan. No reasonable, or rational person can say medical professionals do not commit acts of malpractice, because they are human .

The Plaintiffs / Appellees in this case were forced to go outside the State to obtain an 'Affidavit of Merit', which caused logistics difficulties. The twenty-eight (28) extension pursuant to **MCL 600.2912d(2)** was without question a necessity in this case.

APPELLEES' ARGUMENT REGARDING QUESTION POSED

Does the filing of a Motion for an Extension of Time to File an Affidavit of merit, which is subsequently granted sufficient to toll the Statute of Limitations?

The Defendant / Appellant says: "No."

The Lower Court said: "No."

The Majority of the Court of Appeals said: "Yes".

The Supreme Court inquires by Order of June 10, 2016.

The Plaintiffs / Appellees say: "Yes under the facts of this Case."

Standard of Review: The Standard of Review as to Statutory Construction, and the granting or denial of Motions for Summary Disposition is **'de novo'**. ***(Hill v. Sers Roebuck & Co., 492 Mich 651, 659; 822 NW 2d 190 (2012); Mich Dep't of Transp. V. Tomkins, 481 Mich 184, 190; 749 NW 2d 716 (2008).).***

Argument: MCL 600.2912d(1), and MCL 600.2912d(2) were amended in 1986 in Michigan's movement for Tort Reform. The announced Legislative intent was to reduce the number of frivolous Medical Malpractice claims brought against the medical professionals and facilities in Michigan. However, the Legislature obviously understood the burden that it placed upon victims of Medical Malpractice by requiring an 'Affidavit of Merit', which was and is the reason **Section (1) thereof is unambiguously subject to Section (2) thereof.**

There is nothing ambiguous about the language of either of the above cited Sections of the subject Statute. The Legislature well knew the medical professionals and providers in Michigan would be reluctant to take on the University of Michigan Health Services which included the Defendants-Appellants herein by preparing an 'Affidavit of Merit'. The victims of actionable Medical Malpractice claims would be required to obtain the 'Affidavits of Merit' outside of Michigan greatly increasing their costs and creating difficulties in the logistics of obtaining, and providing said 'Affidavits of Merit'.

The question as framed by this Court only speaks of the effect of filing a Motion for an Extension of Time to File an Affidavit of Merit, which was filed in this case, when the complaint was filed, which was within the two (2) year Statute of Limitations, and the same were also personally served upon the Defendants / Appellants within said limitation period. The Hearing on said Motion, the filing and serving of the Affidavit of Merit, and the entry of the Order granting the twenty-eight (28) day extension all occurred within the twenty-eight (28) day extension period.

Please be mindful **MCL 600.2912d(1) is subject to MCL 600.2912d(2)**, and none of the previous decisions of the Michigan Courts of Appeal, and this Michigan Supreme Court have had the issue in this case before them. None of our Appellate Courts in Michigan, including this Court have actually considered the fact **MCL 600.2912d(1) is subject to MCL 600.2912d(2).**

There was and is reason for the Legislature to write and pass said Statutes as they did, and that is the extra burden placed upon those claiming Medical Malpractice well knowing obtaining the Affidavit of Merit from a Michigan Physician qualified to give an Affidavit of Merit in as given case was a virtual impossibility, and those claiming would be required to go out-of-State to obtain an Qualified Expert willing to write, and execute an Affidavit of Merit. The twenty-eight (28) days given for an extension by the Legislature was and is not a great amount of time, and certainly those in the medical field cannot be said to be prejudiced by the additional twenty-eight (28) days over the two (2) year Statute of Limitations. If any of them claim to be prejudiced by the twenty-eight (28) extension "shame on them".

It is necessary to briefly discuss a few of the prior decisions of this Court, and the Michigan Court of Appeals:

In ***Barlett v. North Ottawa Community Hospital, 244 Mich App. 685, 693-694; 625 NW 2d 470 (2001)*** the Plaintiff filed a Medical Malpractice Action on July 27, 1998, with a Motion for an Extension of Time for Filing the Affidavit of Merit, however did not notice the Motion for an Extension for Hearing, and by not noticing the Motion for an Extension of Time for Hearing the same was not called to the Court's attention until November 30, 1998. This Court affirmed the granting of Summary Disposition against **Barlett**. The ***Barlett*** case is distinguishable from this case on its facts.

In ***Young v. Sellers, 254 Mich App 447, 450-451; 657 NW 2d 555 (2002)*** the Medical Malpractice Action was filed November 23, 2001, however the Attorney accidentally failed to file the 'Affidavit of Merit', although the same was in the Attorney's possession at the time of filing the Action.

The Attorney faxed a copy of the 'Affidavit of Merit' to opposing Counsel on December 27, 2001, however even then did not discover the same had not been filed with the Court. The Attorney did not file a 'Motion for an Extension of Time' until January 14, 2002, which was outside of the twenty-eight (28) day period. In deciding against the Plaintiff therein this Court looked to ***Scarsella v. Pollak, 461 Mich 547, 549; 607 NW 2d 711 (2000), and Holmes v. Michigan Capital Medical Ctr., 242 Mich App 703, 706-707; 620 NW 2d 319 (2000).***

In ***Scarsella, supra, pg. 549*** the Plaintiff had not filed an 'Affidavit of Merit' with the 'Complaint', and did not file the same until seven (7) months later without ever filing a 'Motion for an Extension of Time'. The **Scarsella** is also distinguishable from this case.

In ***Holmes, supra., pgs. 708-709,*** The Plaintiff filed a Complaint' without an 'Affidavit of Merit' on November 12, 1997, and thereafter on December 15, 1997, filed an 'Affidavit of Merit' outside of the twenty-eight (28) day extension period. If a 'Motion for an Extension' had been filed the extension period would have run on December 15, 1997.

The facts in ***Holmes, supra.; Scarsella, supra.; and Young, supra.***; are all distinguishable from this case based upon the cases' respective facts. All filings in this case occurred within the twenty-eight (28) extension period, and no prejudice can be claimed by the Defendants / Appellants herein, which did not, and does not run afoul of the plain unambiguous language of **MCL 600.2912d(1) and MCL 600.2912d(2)**

In ***Ligons v. Crittenton Hosp., 490 Mich 61, 73; 809 NW 2d 271 (2011)*** this Court discussed the issue of an amendment without mention, or consideration of the unambiguous language of **MCL 600.2912d(1), <u>which as it states "is subject to (2)"</u>** referring to **MCL 600.2912d(2).**

MCL 600.2912d(2) was discussed as an alternative for recourse to **MCL 600.2912d(1), but not being subject thereto** in this Court's **Ligons, Supra.,** Opinion.

In ***Solowy v. Oakwood Hospital Corp., 454 Mich 214, 228-229; 561 NW 2d 843 (1997)*** this Court nearly recognized the unambiguous language of **MCL 600.2912d(1) <u>being subject to (2)</u>** referring to **MCL 600.2912d(2).**

> **"We are also mindful of the enhanced responsibilities placed on medical malpractice plaintiffs by the 1986 medical malpractice tort reform legislation. See MCL 600.2912a et. seq.; MSA 27A2912(1) et. seq. Specifically, the reforms require, among other things, that a plaintiff locate a medical expert who can review medical records, determine the claim has merit, and draft an affidavit of merit to submit with the complaint. We realize that a case may arise where perhaps because of delay in diagnosis, a plaintiff will not be able to secure an affidavit of merit before the six month period expires. In such a case, the plaintiff's attorney should seek relief, upon a showing of good cause, an additional twenty-eight days to obtain the required affidavit of merit. During this period the statute would be tolled and summary disposition motions on the ground of the failure to state a claim should not be granted."** ***Solowy, surpa., pgs 228-229.***

RELIEF REQUESTED

The Plaintiffs / Appellees respectfully request the Defendants' / Appellants' 'Application for Leave' be denied, and the decision of the Michigan Court of Appeals be affirmed remanding this Case to the lower Court for Jury Trial.

SIGNATURE

Dated: July 13, 2016.

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