STATE OF MICHIGAN
IN THE SUPREME COURT

KERRY JENDRUSINA,

Plaintiff-Appellee

v.

SHYAM MISHRA, M.D. and SHYAM N. MISHRA, M.D., P.C., jointly and severally,

Defendants-Appellants.

Supreme Court No. 154717

Court of Appeals Case No. 325133

Macomb County Circuit Case No. 13-3082-NH

SUPPLEMENTAL BRIEF OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

KERR, RUSSELL AND WEBER, PLC
Joanne Geha Swanson (P33594)
Jacquelyn A. Klima (P69403)
Attorneys for Amicus Curiae
Michigan State Medical Society
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jswanson@kerr-russell.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

STATEMENT OF QUESTION PRESENTED

The question raised by the Application is whether this Court should grant leave to consider and ultimately reverse the published, non-unanimous decision of the Court of Appeals in *Jendrusina v Mishra* which, in deciding whether plaintiff discovered his claim within six months prior to filing the complaint, departs from the standard established by this Court in *Solowy v Oakwood Hosp* by (1) changing the standard from "possible claim" to "likely" or "probable" claim, (2) requiring sophisticated knowledge of the existence of causation, and (3) failing to enforce the due diligence requirement and the standard of reasonableness?

The Court of Appeals would say "no."
The Circuit Court would say "no."
Plaintiffs-Appellees would say "no."
Defendants-Appellants would say "yes."
Amicus Curiae Michigan State Medical Society would say "yes."

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants Shyam Mishra, M.D. and Shyam N. Mishra, M.D., P.C., seek leave to appeal from the non-unanimous Michigan Court of Appeals' decision in *Jendrusina v Mishra*, 316 Mich App 621; 829 NW2d 423 (2016), which reversed the trial court's grant of summary disposition under the six-month statute of limitations discovery rule. MSMS respectfully joins Defendants in urging the grant of leave and the ultimate reversal of the *Jendrusina* decision.

INTEREST OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has frequently been afforded the privilege of acting as *amicus curiae* with respect to legal issues of significance to the medical profession. Important issues involving the discovery provision of the medical malpractice statute of limitations, particularly as applied by this Court in *Solowy v Oakwood Hosp*, 454 Mich 214; 561 NW2d 843 (1997) , are raised by the non-unanimous opinion in *Jendrusina v Mishra*, 316 Mich App 621; 829 NW2d 423 (2016).

In reversing the trial court order granting summary disposition for Defendants, the *Jendrusina* majority (Gleicher, PJ, and Shapiro, JJ) modified the discovery standard this Court established in *Solowy*, which held that the discovery rule set forth in MCL 600.5838a(2) is triggered when, on the basis of objective facts, the plaintiff knew or should have known of a *possible* cause of action (an injury and its possible cause). Contrary to the *Solowy* standard, the *Jendrusina* majority said that "the inquiry is not whether it was *possible* for a reasonable lay person to have discovered the existence of the claim; the inquiry is whether it was *probable* that a

reasonable lay person would have discovered the existence of the claim" (italics in original). 316 Mich App at 2.

Using the term "claim" in conjunction with "probable" makes discovery contingent upon knowledge of a "probable claim," raising the discovery threshold and making it easier for plaintiffs to meet their burden of showing that they did not discover the existence of the claim more than six months prior to filing suit. Although later in the opinion, the *Jendrusina* majority repeated the correct standard, it nonetheless failed to apply it.

Beyond that, while the discovery statute expressly places the burden of proof on the plaintiff to show that he or she did not discover, or should not have discovered, the existence of a claim more than six months prior to filing, the *Jendrusina* majority shifts the burden to the defendant, who must now demonstrate that a reasonable lay person would have known enough about the sophisticated indicators of his or her medical condition to have been deemed to have discovered the claim.[1] The *Jendrusina* majority also rests discovery upon the acquisition of sophisticated knowledge of causation, and fails to enforce the due diligence requirement and the standard of reasonableness.

These issues are of immense importance to MSMS and its member physicians, who are understandably concerned that *Jendrusina's* departure from the *Solowy* standard will undermine the effectiveness of the statute of limitations protocol for medical malpractice litigation and will thwart the Legislature's tort reform intent to shorten the time within which such claims can be brought. For reasons more fully explained below, MSMS joins Defendants in urging this Court to

[1] In finding that Defendants did not satisfy this burden in *Jendrusina*, the *Jendrusina* majority went beyond the record and conducted its own medical research, ultimately championing Plaintiff's position with arguments that Plaintiff had not himself raised. See Defendants-Appellants Application at 8, 29-35.

grant the application for leave to appeal and to ultimately reverse the erroneous decision in *Jendrusina*.

STATEMENT OF FACTS AND PROCEEDINGS

Lacking an independent basis for reciting the facts, MSMS relies upon the Statement of Facts set forth in Defendants-Appellants' Application for Leave to Appeal and Supplemental Brief in Support.

ARGUMENT

In an effort to thwart appellate review, Plaintiff makes two novel arguments that would require this Court to discard decades of precedent governing the meaning and application of MCL 600.5838a(2). The first is a statutory interpretation argument by which Plaintiff insists that this Court has misapplied the language of MCL 600.5838a(2), apparently since its inception. The second argument urges this Court to discard *Solowy v Oakwood Hospital*, the pivotal case addressing the discovery of a claim in the medical malpractice context.

Solowy adopted the "possible" cause of action standard that this Court had previously applied to a products liability claim in *Moll v Abbot Laboratories*, and to a legal malpractice claim in *Gebhardt v O'Rourke*. Plaintiff would apparently have this Court junk it all given that "*Solowy* was decided more than 20 years ago by a Court that did not include any of the current Justices" and at a time when "the doctrine of textualism had not yet taken hold." Plaintiff's Supp. Br. at 19. If compositional and philosophical changes in this Court provided sufficient warrant to undo the law, Michigan jurisprudence would be in chaos. Fortunately, our law is much sturdier than that.

I. The Language of MCL 600.5838a(2) Unambiguously Provides that the Statute of Limitations is the Later of the Two-Year Period or Six-Month Discovery Period.

MCL 600.5838a(2) is unambiguous. It provides:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period

> prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, the claim shall not be commenced later than 6 years after the date of the act or omission which is the basis for the claim. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A medical malpractice action which is not commenced within the time prescribed by this subsection is barred. This subsection shall not apply, and the plaintiff shall be subject to the period of limitations set forth in subsection (3), under 1 or more of the following circumstances:
>
> (a) If discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.
>
> (b) If a foreign object was wrongfully left in the body of the patient.
>
> (c) If the injury involves the reproductive system of the plaintiff.

The applicable period of limitations for a medical malpractice case is two years from the date of the act or omission that forms the basis for the claim. MCL 600.5805(6); MCL 600.5838a(1). This means that to be viable, a medical malpractice complaint must be filed within two years of the date of the act or omission that forms the basis for the claim, or within six months of the date that plaintiff discovered or should have discovered the existence of the claim, whichever is later. MCL 600.5838a(1), (2).

Plaintiff erroneously argues that the "whichever is later" clause is ambiguous because it could refer to the later of the two-year statute of limitations versus the discovery clause, or alternatively, it could refer to the later of "discovers" versus "should have discovered" within the discovery clause. Although the former application has been the rule for decades, Plaintiff favors this new interpretation, the one that would guarantee that the statute of limitations will ***never*** be a bar to a medical malpractice claim because the discovery period will always commence when plaintiff actually discovers the claim. This free pass is certainly not what the Legislature had in mind when it enacted the medical malpractice statute of limitations provisions.

"The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). In construing the language of a statute, courts must give effect to the intent of the Legislature. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002). Courts must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted). "As far as possible, effect should be given to every phrase, clause, and word in the statute." *Id*. It is a well-established rule of statutory construction that words used in a statute are "not [to] be ignored, treated as surplusage, or rendered nugatory." *Robertson v DaimlerChrylser Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002).

Plaintiff does not cite or acknowledge these rules in making his statutory interpretation argument. He relies instead on the "last antecedent rule." The last antecedent rule provides that "'a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, *unless something in the statute requires a different interpretation*.'" *Duffy v Michigan Dept of Natural Resources*, 490 Mich 198, 221; 805 NW2d 399 (2011), quoting *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002) (emphasis added in *Duffy*). The last antecedent rule "should not be applied blindly," and "does not mandate a construction based on the shortest antecedent that is grammatically feasible." *Hardaway v Wayne Co*, 494 Mich 423, 427-428; 835 NW2d 336 (2013). Courts should consider "the logical metes and bounds" of the last antecedent. *Id*. at 429. The rule should not be applied where it would result in a grammatically incorrect interpretation or an awkward and unreasonable reading. *Duffy*, 490 Mich at 222.

The language of MCL 600.5838a(2) is not ambiguous. The only practical interpretation is to apply the "whichever is later clause" to the two-year period of limitations versus the six-month discovery period. This Court has already ruled that "the six-month discovery rule is a distinct period of limitation." *Miller v Mercy Memorial Hosp Corp*, 466 Mich 196, 202; 644 NW2d 730 (2002). "The plain language of § 5838a(2) provides two distinct periods of limitation: two years after the accrual of the cause of action, and six months after the existence of the claim was or should have been discovered by the medical malpractice claimant." *Id*. Without applying "whichever is later" to the two periods of limitation, it would be unclear which would apply in any given circumstance.

Further, applying the temporal clause to "discovered or should have discovered" would render the second part nugatory because there is no situation in which "should have discovered" would occur later than actual discovery. This would convert the limitations period to six months from the date of actual discovery, which would undermine the purpose of the statute of limitations and promote willful ignorance. There is only one workable and logical interpretation of the statute: the statute of limitations for a medical malpractice claim is the later of two years from the act or omission that forms the basis for the claim, or six months from the date that plaintiff discovered or should have discovered the existence of the claim, just as decades of Michigan law has held.

II. Solowy Sets the Proper Standard for Determining When a Plaintiff "Should Have Discovered the Existence of the Claim."

The common law discovery rule was applied to medical malpractice cases at least as early as 1963. See *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963) (holding that "[t]he limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act."). This rule was subsequently codified as a six-month discovery rule in 1975 PA 142, *Hawkins*

v Regional Medical Laboratories, PC, 415 Mich 420, 428 n 2; 329 NW2d 729 (1982), and is currently codified in MCL 600.5838a(2) for medical malpractice actions. *Trentadue v Gorton*, 479 Mich 378, 388-389; 738 NW2d 664 (2007).[2] As stated in *Trentadue*, "[u]nder a discovery-based analysis, a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint." *Id*. at 389, citing *Moll v Abbott Laboratories*, 444 Mich 1, 16-17; 506 NW2d 816 (1993). The current codification further adds that the burden of proof is on the plaintiff to show that, "as a result of physical discomfort, appearance, condition, or otherwise, [the plaintiff] neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim." MCL 600.5838a(2).

A. The Discovery Rule Standard.

In *Moll*, 444 Mich at 15, this Court applied the common law discovery rule to a products liability action. The Court considered whether the applicable standard should be the discovery of a "possible" cause of action or a "likely" cause of action. *Id*. at 22. The Court considered the policy reasons behind statutes of limitations compared with the policy reasons behind the discovery rule:

> [Statutes of limitations] encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they 'afford security against stale demands when the circumstances would be unfavorable to a just examination and decision;' they relieve defendants of the prolonged fear of litigation; they prevent fraudulent claims from being asserted; and they 'remedy ... the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.'
>
> As discussed earlier, this Court has adopted the discovery rule to prevent the barring of claims before the claimant's realization of a cause of action. [*Id*. at 23, quoting

[2] In *Trentadue*, 479 Mich at 388-390, this Court ruled that the Legislature abrogated the common law discovery rule by codifying the rule for specific causes of action in MCL 600.5838(2), MCL 600.5838a(2), MCL 600.5839(1), and MCL 600.5855.

> *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982) (internal citations omitted).]

This Court found that the best balance between the two was struck with the "possible cause of action" standard because it promotes both the concern regarding preservation of a claim when the plaintiff is unaware of an injury or its cause, and the concern for finality and diligent pursuit of a cause of action. *Id*. at 23-24. This Court stated that once a plaintiff is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action and is equipped with sufficient information to protect that claim. *Id*. at 24. This Court held that "the plaintiff's claim accrues when the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered, the two later occurring elements: (1) an injury, and (2) the causal connection between plaintiff's injury and the defendant's breach." *Id*. at 16.

In *Gebhardt v O'Rourke*, 444 Mich 535, 541; 510 NW2d 900 (1994), this Court interpreted the discovery rule applicable to legal malpractice claims set forth in MCL 600.5838(2):

> Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.

The Court applied the standard set forth in *Moll*, which held that the plaintiff only needed to discover a "possible" and not a "likely" cause of action. *Id*. at 544.

In *Solowy*, 454 at 222-223, this Court held that the rationale for the "possible cause of action" standard in *Moll* "applies equally to malpractice actions, whether legal or medical." This Court described the standard as follows:

> The majority [in *Moll*] concluded that an objective standard applied in determining when a plaintiff should have discovered a claim. Further, the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin. Rather, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. [*Id*. at 222.]

Quoting *Moll*, the Court reiterated that a "possible cause of action standard" properly balanced "the Court's concern regarding preservation of a plaintiff's claim when the plaintiff is unaware of an injury or its cause" and the "Legislature's concern for finality and encouraging a plaintiff to diligently pursue a cause of action." *Id.* Although the "possible cause of action" standard requires less knowledge than a "likely cause of action" standard, it nonetheless requires a minimum level of information that, "when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id*. at 226. The totality of information includes the plaintiff's "own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id*. at 227. The Court in *Solowy* recognized that a delay in diagnosis might make causation difficult; but while the possible cause of action standard should be applied with flexibility, the standard must "nevertheless be maintained" so the purpose of the limitations period can be enforced:

> In summary, we caution that when the cause of a plaintiff's injury is difficult to determine because of a delay in diagnosis, the "possible cause of action" standard should be applied with a substantial degree of flexibility. In such a case, courts should be guided by the doctrine of reasonableness and the standard of due diligence and must consider the totality of information available to the plaintiff concerning the injury and its possible causes. *While the standard should be applied with flexibility, it should nevertheless be maintained so that the legitimate legislative purposes behind the rather stringent medical malpractice limitation provisions are honored*. [*Id*. at 230 (emphasis added).]

For the last two decades, the "possible cause of action" standard set forth in *Moll* and adopted by *Gebhardt* and *Solowy* has been consistently applied to medical malpractice claims, as

well as other claims with similar discovery rules. See, e.g., *Shawl v Dhital*, 209 Mich App 321, 324-325; 529 NW2d 661 (1995) (applying *Moll* standard to medical malpractice claim); *Berrios v Miles, Inc*, 226 Mich App 470, 477-478; 574 NW2d 677, 680 (1997) (applying *Moll* standard to products liability claim); *Staff v Johnson*, 242 Mich App 521, 534 n 5; 619 NW2d 57 (2000) (applying *Solowy* standard to medical malpractice claim); *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005) (applying *Moll* standard to claim for breach of fiduciary duty). The same language should have the same standard and the same application, whether it is for a legal malpractice claim, a medical malpractice claim, or any other type of claim. Under the current state of the law, it does.

B. The Diligence Requirement.

Plaintiff argues that *Solowy* imposes a due diligence requirement that is not set forth in the statute of limitations. Diligence by the plaintiff in pursuing claims has always been a requirement and is a primary reason for the existence of statutes of limitations. "[T]he primary purposes behind statutes of limitation are: 1) to encourage plaintiffs to pursue claims diligently, and 2) to protect defendants from having to defend against stale or fraudulent claims." *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 311; 399 NW2d 1 (1986). The policy reasons behind statutes of limitations are:

> They encourage the prompt recovery of damages, *Buzzn v. Muncey Cartage Co.*, 248 Mich. 64, 67, 226 N.W. 836 (1929); they **penalize plaintiffs who have not been industrious in pursuing their claims**, *First National Bank of Ovid v. Steel*, 146 Mich. 308, 109 N.W. 423 (1906); they "afford **security against stale demands** when the circumstances would be unfavorable to a just examination and decision", *Jenny v. Perkins*, 17 Mich. 28, 33 (1868); they **relieve defendants of the prolonged fear of litigation**, *Bigelow*, *supra*, 392 Mich. at 576, 221 N.W.2d 328; they prevent fraudulent claims from being asserted, *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 22 L.Ed.2d 636 (1875); and they " 'remedy * * * the general **inconvenience resulting from delay** in the assertion of a legal right which it is practicable to assert' ". *Lenawee County v. Nutten*, 234 Mich. 391, 396, 208 N.W. 613 (1926). [*Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982) (bold emphasis added.]

Diligence has also played a role in the purpose of tolling provisions, such as the discovery rule applicable here. "The discovery rule does not mean that a cause of action is held in abeyance indefinitely until a plaintiff obtains professional assistance to determine the existence of a cause of action." *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482, 485 (1986), citing *Stoneman v Collier*, 94 Mich App 187, 193; 288 NW2d 405 (1979). "A plaintiff must act diligently in discovering his cause of action and cannot simply sit back and wait for others to inform him of his possible claim." *Id*.

Thus, throughout history, a plaintiff's diligence in pursing claims has been a primary purpose behind the enactment of statutes of limitations and their exceptions. *Solowy* did not need to add words to the statute of limitations or its corresponding discovery provision to effectuate this understanding. Diligence is an endemic statute of limitations principle.

III. There is No Compelling Justification to Overrule Decades of Precedent.

This Court does not overrule precedent lightly. *Pohutski v Allen Park*, 465 Mich 675, 693; 641 NW2d 219 (2002). "Stare decisis is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251; 118 SCt 1969; 141 LEd2d 242 (1998). There is a "presumption in favor of upholding precedent" that may be rebutted if there is a special or compelling justification, but there must be more than a mere belief that a case was wrongly decided to overturn precedent. *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 367; 792 NW2d 686 (2010).

In determining whether to overrule a prior decision, this Court considers the following factors: "1) whether the earlier case was wrongly decided, 2) whether the decision defies 'practical

workability,' 3) whether reliance interests would work an undue hardship, and 4) whether changes in the law or facts no longer justify the questioned decision." *Pohutski*, 465 Mich at 694 (citation omitted). With respect to the reliance factor, this Court considers "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466.

With respect to the first factor, *Solowy* was correctly decided. Pursuant to MCL 600.5838a(2), a plaintiff with a medical malpractice claim must file suit within the later of two years from the date the claim accrued, "or within 6 months after the plaintiff discovers or should have discovered the existence of the claim." This Court thoroughly considered whether, under this language, the discovery rule period begins to run when the plaintiff knows he has a *possible* cause of action, whether he knows for *certain* that he has a claim, or whether he knows of a *likely* claim. *Solowy*, 454 Mich at 222. This Court agreed with the rationale in *Moll* that adopting a possible cause of action standard struck the proper balance between the concern for preserving a plaintiff's claim when he is unaware of the injury or its cause, and the concern for finality and the diligent pursuit of the plaintiff's cause of action. *Id.*

The decision in *Solowy* does not defy practical workability. The rationale that "[o]nce a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim," has been applied successfully for decades and is consistent with the rule applied in other types of cases. *Solowy*, 454 Mich at 222. There is no reason for different professionals to be held to different standards when the statutory language is essentially the same. As set forth above, the "possible cause of action" standard set forth in *Moll* has been consistently applied to the language "discovers or should have discovered the existence

of the claim" across a variety of causes of action. The consistent application of the same standard across various causes of action has not only made the standard workable, but has also induced reliance across professions regarding the applicable standard. Indeed, the standard set forth in *Moll*, *Gebhardt*, and *Solowy* has been followed for decades in a variety of actions and has become "so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466.

Finally, there have been no changes in the law or facts that would no longer justify the decision. The only reason Plaintiff gives as alleged justification for overruling *Solowy* is that it was rendered before textualism took hold and there are now different judges on the Court. If these were appropriate reasons to overrule precedent, the interpretation of the law would change with each change in the composition of the Court, and there would be no stare decisis.

Although *Solowy* has not been overruled, the published *Jendrusina* opinion is inconsistent with its holding. In considering whether to adopt the "possible" or "likely" cause of action standard, the Court in *Moll* found that the "likely" cause of action standard "wreaks havoc with the legislative policies underlying the statute of limitations." *Moll*, 444 Mich at 23. The *Solowy* Court likewise rejected the "likely" standard and held that "the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Solowy*, 454 Mich at 222. The *Jendrusina* majority, on the other hand, specifically adopted the test rejected by *Moll* and *Solowy*. Bearing the mark of what is hence forward obligatory precedent, *Jendrusina* cannot be reconciled with this Court's consistent adoption and explication of the "possible cause of action" standard across the spectrum of practice areas in *Moll*, *Gebhardt* and *Solowy*. *Jendrusina* is a blatant departure, creating a difficult dilemma for litigants and our courts, which may now apparently elect one formulation or the other, depending upon the preferred result.

This is clearly contrary to the Legislature's intent and to the precedential value of this Court's case law.

RELIEF REQUESTED

For the reasons expressed above and in Defendants-Appellants' Application for Leave to Appeal, Defendants-Appellants' Supplement to their Application for Leave to Appeal, and Amicus Curiae Michigan State Medical Society's Brief in Support of Defendants-Appellants' Application for Leave to Appeal, Amicus Curiae Michigan State Medical Society respectfully requests that this Court grant leave to appeal and ultimately reverse the erroneous decision in *Jendrusina*.

Dated: August 2, 2017

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By:/s/Jacquelyn A. Klima
Joanne Geha Swanson (P33594)
Jacquelyn A. Klima (P69403)
Attorneys for Amicus Curiae
Michigan State Medical Society
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jswanson@kerr-russell.com
Email: jklima@kerr-russell.com

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2017, I caused Michigan State Medical Society's Supplemental Amicus Brief in Support of Defendants-Appellants' Application for Leave to Appeal and this Certificate of Service to be electronically filed with the Clerk of the Court using the Court's electronic filing system which will electronically serve all attorneys of record.

/s/Jacquelyn A. Klima
Jacquelyn A. Klima (P69403)