Apsey Update:

Out-of-State Notary Certification Requirement to be Applied Prospectively

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On June 9, 2005 the Michigan Court of Appeals issued its final decision in the *Apsey v. Memorial Hospital, et al.* (No. 251110, rel'd 04/19/05) controversy. On rehearing, the court determined that MCL 600.2102 does apply to the notarization of affidavits in medical malpractice actions, requiring plaintiff to file a special certification from the court clerk of the court in the county where the out-of-state notary is acting.

However, in the interests of justice and equity, the court applied the decision prospectively and allowed plaintiffs in currently pending actions to come into compliance with its ruling by filing the proper certification.

In *Apsey*, plaintiff underwent an exploratory laparotomy with various complications. This surgery resulted in plaintiff filing a complaint wherein she alleged that the defendants were professionally negligent in their diagnosis and in failing to report her complications, which caused her to become septic and require several follow-up surgeries.

The affidavit of merit accompanying plaintiff's complaint possessed a traditional notarial seal and was prepared in Pennsylvania using a notary public of that state. At the time of filing, plaintiff failed to provide special certification to authenticate the credentials of the out-of-state notary. On June 25, 2003, after the statute of limitations had already run on their cause of action, the plaintiff filed the special certification.

Defendants brought a motion for summary disposition on the basis that the affidavit of merit was required to have the special certification at the time of filing in order for it to be deemed proper and to commence suit pursuant to MCL 600.2912d and 600.2102. The trial court granted defendants' motion and reasoned that the failure to provide the special certification was fatal to the notarization. The affidavit was therefore a nullity, plaintiff's complaint was invalid, and suit was never properly commenced. Accordingly, the trial court dismissed plaintiff's complaint with prejudice.

In its first decision, the Michigan Court of Appeals had to determine what exactly constituted a valid out-of-state notarization. Plaintiff argued that the Uniform Recognition of Acknowledgement Act (URAA) in MCL 565.261 was controlling. Under MCL 565.262, a special certification is not required for an out-of-state notarization to be valid. Thus, if the URAA governed, plaintiff would not need the special certification and her out-of-state affidavit would be valid. Defendants argued that MCL 600.2102 was the controlling statute and that it required a special certification.

The Michigan Court of Appeals affirmed the trial court's ruling and held that without the necessary special certification plaintiff's affidavit of merit was defective. Specifically, the court agreed with defendants for two reasons. First, MCL 600.2102 appears within the Revised Judicature Act, MCL

600.101 *et seq.* and retains its predecessor's language concerning affidavits "received in judicial proceedings." In *In re Alston's Estate*, 229 Mich 478 (1924), the Supreme Court strictly construed the revised statute and required special certifications to accompany notarizations by out-of-state notaries. Second, the URAA provides that it does not diminish or invalidate Michigan law. MCL 565.268. As such, the URAA is a more general statute, which was enacted after MCL 600.2102, the more specific statute. Therefore, MCL 600.2102 takes precedence. The court further noted that the belatedly filed certification did not toll the statute of limitations or cure the defect.

As one can imagine, the result of this ruling effectively extinguished a significant portion of medical malpractice cases that were pending within the Michigan court system. A recent poll amongst the Michigan Defense Trial Counsel practitioners estimated that as many as 95 percent of the medical malpractice cases currently pending in Michigan courts were premised on out-of-state affidavits, which do not possess this mandatory "special certification."[1] Not surprisingly, the ruling formed the basis for a flood of dispositive motions filed by both plaintiffs and defendants. Despite the filings by both sides, the ultimate impact of *Apsey* had an unquestionably greater impact on plaintiffs.

In reaction to the decision, a Motion for Reconsideration was filed by the plaintiffs with the Michigan Court of Appeals, and was joined by a number of amicus curiae briefs filed by: the Michigan Trial Lawyers Association, the UAW, Citizens for Better Care, the State Bar of Michigan, Community Health Department, the Michigan Defense Trial Counsel, the Attorney General's office, and the Michigan State Medical Society. The consensus of bar organizations and lawyers across the state was that the Apsey decision ultimately failed to serve the interests of justice, and that the Court of Appeals in formulating its decision, placed "the form over the substance" of the statutory requirements for an affidavit of merit. The opponents of the decision asserted that the URAA applies as a supplement to MCL 600.2102(4), and that under the basic rules of statutory construction the URAA should apply because it was the more recent law and was meant to be all-inclusive. Further, the parties asserted that the court should reconsider its decision due to the public policy interests at stake and the extreme prejudice to affected parties.[2] In the alternative, the parties asked that the decision apply only prospectively and not retroactively, so as not to invalidate those claims which were currently pending.

The reaction to *Apsey* was so strong that several retired judges recently authored a letter to the editor of Michigan Lawyers Weekly, a prominent legal newspaper. The former judges articulated the same opinions and noted specifically that neither the merit of the lawsuit nor the qualifications of the actual expert who signed the affidavit had been questioned, but rather, only the notary's qualifications were at issue. The judges expressed their frustration in the court's ruling, and stated that:

> Utilizing a questionable technicality and a Draconian remedy, the appellate court dismissed a potentially meritorious malpractice lawsuit. The resulting injustice in this one case is distressing, but the potentially devastating ramifications of this apparently wrong and unfair decision on thousands of other potentially meritorious claims compel us to publicly comment.[3]

Circuit court judges across southeastern Michigan were split on how to deal with the *Apsey* decision, most likely due to the far-reaching effects of dismissing so many claims. While some courts granted the motions outright, others denied the motions by imposing the doctrine of "equitable tolling" and/or holding their decisions in abeyance until further action was taken by the court of appeals or the Michigan Supreme Court. Most recently, an alternate panel of the Michigan Court of Appeals halted appellate proceedings in the case of *Bricker v Sladek*, which also involved an out-of-state notary. The court held specifically that "the application for leave to appeal [be] held in abeyance pending resolution of the motion for reconsideration" in *Apsey*.[4]

In the court's most recent decision on reconsideration, the court indicated that the conflict between the URAA and MCL 600.2102 was one of first impression and the prior decision was not one, which was clearly foreshadowed. The court held that justice required a prospective application of its opinion, given the confusion in the legal community and the plaintiff's apparent reliance on the URAA. Further, in the interests of fairness and public policy, the court allowed those plaintiffs with currently pending medical malpractice claims to come into compliance with its ruling by filing the proper certification. The court also issued a warning that the new opinion served to put the legal community on notice as to the state of the law on this issue and that there would be strict application of the law as of the date of the reconsideration opinion. Finally, the court left issues regarding the archaic nature of the statute and acquiring the affidavit to the legislature.

Given the court's most recent decision, it appears that the saga of *Apsey* has come to an end . . . for now. After a busy two months, the law on this issue has been settled if or until the Supreme Court grants certiorari. At this point, both plaintiffs and defendants alike must file a special certification from the clerk of the court in the county where the notary is acting, in cases involving an out-of-state notary. Failure to file this certification will result in the nullification of the affidavit, an invalid complaint, and the continuation of the statute of limitations. The result of this decision is to ultimately make obtaining affidavits from out-of-state practitioners harder and more time consuming. There is no question that this new ruling will have a significant impact on the state of medical malpractice cases in Michigan.

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[1] *Brief of Amici Curae Michigan Defense Trial Counsel at v., Apsey v Memorial Hospital, (No. 251110, rel'd 4/19/05 for publication).*
[2] *Id. at 1, 5, and 9. Brief of Amici Curae Attorney General, Apsey v Memorial Hospital, (No. 251110, rel'd 4/19/05 for publication).*
[3] *Letter from Hon. Burress, Howard, Chrzanowski, Kaufman, Harwood, Tertzag, and Houk to the Editor, Mich. Lawyers Weekly, May 23, 2005.*
[4] *'Apsey' inspired action by Court of Appeals, Mich. Lawyers Weekly, May 30, 2005, at 2.*