

MEDICAL MALPRACTICE UPDATE

February 2006

MICHIGAN FEDERAL DISTRICT COURT RE-AFFIRMS DEFENSE COUNSEL'S ABILITY TO MEET *EX PARTE* WITH PLAINTIFF'S TREATING PHYSICIAN

By Joseph E. Belsito, Attorney

Michigan has long favored a "far-reaching, open, and effective" discovery process. Restrictions that limit parties to formal methods of discovery not only complicate trial preparation, but also deter the search for truth. Michigan courts and the legislature have embodied this principle in MCR 2.314 and MCL 600.2157, which govern the discovery of medical information, and effectively permit discovery of a plaintiff's medical condition when placed at issue by plaintiff. Asserting the physician-patient privilege may bar plaintiff's claim.

Michigan jurisprudence has long supported the proposition that a plaintiff's waiver of privilege permits defense counsel to conduct *ex parte* communications with plaintiff's treating physician. *Ex parte* communications occur without the presence of all parties involved. Typically after obtaining a release from the plaintiff, defense counsel interviews the plaintiff's treating physician without the presence of the plaintiff's counsel. Indeed, even prior to the adoption of the Michigan Court Rules of 1985, common practice permitted defense counsel to engage in such *ex parte* communications with a plaintiff's treating physician. This practice also applied to non-medical malpractice cases.

Thus, under Michigan law, plaintiffs automatically and involuntarily waived the physician-patient privilege upon filing a claim alleging medical malpractice or personal injury. As such, Michigan law did not require written authorization from the plaintiff permitting *ex parte* communications, or notice to plaintiff's counsel. However, defendants were (and still are) required to notify the physicians

that he or she need not meet with defendant's counsel.

As of 1996, however, HIPAA and its accompanying federal regulations now govern the procedures by which physicians and other health care providers may release a plaintiff's medical information. HIPAA, though, neither created a new federal privilege, nor superseded the rationale underlying the Michigan Supreme Court's decision in *Domako v. Roe*, 438 Mich. 347 (1991). Instead, HIPAA (to the extent not afforded by state law) merely provides standard procedural regulations governing a plaintiff's waiver of his or her physician-patient privilege.

In *Croskey v. BMW of N. Am., Inc.*, an unpublished federal court case from the Eastern District of Michigan, the Magistrate's opinion addressed HIPAA's impact on Michigan law. The magistrate held that HIPAA preempted state law and that defendants were required to secure HIPAA-compliant authorizations before conducting *ex parte* communications with a plaintiff's treating physician. Additionally, however, the magistrate held that defendant must also notify plaintiff's counsel of, and acquire plaintiff's consent to, any *ex parte* meetings.

However, the Honorable Nancy G. Edmunds recently reversed in part, and affirmed in part, the Magistrate's opinion in *Croskey*. The defendant in *Croskey* challenged the Magistrate's conclusion that HIPAA requires notice to plaintiff's counsel of a proposed *ex parte* meeting, and plaintiff's consent to such meetings.

In order to comply with HIPAA federal regulations governing disclosure of protected health information by a provider, 45 CFR § 164.512(e)(1) requires that a defendant either obtain a court order, send a subpoena or discovery request to the physician or other health care provider indicating reasonable efforts have been made to provide plaintiff with notice of the request, or send a subpoena or discovery request indicating reasonable efforts have been made to obtain a qualified protective order. According to Judge Edmunds, no additional requirements are provided for, and the Magistrate erred in determining that defendant need also give notice to plaintiff's counsel, and acquire plaintiff's consent, before conducting *ex parte* interviews with plaintiff's treating physician.

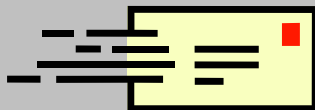
The defendant in *Croskey* argued that any notice requirement for plaintiff's counsel and any consent requirement from plaintiff "will have the practical effect of obstructing, or precluding entirely, *ex parte* interviews," and that "principles of fundamental fairness" permit defendant to investigate the health condition of Plaintiff "without interference of and without disclosing its work product to [plaintiff's] counsel." According to the defendant, "[p]laintiff should not be permitted to use the patient-physician privilege as both a sword and shield." Judge Edmunds agreed, characterizing defendant's concerns as "legitimate." Judge Edmunds also reasoned that the additional requirements of notice to plaintiff's counsel, and consent by plaintiff, "would render superfluous" the CFR regulations permitting the acquisition of

protected health information by the prescribed means. Judge Edmunds went on to hold that "[t]o allow Plaintiff to block the interview would be inconsistent with HIPAA's structure, and would impede Defendant's access to evidence."

Despite the Magistrate's error, Judge Edmunds did affirm the Magistrate's conclusions that HIPAA preempted Michigan law, and that Michigan law still requires notice to the treating physician that he or she need not meet with defense counsel. Eliminating the requirements of notice to plaintiff's counsel, and plaintiff's consent, the court recognized these requirements as superfluous and unsupported. After all, plaintiff's refusal to allow *ex parte* communications arguably constitutes an assertion of the physician-patient privilege, thereby invoking MCR 2.314, and effectively precludes plaintiff from proceeding with his or her lawsuit.

Judge Edmunds' reversal of the Magistrate's opinion in *Croskey* confirms defense counsel's ability to meet with plaintiff's treating physician *ex parte*, acknowledges that Michigan law does not require plaintiff's consent or notice to plaintiff's counsel, and definitively acknowledges the absence of any such requirements from HIPAA and its federal regulations. Ultimately, Judge Edmunds' opinion represents a "win" for defense counsel seeking to accurately and comprehensively assess plaintiff's health condition.

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CASE LAW UPDATE

Edited by: Cara L. Nieboer, Attorney & Robert W. Tubbs, Attorney

Affidavit of Merit/Affidavit of Meritorious Defense

Wyant v Norton Shores Medi-Center, Mich. Ct. App., December 13, 2005 (unpublished). Trial court granted summary disposition because the plaintiff filed an affidavit of merit that was not properly sworn and, therefore, the statute of limitations was not tolled. Specifically, because the affidavit of merit was not signed in the presence of a notary public, all the requirements of a valid affidavit were not met. The Court held that an affidavit must be (1) a written or printed declaration of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it and taken before a person having authority to administer such oath or affirmation. Because the plaintiff did not file an affidavit of merit signed in the presence of a notary public, by definition, the document attached with the complaint was not an affidavit and was tantamount to not filing an affidavit at all. Accordingly, the medical malpractice action was not properly commenced and the statute of limitations barred plaintiff's claim.

Affidavit of Merit/Malpractice v Ordinary Negligence

Sturgis Bank & Trust Co. v Hillsdale Community Health Center, 268 Mich App 484 (2005). In the complaint, the plaintiff alleged that the defendant's nursing staff were negligent in failing to prevent the patient from falling out of her hospital bed. Plaintiff filed affidavits from a registered nurse and a nurse practitioner. Defendant moved for summary disposition of plaintiff's claim of ordinary negligence and the claims of medical malpractice because the plaintiff's nursing experts were not qualified to give opinions as to proximate cause. The trial court granted both motions. The Court of Appeals held that defendant's motion with regard to the claim of ordinary negligence was properly granted because the claim presented questions involving medical judgment. However, the Court reversed the order granting summary disposition of the plaintiff's medical malpractice claims. The Court held that MCL 600.2169d(1) only requires the affidavit be signed by an expert practicing or teaching in the same health care profession as those

accused of malpractice. Although the affiant may be unqualified to attest to matters of causation, this is not of concern at this "first stage" of litigation.

Duty

Hallman v Holy Cross Hospital of Detroit, et. al., Mich. Ct. App., October 25, 2005 (unpublished). Following psychiatric hospitalization pursuant to an order of the probate court, plaintiff's decedent was discharged to an adult foster care facility for supervision due to a history of noncompliance, particularly with respect to his use of medication. Plaintiff's decedent left the facility on the day of admission, presumably to buy cigarettes, and was found dead in the Detroit River several days later. Defendants brought a motion for summary disposition on the basis that plaintiff could not establish that the death was the result of suicide and that the death was proximately caused by the defendants' negligence. The Court of Appeals held that the trial court correctly denied the motion as to the adult foster care facility because there were questions of fact as to whether the facility was negligent and whether plaintiff's decedent "died at drowning." The Court also held that the trial court correctly granted summary disposition to the remaining defendants because following discharge to the adult foster care facility they no longer had a duty to plaintiff's decedent as he was then in the custody and care of the facility.

Evidence

Barnett v Hidalgo, M.D., et. al., 268 Mich.App. 157 (2005). In this case, arising out of plaintiff's decedent's death from an untreated blood disorder following emergency gallbladder surgery, the Court reversed entry of judgment in favor of defendants on the basis that the trial court committed reversible error in admitting certain evidence. In particular, the trial court incorrectly admitted into evidence three affidavits of merit filed with plaintiff's complaint. The affidavits were inadmissible hearsay and impermissibly referenced a party who had previously settled out of the lawsuit. In addition, two of the affidavits were also improperly used for impeachment purposes as the affidavits were not inconsistent with the witnesses' trial

testimony. Furthermore, evidence used solely for impeachment purposes may not be given to the jury as an exhibit. The Court also held that although prior deposition testimony could be used for impeachment purposes, it was inadmissible as substantive proof of the matter asserted. "Counsel may not impeach a witness merely to place before the jury otherwise inadmissible hearsay as substantive evidence."

Experts

Smith v Joy, M.D., et. al., Mich. Ct. App., September 27, 2005 (unpublished). Plaintiff was treated for a laceration by defendant physician, a board certified family practice physician working in the defendant hospital's emergency department. It was alleged that at the time of treatment he negligently failed to prescribe antibiotics and plaintiff subsequently developed an infection requiring surgical re-opening and drainage and hospitalization for about a week. The trial court, citing *Cox v Flint Bd of Hosp Managers*, 467 Mich 1 (2002), held that plaintiff's expert, a board certified family practice physician working in the emergency department in a metropolitan area, was not familiar with the local standard of care and, therefore, was unable to testify. As a result, the court granted defendants' motion for summary disposition. On appeal, the Court held that the standard of care for a specialist is not a local standard, but a national standard, and that *Cox* only requires that the expert testify regarding the national standard of care in light of the resources available in the community. In this case, there was sufficient evidence to show that the antibiotics were available in the local community and the expert should have been allowed to testify. The case was reversed and remanded to the trial court for further proceedings.

Ward v Rooney-Gandy, D.O., ___ Mich ___ (2005). In lieu of granting leave to appeal, the Court reversed the Court of Appeals decision and reinstated the trial court's dismissal of plaintiff's complaint, for the reasons stated in the Court of Appeals dissent. In the original action the plaintiff inadvertently filed the wrong affidavit of merit with his complaint and the majority in the Court of Appeals held that the doctrine of equitable tolling

tolled the statute of limitations until the error was discovered. In the dissent, however, which has been adopted by the Michigan Supreme Court, it was reasoned that the wrong affidavit filed with the complaint was grossly nonconforming and, therefore, did not toll the statute of limitations. Equitable tolling does not apply because the mistake was the result of a "negligent failure" and not an "understandable confusion."

Bates v Gilbert, O.D., et. al., Mich. Ct. App., August 16, 2005 (unpublished). Plaintiff alleged in her complaint that defendant optometrist failed to test her for glaucoma and as a result she now suffers from legal blindness. Accompanying her complaint was an affidavit of merit signed by an ophthalmologist. Defendant's affidavit of meritorious defense was signed by him. Co-defendant filed a document stating that for its affidavit of meritorious defense, it was relying upon the affidavit of meritorious defense signed by the optometrist. The validity of the various affidavits was the issue on appeal. The majority held that although plaintiff's affidavit of merit was signed by an ophthalmologist and not an optometrist, given the lack of case law on the requirements of affidavits of merit as to non-physician defendants, the plaintiff's attorney reasonably believed the affiant was qualified to testify against the defendant optometrist. In his dissenting opinion, Judge Donofrio would have held that the affiant did not devote the majority of his professional time to the practice of optometry and, therefore, it was not reasonable for plaintiff's attorney to believe he was qualified to render expert testimony as to the standard of care for the defendant. With respect to the affidavit of meritorious defense signed by the defendant optometrist, the majority held that even though the optometrist could not testify on the issues of causation and damages, his attorney possessed a reasonable belief that he met the required qualifications. Again, Judge Donofrio dissented. In his dissenting opinion he states that because the defendant lacked the capacity to offer an opinion on proximate cause and damages it could not be reasonable for his attorney to believe that he met the statutory requirements. Finally, and without dissent, the Court held that the document

filed by the co-defendant was not an affidavit of meritorious defense and, therefore, it did not comply with the requirements of MCL 600.2912e(1). The Court remanded the matter back to the trial court for consideration of the appropriate sanction.

Hepfinger v White, M.D., et. al., Mich. Ct. App., September 13, 2005 (unpublished). Where the affidavit of merit accompanying plaintiff's complaint was not signed before a notary public who administered an oath or affirmation with regard to the contents of the affidavit, the affidavit did not comport with the statutory requirements and was defective. Because the statute of limitations had expired, the proper remedy was a dismissal of the action with prejudice.

Peet v Beshore, D.O., et. al., Mich. Ct. App., November 8, 2005 (unpublished). In affirming the denial of defendants' motion for summary disposition the Court held that although plaintiff's affidavit of merit failed to contain the necessary certification for an out-of-state notary, because the case was pending when *Apsey v Memorial Hosp.*, 266 Mich App 666 (2005), was decided, plaintiff can come into compliance by filing the proper certification.

Joint & Several Liability

Bell v Ren-Pharm, Inc. et. al., ___ Mich App ___ (2006). The Court held that joint and several liability in a medical malpractice claim extends to damages attributable to the fault of named nonparties. Plaintiffs filed suit against defendants alleging malpractice when the plaintiffs' minor sustained burns after a topical ointment was applied to his skin by the minor's grandmother. The defendants named the grandmother as a nonparty at fault. The jury returned a verdict in favor of the plaintiffs and found that the defendants were 20 percent at fault and the grandmother was 80 percent at fault. For medical malpractice cases, tort reform did not abolish joint and several liability. The Court examined the general principles of joint and several liability and concluded that the underlying purpose of joint and several liability is to place any injustice on the wrongdoer and not an innocent

plaintiff. Therefore, joint and several liability extends even to damages caused by the fault of a person not a party to the action.

Medical Malpractice vs Ordinary Negligence

Dennis v Specialty Select Hospital -Flint, et. al., Mich. Ct. App., September 29, 2005, (unpublished). Plaintiff's decedent was administered a dose of Nystatin intravenously by a non-licensed student nurse. Nystatin administered intravenously rather than orally is toxic and plaintiff's decedent died soon after receiving the medication. Because the administration of the medication occurred within the context of a professional relationship and raised questions of medical judgment beyond the realm of common knowledge and experience of lay jurors, plaintiff's claim therefore was properly dismissed because plaintiff did not serve defendants with a notice of intent nor did plaintiff file an affidavit of merit with his complaint.

Howell v Macomb MRI, Mich. Ct. App., October 11, 2005 (unpublished). Plaintiff claimed injuries when an agent of defendant caused him to roll off the table while positioning him for an MRI. Because the reasonableness of the technician's actions does not involve a question of medical judgment, the claim is one of ordinary negligence and not medical malpractice. Whether the technician acted reasonably is within the realm of common knowledge and experience and can be evaluated by lay jurors without expert testimony on the standard of care. Plaintiff, therefore, was not required to file an affidavit of merit with his complaint.

Multiple Notices of Intent/Tolling

Mayberry v General Orthopedics, P.C., et. al., 474 Mich 1 (2005). Where plaintiff serves two notices of intent and the first notice does not toll the statute of limitations, the second notice served within 182 days of the expiration of the limitations period will toll the statute of limitations for 182 days. The Court held that this does not violate the prohibition against tacking as set forth in MCL 600.2912b(6), which provides that "the tacking or addition of successive 182-day periods is not allowed," because there had been no prior tolling of the statute of

limitations. As per the holding in *Omelenchuk v City of Warren*, 461 Mich 567 (2000), a notice of intent served upon defendant more than 182 days prior to the expiration of the statute of limitations will not toll the statute of limitations. Therefore, service of the second notice of intent was the first time tolling under MCL 600.5856(d) [now .5856(c)] applied. Plaintiffs who serve defendants with the notice of intent more than 182 days prior to the expiration of the statute of limitations can now toll the limitations period by simply serving defendant with a second notice of intent.

Proximate Cause

Zainea, et. al., v Shinar, M.D., et. al., Mich. Ct. App., December 1, 2005 (unpublished). Where the anesthesiologist was aware of plaintiff's preference for a general anesthetic but used a spinal anesthetic, plaintiff's damages were not proximately caused by the attending physician's failure to warn the plaintiff as to the potential side effects of a spinal anesthetic. As a result, the trial court correctly granted defendants' motion for summary disposition.

Standard of Care

McElhaney v Harper-Hutzel Hospital, ___ Mich App___(2006). The Court held that because an obstetrician/gynecologist does not practice in the same "health profession" as a nurse midwife they are not qualified to testify as to the standard of care for a nurse midwife as required by MCL 600.2169(1). Therefore, although the obstetrician/gynecologist may testify as to how any breach may have caused the injury and what they may have done had they been called, they may not testify as to the standard of care for the nurse midwife. As a result, the trial court properly granted defendant's motion for summary disposition on the basis that plaintiff could not establish a genuine issue of material fact regarding the appropriate standard of care.

Trial Appearance

Griffiths v Sezgin, M.D., Mich. Ct. App., August 23, 2005 (unpublished). In this medical malpractice action arising out of defendant's alleged professional negligence while performing a

laminectomy, the trial court entered a default against the defendant when he failed to appear for trial although his attorney was present and prepared to proceed. On appeal, the Court held that the trial court abused its discretion in entering the default. An appearance by an attorney for a party is an appearance by the party. Unless the party was issued a subpoena or ordered by the court to personally appear at trial, he was not required to do so and a default should not have been entered. The case was remanded to the trial court for a new trial.

Wrongful Death/Statute of Limitations

Washington v Jackson, Mich. Ct. App., December 13, 2005 (unpublished). In this wrongful death action alleging medical malpractice, the Court of Appeals addressed whether a timely filed complaint under the wrongful death savings provision tolled the running of the wrongful death savings provision during the year between the filing of the complaint and the dismissal of the action pursuant to the parties' stipulation. The court held, relying on *Waltz v Wyse*, that the tolling provisions in MCL 600.5856 do not toll the wrongful death savings period. Accordingly, summary disposition of plaintiff's complaint was appropriate. The Court of Appeals also refused to extend the doctrine of equitable or judicial tolling to these circumstances. Therefore, where a plaintiff timely filed the complaint within the wrongful death savings period, and that complaint is dismissed either by stipulation of the parties or without prejudice, plaintiffs will not have the benefit of tolling during the time period between the filing of the complaint and the dismissal of the action.

Harris v Bolling, M.D., et. al., 267 Mich.App 667 (2005). This is a wrongful death action in which the Court affirmed the trial court's order granting summary disposition based upon the expiration of the statute of limitations. The alleged malpractice occurred on May 17, 1999. The decedent died on August 17, 2000 and the personal representative was appointed on September 28, 2000. The notice of intent was mailed to defendants on May 24, 2002. Plaintiff's complaint was filed on March 19, 2003. Because that complaint was filed more than two years after the appointment of the personal

representative, it was untimely and the court properly granted summary disposition. On May 17, 2004 plaintiff attempted to cure its tardiness by appointing a successor personal representative, the Court held that a successor personal representative cannot rely upon the untimely filed complaint that was filed prior to the appointment. Thus, the appointment cannot render timely an untimely filed complaint.

Costa v Michigan Heart & Vascular Institute, Inc., et. al., Mich. Ct. App., December 6, 2005 (unpublished). In applying the holdings in *Waltz v*

Wyse, 469 Mich 642 (2004) and *Ousley v McLaren*, 264 Mich App 486 (2004), the Court reversed the decision of the trial court and held that the plaintiff's complaint was barred by the applicable statute of limitations for the reason that the tolling statute under MCL 600.5856 does not apply to the wrongful death savings statute under MCL 600.5852 and, therefore, the plaintiff failed to file his complaint before the expiration of the two-year period granted to him as a personal representative. The trial court erred in not giving retroactive effect to the *Waltz* decision.

NEWS AND SUCCESS

Paul Oleniczak has assumed the role of chairman of the Medical Malpractice practice group. A medical malpractice attorney with Smith Haughey for 25 years, Paul replaces outgoing chairman, **Joe Engel**.

Bill Jack obtained a no cause verdict on behalf of an anesthesiologist in a wrongful death action tried in Kalamazoo. The plaintiff claimed the patient died as a result of an incident in the operating room. Bill successfully established that her death was caused by a rare anaphylactic reaction to one of the anesthetic drugs that no one could have foreseen. The jury deliberated for just over an hour.

Carol Carlson received a no cause verdict from a unanimous jury after a two week trial involving hand surgery. The jury found the defendant doctor was not negligent in the performance of carpal tunnel surgery, despite the fact that he cut the median nerve during the procedure. Plaintiff claimed the injury turned her into a "one armed person," and sought damages in excess of \$800,000. Many others at Smith Haughey played important roles in the successful defense of this case, including **Cindy Boer** and **Brian Molde**.

New Contact Cards!

Watch for your updated **Medical Malpractice and Health Law Attorney Contact List** to be mailed later this month. The list includes recent additions to the Medical Malpractice and Health Law practice groups and updated contact information. Please note, that the health law pager is no longer in use.

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