HEALTHCARE

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2005 – The Year in Review

Over the past year, the Plunkett & Cooney Healthcare Update has included summaries of all the notable cases that impacted our area of practice. As this year comes to a close, we would like to provide you with the most relevant summaries grouped by topic as a 2005 Year in Review. Hopefully, this Year in Review will serve as a guide to illustrate the evolution of medical malpractice case law in 2005, as well as an easy reference guide in 2006.

Waltz/Eggleston:

One of the most notable decisions of 2004 was *Waltz v Wyse*, 469 Mich 642 (2004), in which the Michigan Supreme Court held that since the wrongful death savings provision is not a statute of limitations or a statute of repose, the notice of intent tolling provision under MCL 600.58569(d) does not apply.

In order to avoid summary judgment on *Waltz*, plaintiffs have continually cited the case of *Eggleston v Bio-Med Applications of Detroit, Inc.,* 468 Mich 29 (2003). In *Eggleston*, the Supreme Court held that the statutory language of the wrongful death statute simply provided a two-year grace period, which is measured from the issuance of letters of authority (i.e., the court did not limit the estate to a single personal representative).

Over the course of the year, the Michigan Court of Appeals has continually affirmed the Supreme Court's holding in *Waltz*. In their unpublished decisions, the court weakened the holding of *Eggleston* by choosing to distinguish each new case from *Eggleston* on factual grounds. The following four case summaries reflect the updates to this area of the law.

***Farley v Garden City Osteopathic Hospital, et al*, 266 Mich App 566 (2005).**

The Michigan Court of Appeals held that the opinion of *Waltz v Wyse*, D.O., 469 Mich 642 (2004), is applied retroactively and governs a wrongful death case grounded in allegations of medical malpractice, which was filed before the release of *Waltz*. *Waltz* holds that the tolling applicable to certain notice of intent situations, MCL 600.5856(d), is inapplicable to the savings period, MCL 600.5852, which provides two years from the date letters of authority are issued in which to file a timely wrongful

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death case.

The appellate court rejected the plaintiff's arguments that the savings period in the medical malpractice context constitutes a "five year statute of limitations," and that the previously-binding cases, namely *Waltz* and *Ousley v McLaren, M.D.*, 264 Mich App 486 (2004), apply the "no tolling" rule only to the three-year extension period found in the savings statute.

***Harris v Steven F. Bolling, M.D.*, et al, 267 Mich App 667 (2005).**

The decedent died on Aug. 17, 2000. Just over a month later, the personal representative was appointed. On May 24, 2002, the plaintiff served a notice of intent on the defendants. On March 19, 2003, the plaintiff filed the complaint. On May 17, 2004, a successor personal representative was named. Four months later, the trial court entered a stipulated order to amend the caption to reflect the appointment of the successor personal representative.

The defendants subsequently filed a motion for summary disposition arguing that the complaint was not timely filed within two years of the original personal representative's appointment, as required by *Waltz v Wyse*, 469 Mich 642 (2004), and the subsequent appointment of a successor personal representative did not render the filed complaint in time. Applying *Waltz*, the trial court granted the defendants' motion. The plaintiff appealed the dismissal of her claim.

In upholding the trial court's decision, the Michigan Court of Appeals first addressed the plaintiff's contention that she was relying on *Omelenchuk v Warren*, 461 Mich 567 (2000), when she filed her complaint more than two years after the appointment of the personal representative, but sent the notice of intent within the two year savings provision, thus allowing her an additional 182 days to file the complaint. The court refused to apply *Omelenchuk* holding instead that in *Waltz* the Michigan Supreme Court clarified that, despite the "imprecise choice of words" in *Omelenchuk*, MCL 600.5852 "is not a statute of limitations, but a saving statute." Further, in *Ousley v McLauren*, 264 Mich App 486 (2004), the appellate court held that it was appropriate to apply *Waltz* retroactively. Following these decisions, the court concluded that it was proper for the trial court to apply *Waltz* to this case.

Next, the court addressed whether the subsequent appointment of the successor personal representative revived the complaint that the original personal representative filed untimely – more than two years after the original personal representative was appointed. In support of her assertion that it did, plaintiff relied on *Eggleston v Bio-Medical Applications of Detroit*, 468 Mich 29 (2003). In *Eggleston*, the Michigan Supreme Court held that MCL 600.5852 "clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date the letters of authority are issued to the initial personal representative." Thus, the plaintiff argued that according to this decision, she could have filed a complaint two years after she was appointed successor personal representative. However, the court noted that this situation was different from *Eggleston* because after being appointed, the successor personal representative never filed a complaint. Thus, the court held this case was distinguishable from *Eggleston* and that the plaintiff's complaint was untimely filed.

Further, the court discussed the plaintiff's contention that she did not need to file another complaint, because the previous personal representative had filed one. The court applied MCL 600.5852 and the Supreme Court's ruling in *Eggleston*, and held that the successor personal representative could have filed a complaint after her appointment, but not before. Finally, the court held that MCL 700.3701 does not allow the successor personal representative's powers to "relate back" to those of the original personal representative.

***King v Michael Briggs, D.O., et al*, (Nos. 259136 and 259229, rel'd 07/12/05) (unpublished).**

The date of the alleged malpractice was Sept. 6, 2001, and letters of authority were issued to the personal representative 20 days later. The notice of intent was sent to the defendants on Sept. 5, 2003, and the 182-day tolling period began. The final date by which to file suit under the saving provision in MCL 600.5852 was Sept. 26. The statute of limitations ran on March 8, 2004. The defendant filed a motion for summary disposition on the

basis that the complaint filed on March 11, 2004 was untimely. The trial court denied the motion and the defendant appealed.

The appellate court first examined whether the saving provision in the wrongful death statute, MCL 600.5852, which gives a personal representative two years from the issuance of the letters of authority to file a malpractice claim, is tolled during the 182-day mandatory notice period required by MCL 600.2912b(1) before a medical malpractice action can be filed. The court looked directly to *Waltz v Wyse*, 469 Mich 642 (2004), and held that since the saving provision is not a statute of limitations or a statute of repose, the notice tolling provision under MCL 600.5856(d) did not apply.

The appellate court then examined whether a successor personal representative of the estate was entitled to an additional two years from the issuance of his letters of authority. In their argument, the plaintiffs cited *Eggleston v Bio-Med Applications of Detroit, Inc.*, 468 Mich 29 (2003), in which the Michigan Supreme Court allowed for an additional two year period for a successor personal representative to file suit. The court held that the plaintiff's reliance on *Eggleston* was misplaced, because *Eggleston* was factually distinguishable. *Eggleston* dealt with a situation where the initial personal representative had never filed suit, whereas in *King*, the initial representative had filed suit. Therefore, the Supreme Court had never specifically addressed whether "a personal representative who failed to diligently pursue a . . . [malpractice claim] . . . within the allotted time may, nonetheless, save the action from dismissal by substituting another personal representative."

Further, according to MCL 700.3613 a successor personal representative "must be substituted in all actions and proceedings in which the former personal representative was a party." Pursuant to this statute, the Supreme Court determined that the successor personal representative must be substituted in the already commenced action, the saving provision would then be measured from the issuance of the initial letters of authority, and that the plaintiff's claim was not timely filed. Based on this reasoning, the court reversed the trial court's decision and granted the defendants' dispositive motion.

***Gainforth v Bay Health Care, et al*, (No. 260054, rel'd 8/11/05) (unpublished).**

Due to complications from alleged misdiagnosed breast cancer, the decedent died on Sept. 11, 1999. Letters of authority were issued on June 6, 2000. The letters expired a year later and new letters were issued on June 18, 2001. The notice of intent was sent on May 17, 2002. The plaintiff filed the complaint on behalf of the estate on Oct. 25, 2002.

Based on *Waltz v Wyse*, 469 Mich 642 (2004), the defendants moved for summary disposition asserting that the statute of limitations barred the plaintiff's claims. The trial court denied the defendants' motion, and they appealed.

The Michigan Court of Appeals first addressed the trial court's determination that *Waltz* could only be applied prospectively and, therefore, it did not apply to the plaintiff's claims. The court noted that in *Waltz*, the Michigan Supreme Court admitted that any confusion regarding the interpretation of the statutes affecting the filing of medical malpractice claims was caused by its use of imprecise language and mistaken time calculations in *Omelenchuk*. Further, the court stated that although the Supreme Court admitted its fault in causing the confusion, *Waltz* had been applied retroactively in several prior cases. Accordingly, the appellate court held it was bound by these prior decisions and concluded it was compelled to apply *Waltz* in this case.

Next, the appellate court addressed the trial court's reliance on *Eggleston v Bio-Med Applications of Detroit, Inc.*, 468 Mich 29 (2003), in holding that the savings period did not expire until June 18, 2003, two years after the issuance of the second letters of authority. The court held that this case was distinguishable from *Eggleston*. In *Eggleston*, granting the plaintiff two years from his appointment as successor personal representative allowed him two full years to file his complaint. In this case, allowing the savings period to run from the issuance of the second letters of authority granted the plaintiff an additional year beyond the statutory savings period in which to file the complaint. Thus, the complaint was not timely filed within either the statute of limitations or within the two-year period provided by the savings provision.

Lastly, the appeallate court determined whether the plaintiff's claim was timely under MCL 600.5852. The claim was filed three days after the expiration of the three-year ceiling provided in MCL 600.5852. The court held the three-year ceiling is also not tolled by the notice of intent. Therefore, based on the above analysis, the court reversed the trial court's denial of the defendants' motion for summary disposition holding that the plaintiff's claims were time barred.

Ex Parte Interviews:

The effects of the Health Insurance Portability and Accountability Act (HIPAA) on ex parte meetings with a plaintiff's subsequent treating physician(s) was another hot topic for 2005 and will likely remain an area of active change for 2006 because there currently is no definitive ruling on the appropriate circumstances for an ex parte meeting. The two decisions summarized below are not binding precedent.

Belote v Strange (No. 262591, rel'd 10/25/05)(unpublished) is an unpublished opinion from the Michigan Court of Appeals. This case did not offer significant discussion of how HIPAA compliant ex parte meetings should occur.

Fortunately, the order issued by the Honorable Nancy G. Edmonds in *Croskey v BMW of North America*, (No. 02-73747, rel'd 11/14/05), 2005 WL 1959452 (ED Mich), provides more insight in analyzing whether and under what circumstances ex parte meetings are allowed under HIPAA. However, Judge Edmonds' order is not considered binding precedent because *Croskey* is a federal court case.

Yet, a federal court sitting in diversity pursuant to the Federal Rules of Evidence applies the state rules of privilege. Thus, Judge Edmonds' reasoning was based on Michigan case law and should be considered persuasive by Michigan's judiciary. Below is a summary of each case.

***Belote v Strange* (No. 262591, rel'd 10/25/05) (unpublished).**

In an attempt to avoid summary disposition, the plaintiff argued an affidavit obtained by one of her treating physicians should not be considered by the court because it was obtained in violation of HIPAA. The trial court refused to disregard the affidavit and granted summary disposition based on the plaintiff's failure to establish that the car accident she suffered proximately caused her to sustain a threshold injury.

The Michigan Court of Appeals considered whether it was appropriate for the affidavit to be used as evidence by the trial court. To decide this issue, the court first discussed whether the ex parte meeting between defense counsel and the plaintiff's physicians violated HIPAA. The court held the ex parte meeting between defense counsel and the plaintiff's physicians violated HIPAA because any discussion of the plaintiff's medical history or condition clearly falls within HIPAA's definition of protected health information.

In obtaining the meeting, defense counsel did not comply with any of HIPAA's provisions, which allow for the transmission of protected health information. Defense counsel argued his failure to do so was allowed under the Michigan Supreme Court's decision in *Domako v Rowe*, 438 Mich 347; 475 NW2d 30 (1991). In *Domako*, the Supreme Court held ex parte interviews are permitted once a plaintiff has waived her privilege by filing a lawsuit. This court held *Domako* did not allow the ex parte meeting to take place because, under HIPAA, a patient may not informally waive HIPAA protection by filing a lawsuit. Under HIPAA, a physician may not disclose health information absent a court order, written permission from the patient or assurance that the patient has been informed of the request and given an opportunity to object.

After determining a HIPAA violation occurred, the court discussed the appropriate remedy for the violation. It stated that although there is no remedy specified under HIPAA for violations made in the discovery context, a trial court has the inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney. Consistent with this inherent authority, the court held that trial courts may treat discovery obtained in violation of HIPAA as a discovery violation under MCR 2.313(B). This holding allows a trial court to impose any sanction it feels is appropriate for a HIPAA violation, including a default judgement. In this case, the trial court decided not to sanction the defendant for his HIPAA violation.

***Croskey v BMW of North America*, (No. 02-73747, rel'd 11/14/05) (ED Mich).**

On Feb. 16, 2005, Magistrate Paul J. Komives of the U.S. District Court, Eastern District of Michigan, Southern Division, in the case of *Croskey v BMW of North America*, (No. 02-73747, rel'd 02/16/05), 2005 WL 1959452 (ED Mich), issued an opinion which significantly cut back on defense counsel's right to conduct ex parte meetings with a plaintiff's subsequent treating physician(s). After Magistrate Komives issued his opinion, the defendants filed objections to his opinion with the assigned District Court Judge, the Honorable Nancy G. Edmonds.

Upon review of the parties briefs and Amicus Curiae briefs from ProNational Insurance Company, Michigan Trial Lawyers Association, and Michigan Health Association, Judge Edmonds issued an order, which provides defense counsel much easier access to a plaintiff's subsequent treating physicians by overruling Magistrate Komives requirement that plaintiff's counsel be notified and consent to ex parte meetings be given before they take place. The following is a brief summary of the relevant portions of Magistrate Komives' opinion and how Judge Edmonds' order changes his findings.

In his opinion, Magistrate Komives held the defendants could submit a protective order under 45 CFR 164.512(e)(1) to satisfy HIPAA's requirements and obtain a meeting with the plaintiff's subsequent treating physician(s). In addition to requesting a qualified protective order, Magistrate Komives also required the defendants to give notice to plaintiff's counsel of the desire to conduct an ex parte meeting with the plaintiff's treating physician(s) and to give notice to the treating physician(s) that such a meeting is not required.

In her order, Judge Edmonds affirmed two parts of Magistrate Komives' opinion. She held he was correct in requiring the defendants to request a qualified protective order, as long as it met the following criteria: (1) The qualified protective order must prohibit the defendant from disclosing the plaintiff's protected information beyond the purposes of the litigation; (2) It must also mandate that defendant return or destroy the protected information after the litigation has concluded.

She also held Magistrate Komives was correct in requiring notice to the treating physician that he or she need not answer the defendant's questions. In her order, Judge Edmonds requires that notice to the plaintiff's treating physician(s) clearly and explicitly states both the purpose of the interview and the fact the interview is not required.

Judge Edmonds found error in Magistrate Komives' holding that plaintiff's counsel be notified and consent be given to ex parte meetings before they occur. Judge Edmonds held notice to plaintiff's counsel would be superfluous and is not required under HIPAA's guidelines.

Affidavits of Merit:

Although *Apsey v Memorial Hospital, et al.* (No. 251110, rel'd 04/19/05)(unpublished) made a big splash when it was initially issued in April 2005, the Michigan Court of Appeals' subsequent review in June, which made the Apsey holding prospective, most likely means this case will have little effect in years to come. However, the additional requirement that all out-of-state affidavits must be specially certified is an essential one, because failure to do so mandates dismissal of the plaintiff's claim. Below is a summary of *Apsey v. Memorial Hospital, et al.*, 266 Mich App 666 (2005), in its final form.

***Apsey v Memorial Hospital, et al*, 266 Mich App 666 (2005).**

After the plaintiff underwent an exploratory laparotomy, which resulted in various complications, she filed a complaint alleging the defendants were professionally negligent in misdiagnosing her and failing to report her complications, causing her to become septic and, subsequently, to have several follow-up surgeries. The affidavit of merit that accompanied the plaintiffs' complaint possessed a normal notarial seal and was prepared in Pennsylvania, using a notary public of that state. At the time of filing, the plaintiffs failed to provide special certification to authenticate the credentials of the out-of-state notary, but on June 25, 2003, provided the special certification after the statute of limitations had run on their cause of action.

The 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, prior to the statute of limitations running in order for it to be deemed proper under MCL 600.2912d and 600.2102. The trial court granted the defendants' motion reasoning that the failure to provide the special certification was fatal to the notarization and the affidavit itself was a nullity rendering

the plaintiff's complaint invalid. Accordingly, the trial court dismissed the plaintiff's complaint with prejudice.

The Michigan Court of Appeals affirmed the trial court's ruling and held that without the special certification, the plaintiff's affidavit of merit was defective and the belatedly filed certification did not toll the statute of limitations, nor did it cure the defect.

In coming to these conclusions, the appellate court had to decide what constituted a valid out-of-state notarization. The plaintiffs argued that the Uniform Recognition of Acknowledgement Act (URAA) was controlling. MCL 565.261 et seq. Under the MCL 565.262, a special certification is not required for an out-of-state notarization to be valid. Thus, if the URAA governed, the plaintiff would not need the special certification and her out-of-state affidavit would be valid.

The defendants argued MCL 600.2102, which requires the special certification, was the controlling statute. The court agreed with the defendants for the following reasons. First, MCL 600.2102 appears within the Revised Judicature Act, MCL 600.101 et seq., and it retains its predecessor's language concerning affidavits "received in judicial proceedings." The Michigan Supreme Court, in *In re Alston's Estate*, 229 Mich 478 (1924), strictly construed the revised statute, requiring special certification accompany notarizations by out-of-state notaries. Second, the URAA provides that it does not diminish or invalidate Michigan law. As such, since the URAA, which is a more general statute, was enacted after MCL 600.2102, the more specific statute, MCL 600.2102 takes precedent.

However, because of the injustice and inequity that would result in enforcing this ruling, the appellate court decided to reverse the trial court's order granting the defendant's motion for summary disposition and allowed the plaintiffs to proceed with their claim. With regard to all currently pending medical malpractice cases, the court required plaintiffs to come into compliance by filing the proper certification. Further, the court held justice and equity dictated a strict application from the date of the opinion.

Notices of Intent:

In 2005, the Michigan Supreme Court issued two cases affecting when a plaintiff may file a notice of intent. *Burton v Reed City Hospital Corp.*, 471 Mich 745 (2005), serves as a warning to plaintiff attorneys to wait for the entire notice of intent waiting period to expire before filing their claim because filing before the end of the waiting period will result in dismissal.

The case of *Mayberry v General Orthopedics*, P.C., et al, 474 Mich 1 (2005), allows the plaintiffs, under certain circumstances, to use the notice of intent to extend the period in which to file their claims. Under *Mayberry*, if a notice of intent is filed more than 182 days before the statute of limitations expires, as occurred in *Mayberry*, the tolling period will not commence. However, if a second notice of intent is filed when there is less than 182 days before the statute of limitations expires, a tolling period will begin with the second notice.

***Burton v Reed City Hospital Corp.*, 471 Mich 745 (2005).**

On Feb. 10, 2000, the plaintiff filed a medical malpractice complaint alleging that his common bile duct and pancreatic duct were negligently transected during surgery and that corrective surgery had to be performed as a result. The malpractice was alleged to have occurred on Jan. 26, 1998. Absent a tolling provision, the plaintiff's claim expired on Jan. 26, 2000 from the two-year statute of limitations period.

The plaintiff's attorney sent the defendants a notice of intent on Oct. 18, 1999, which left the statute of limitations period unaffected. On Feb. 10, 2000, only 115 days after the filing of the notice of intent, the plaintiff filed a complaint and affidavit of merit. After receiving two extensions from plaintiff's counsel, the defendants filed an answer to the complaint less than three months later and included affirmative defenses as to the statute of limitations and failure to comply with the provisions of MCL 600.2912b and MCL 600.2912d.

On Aug. 24, 2000, the defendants filed a motion for summary disposition on the basis of MCL 600.2912b because the plaintiff's complaint was filed 115 days after the date the notice of intent was sent. The defendants further argued the prematurely filed complaint did not toll the limitations period, which expired on July 26, 2000. The plaintiff acknowledged that the complaint was filed before

the expiration of the notice period, but argued that the filing of the complaint tolled the limitations period, such that the proper remedy was dismissal without prejudice.

The trial court initially denied the defendants' motion, concluding the defendants' failure to bring their motion for summary disposition before the expiration of the limitations period resulted in waiver. However, upon motion for reconsideration, the trial court reversed its prior ruling and concluded that the affirmative defenses were sufficiently pled so as to place the plaintiff on notice of a problem before the expiration of the limitations period.

The Michigan Court of Appeals reversed the trial court's ruling. The court determined that because the affidavit of merit was filed with the complaint, it tolled the statue of limitations. Further, the court concluded that tolling is permissible when a complaint is prematurely filed because it does not result in unfair prejudice to the defendant.

The Michigan Supreme Court reversed the judgement of the appellate court and reinstated the trial court's grant of summary disposition to the defendants. The Supreme Court held that the fact the defendants did not bring their motion for summary disposition until the limitations period had run did not constitute a waiver of the defense. The court further held, under MCL 600.2912b, that a plaintiff must wait until the statutory notice period expires before filing the complaint.

***Mayberry v General Orthopedics, P.C.*, et al, 474 Mich 1 (2005).**

The defendant physician performed the plaintiff's wrist surgery on Nov. 22, 1999. The plaintiffs (husband and wife) alleged that the defendant negligently cut a nerve in the husband's wrist, causing him to lose some of its use. Subsequently, the plaintiffs mailed a notice of intent to the defendant on June 21, 2000. On Oct. 12, 2001, one month before the statute of limitations expired, the plaintiffs mailed another notice of intent, which named the physician and his professional corporation, and it also set forth additional allegations. On March 19, 2002, 158 days after the second notice of intent was mailed, the plaintiffs filed a complaint against the defendants.

The defendants moved for summary disposition, arguing that the complaint was filed after the statute of limitations expired. The plaintiffs argued the second notice of intent served to toll the statute of limitations period and, therefore, the complaint was timely.

Relying on the holding in *Ashby v Byrnes*, 251 Mich App 537 (2002), the Michigan Court of Appeals held that only the plaintiffs' first notice of intent was eligible for tolling and, therefore, granted the defendants' motion. In *Ashby,* the court found that "only the initial notice results in the tolling of the limitation period irrespective of how many additional notices are subsequently filed." The Ashby court reasoned that MCL 600.2912b(6), which prohibits tacking or addition of successive 182-day periods after the initial notice of intent is given, "nowhere suggests that this limiting language applies only when the first notice filing tolled the period of limitation." Thus, in the present case, the court reasoned that the plaintiffs' second notice of intent did not initiate tolling under MCL 600.5856(d) because MCL 600.2912b prohibited "obtaining the benefit of another 182-day tolling period based on the filing of multiple notices of intent."

The Michigan Supreme Court disagreed with the appellate court's analysis and overruled *Ashby*. The Supreme Court held that tacking "generally refers to adding time periods together to affect the running of a limitations period." Furthermore, because tacking is a legal term of art, the reference to tacking in MCL 600.2912b(6) must be "interpreted in a manner that is consistent with its acquired meaning." The court found that tacking, as referred to in MCL 600.2912b(6), applied only to limitation periods that had been initiated under MCL 600.5856(d), and accordingly, only multiple tolling periods were precluded.

Therefore, the court held that because the plaintiffs' first notice of intent did not serve to toll the statute of limitations, there were no successive 182-day periods as prohibited by MCL 600.2912b(6). Instead, only a single 182-day tolling period was initiated as a result of the second notice of intent and, therefore, the plaintiffs' complaint was timely filed.

Ordinary Negligence v Medical Malpractice:

The distinction between medical malpractice and ordinary negligence continued to be sharpened in 2005 with one

published Michigan Court of Appeals case.

***Tipton v William Beaumont Hospital, et al*, 266 Mich App 27 (2005).**

The plaintiff in this case became pregnant and contacted the defendant hospital's physician referral and information service. She received a list of several doctors along with a brief curriculum vitae for each physician. The plaintiff selected the defendant doctor to provide prenatal care during her pregnancy and delivered a full-term baby boy who died two months after delivery.

Thereafter, the plaintiff brought suit against the defendants under the Michigan Consumer Protection Act (MCPA). She alleged that the hospital and the doctor failed to inform her that the doctor had been involved in five prior birth trauma medical malpractice lawsuits. The complaint also alleged that her decision to treat with him was based upon inadequate information.

The defendants moved for summary disposition on the basis that the practice of medicine is not subject to the MCPA, that failure to disclose prior lawsuits does not violate the MCPA, and prior lawsuits that did not result in settlement or verdict are not material to the transaction under the MCPA.

The court held that although the plaintiff's claims were properly pled under the MCPA, summary disposition was proper on the basis that information about the prior lawsuits was not material to the transaction and that plaintiff could have discovered the information on her own under MCL 445.903(s) and MCL 445.903(cc).

The Michigan Court of Appeals affirmed the trial court's ruling on alternate grounds. The appellate court ruled that if a plaintiff's claim encompasses a professional relationship, which raises questions involving medical judgment, the gravamen of the case is medical malpractice, and it cannot be brought under the MCPA. A medical malpractice action is proper under the MCPA only if it relates to the entrepreneurial, commercial or business aspect of the practice of medicine, such as allegations of unfair or deceptive methods, acts or practices on behalf of the physician or hospital.

In its review, the appellate court noted the plaintiff's complaint focused upon the defendants' failure to inform her of the doctor's prior involvement in birth trauma medical malpractice lawsuits. It was principally an attack on the defendant doctor's ability to provide medical care and raises questions involving medical judgment, which must be addressed in a medical malpractice claim. Accordingly, the appellate court held the plaintiff did not state a claim under the MCPA.

Expert Testimony:

The 2005 decisions regarding expert testimony covered a wide range of topics. The Supreme Court addressed the issue of expert testimony in *Woodward, et al. v Custer, et al.*, 473 Mich 1 (2005), holding that the doctrine of "res ipsa loquitur" does not preclude the need for expert testimony in a medical malpractice case.

The Michigan Court of Appeals addressed the issue three times in published decisions. In *Klein v Kik*, 264 Mich App (2005), the court discussed the issue of "lost opportunity" to survive, and held the difference of the best and worst chance of survival must be greater than 50 percent. In *Estate of Saralyn Clerk, Deceased v Chippewa County War Memorial Hospital, et al.*, (No. 254940, rel'd 08/04/05), the court discussed the importance of Davis-Frye hearings when dealing with novel scientific principles. In *Sturgis Bank & Trust Co. v Hillsdale Community Health Center*, (No. 261767, rel'd 10/27/05), the court held that affidavits of merit by nurses and nurse practitioners were sufficient to commence a lawsuit.

***Woodard, et al v Custer, et al*, 473 Mich 1 (2005).**

In this case, the plaintiffs' two-week-old son was admitted to the Pediatric Intensive Care Unit of the University of Michigan Hospital for respiratory problems under the care of the defendant doctor. While treating the infant, the defendant inserted arterial lines and venous catheters in the infant's legs. After the infant was moved to the general pediatric ward, it was discovered that both of the infant's legs were fractured. Subsequently, the infant's parents filed suit against the hospital and the doctor.

The trial court granted the defendants' motion to strike the plaintiffs' expert witness because the expert was not

qualified to testify under MCL 600.2169. The plaintiffs' affidavit of merit was signed by a pediatrician who did not have any special certifications, whereas the defendant was a board certified pediatrician with subspecialty certification in pediatric critical care medicine and neonatal-perinatal medicine.

The Michigan Court of Appeals upheld the trial court's decision that the plaintiffs' expert was unqualified to testify, but reversed dismissal of the suit ruling that expert testimony was not required in this case because of the doctrine of "res ipsa loquitur." The appellate court reasoned that an inference of negligence could be drawn because the infant entered the Pediatric Intensive Care Unit with healthy legs but was released with fractured legs.

The Michigan Supreme Court held, with regard to the "res ipsa loquitur" issue, that such an inference of negligence could not be made absent expert testimony. The court agreed with the trial court that whether or not such leg fractures are a possible complication of the procedures performed on the infant is "exclusively within the expertise of the medical profession." Therefore, the doctrine of "res ipsa loquitur" did not apply.

The Supreme Court has not issued an opinion regarding whether the plaintiffs' expert was qualified to testify and entry of final judgment is postponed until the Supreme Court makes its decision.

***Estate of Saralyn Clerc, Dec v Chippewa County War Memorial Hospital, et al*, 267 Mich App 597 (2005).**

In July 1997, the decedent sought medical treatment for pneumonia-like symptoms. The radiologist who reviewed the decedent's chest x-rays found no abnormalities. In February 1998, the decedent was diagnosed with lung cancer and succumbed to the disease in March 1999. The plaintiff filed a medical malpractice wrongful death action against the radiologist and the affiliate hospital, alleging that the negligent misreading of the x-rays delayed the decedent's treatment and caused her death.

The defendants filed separate motions to strike the plaintiff's experts' testimony. The plaintiff's experts were board certified medical oncologists that testified the decedent's cancer was probably at Stage I or Stage II in July 1997. Additionally, one of the experts concluded with a reasonable degree of medical certainty that the decedent, if properly diagnosed at the time of the 1997 x-ray, would have had a sixty percent chance to live another five years. However, because their opinions were based on "general experience" and not specific medical research, neither could state with a reasonable degree of certainty what stage the cancer was when the 1997 x-rays were taken.

The defendant hospital moved for the court to conduct a Davis-Frye hearing and both defendants moved for summary disposition. Without conducting a Davis-Frye hearing, the trial court granted the defendants' motions for summary disposition, holding that the plaintiff could not prove that the decedent would have had a greater than fifty percent chance of survival even if properly diagnosed in 1997.

The Michigan Court of Appeals reversed the trial court holding that the lower court's inquiry into the expert testimony concerning "backwards cancer staging" was inadequate for the purposes of MRE 702 and *People v Beckley*, 434 Mich 691 (1990). The court remanded the case back to the trial court and ordered it to determine if "backwards cancer staging" is a novel scientific principle, and if it is, to conduct a Davis-Frye evidentiary hearing.

If the trial court determines that it is not a novel scientific principle, then the trial court must, nonetheless, conduct a more searching inquiry under MRE 702 to determine if the expert testimony satisfies the conditions for admissibility set forth in *Beckley*, by giving the plaintiff the opportunity to offer testimony from impartial experts that "backwards cancer staging" is accepted in the medical community.

***Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, (No. 261767, rel'd 10/27/05).**

The plaintiff alleged in its complaint that the defendant's nursing staff was negligent in failing to prevent the patient from falling out of bed by not using bed rails and by not providing proper monitoring to guard against such an accident.

In compliance with MCL 600.2912d(1), the plaintiff's complaint was accompanied by affidavits of merit from a registered nurse and a nurse practitioner. The defendant

filed a motion for summary disposition, arguing that the affidavits were defective because although the plaintiff's experts were employed in the same health profession as those being accused of malpractice, they were not qualified under MCL 600.2169(2) to testify regarding the proximate cause of injury required by MCL 600.2912d(1)(d).

The trial court denied the motion, finding that the plaintiff's experts did comply with MCL 600.2169(2) requirements. The court also accepted an affidavit of merit from a medical doctor after the statute of limitations had elapsed, treating the late submission as a retroactive amendment to the affidavits previously filed. The defendant filed a motion for partial summary disposition with respect to the ordinary negligence claim along with a motion for reconsideration of the trial court's ruling on the original motion for summary disposition.

The trial court ruled that the plaintiff's case was based on claims of medical malpractice and not ordinary negligence. Further the trial court reversed its original ruling regarding the validity of the affidavits from the nurse, the nurse practitioner and the medical doctor, having found that it had committed palpable error.

The Michigan Court of Appeals reversed the trial court's ruling in part and held that the affidavits executed by the plaintiff's nurse and nurse practitioner experts were sufficient for purpose of MCL 600.2912d(1) and the relevant subsection of MCL 600.2169 even if the nurse and nurse practitioner did not have the experience or qualifications necessary to establish proximate cause.

The appellate court concluded that MCL 600.2912d(1) incorporates MCL 600.2169 solely with respect to "requirements for an expert witness" as expressly stated in MCL 600.2912d(1), or in other words, expert qualifications. The court reasoned that although MCL 600.2169(1) sets forth requirements of qualifications for an expert witness, MCL 600.2169 (2) does not establish requirements or qualifications, but rather a method by which the court evaluates whether an expert is qualified, and it directs the court to take into consideration the four factors given.

The appellate court further reasoned that although MCL 600.2169(1) specifically references expert testimony relative to the standard of practice or care only, it is evident that the Michigan Legislature simply wished that an affidavit of merit be executed by an expert who would be considered a peer of the party alleged to have committed malpractice, and by having the affiant be of the same specialty, board certification or health profession as the accused.

MCL 600.2912d does not contain language suggesting trial courts must conduct proceedings to determine if an expert practicing or teaching in the same health profession as the accused is qualified to speak on issues of causation or on issues concerning standard of care and breach of said standard in order to author a supporting affidavit of merit. A plaintiff is only required to submit an affidavit of merit from experts practicing or teaching in the same health profession as those accused in the wrongdoing and that the affidavit contain the necessary elements listed in MCL 600.2912d(1)(a) - (d).

The ruling of the appellate court is limited only to the first stages of a medical malpractice suit and the filing of a medical malpractice claim. It does not extend to whether the authors of the supporting affidavits are qualified to provide expert testimony at trial regarding standard of care and causation. MCL 600.2169 does not speak to whether an initially retained expert may actually testify at trial.

Informed Consent:

In this recently published decision, the Michigan Court of Appeals held that, as a matter of law, defendants did not have a duty to disclose a surgeon's statistical history of transplant failures in order to obtain the decedent's informed consent. We are honored to acknowledge that one of Plunkett & Cooney's own appellate attorneys, Robert G. Kamenec, successfully argued this issue before the appellate court.

Wlosinski v Steven Cohn, M.D., et al **(No. 253286, rel'd 12/20/05).**

In this recently published decision, the Michigan Court of Appeals held that, as a matter of law, defendants did not have a duty to disclose a surgeon's statistical history of transplant failures in order to obtain decedent's informed consent.

The decedent was diagnosed with kidney failure in May

1998. He underwent a kidney transplant in July 1999. After the surgery, he suffered post-operative complications, and the transplanted kidney ultimately failed. After removal of the failed kidney, the decedent resumed kidney dialysis and his health continued to decline over the next year. Eventually, the decedent elected to withdraw from dialysis and died in a hospice program in September 2000.

The plaintiff filed a medical malpractice wrongful death action against the doctor who performed the transplant and the hospital, alleging that they committed several errors related to a blood clot that appeared after the operation. In an amended complaint, the plaintiff added a count for the defendants' failure to garner the plaintiff's and the decedent's informed consent based upon an alleged discrepancy between the hospital's reported success rate for kidney transplants and its actual success rate.

The defendants moved for summary disposition on the basis that the plaintiff had failed to substantiate any of her claims. Specifically, her claim of lack of informed consent did not have factual support because the plaintiff testified at her deposition that she had been informed of the risks associated with the transplant procedure. The trial court denied the motion on the basis that the defendants had failed to counter the statements of the plaintiff's expert regarding withheld statistical information related to the standard of care. The case proceeded to trial.

At trial, despite the court's proper ruling that privilege precluded the plaintiff from obtaining and presenting details of the defendant doctor's failed transplant surgeries as evidence, the plaintiff's experts continued to make comments about the doctor's failure rate and plaintiff's counsel called attention to those failed surgeries during his closing arguments. The jury awarded the plaintiff $1.4 million in damages and after minor adjustments, the court entered a judgment for $1.5 million.

On appeal, the defendants argued that a physician has no duty to disclose to a patient the physician's success rates for a particular medical procedure and, in the present case, the defendant doctor's failure to advise the decedent of his success rates could not, as a matter of law, taint the patient's consent.

The court agreed with the defendants' argument, relying on the holding in *Lincoln v Gupta*, 142 Mich App 615, 625; 370 NW2d 312 (1985), wherein the Lincoln court held that "the doctrine of informed consent requires a physician to warn a patient of the risks and consequences of a medical procedure." In the present case, the court reasoned that by itself, the defendant doctor's success rate was not a risk associated with the medical procedure and further, none of the affidavits of merit provided by the plaintiff's experts indicated that disclosure of the defendant doctor's particular success rate was necessary to obtain informed consent according to the standard of care.

The court also found that there was no misrepresentation on the part of the defendant doctor regarding his transplant history and that the case lacked any hint of relationship between the defendant doctor's previous failed transplants and the failure of the decedent's new kidney.

Additionally, the court rejected the plaintiff's use of statistical evidence as a link between a doctor's negligence and the treatment's failure. The court reasoned that bare numerical success rates are not, in themselves, evidence that a doctor did anything wrong and determined the trial court erred when it allowed the limited inclusion of these statistics, which encouraged the jury to conclude that the defendant doctor had a proclivity to fail.

In conclusion, the court held that, as a matter of law, a physician's raw success rates do not constitute risk information reasonably related to a patient's medical procedure. Therefore, a physician does not have a duty to disclose statistical history of medical successes or failures in order to obtain a patient's informed consent. The court vacated the trial court's judgment in this matter and remanded the case for a new trial.

Are You in The Know?

Plunkett & Cooney's Medical Liability Practice Group publishes periodic e-mail "Rapid Reports" to keep our clients and friends current on important court rulings, new legislation and other time sensitive legal information.

If you and/or a colleague want to receive our "Rapid Reports," e-mail us at: subscribe@plunkettcooney.com. Be sure to indicate your name, company and telephone number for verification of your request. Previous "Rapid Reports" are available at www.plunkettcooney.com.

Peer Review Privilege:

The peer review privilege, which in a variety of instances protects incident reports from disclosure in lawsuits, is an essential and important privilege to doctors and hospitals.

In the case of *Feyz v Mercy Memorial Hospital*, 264 Mich App 699 (2005), the Michigan Court of Appeals indicated this privilege may not be absolute in cases which allege a breach of contract and that the hospital, as a corporation, violated its own by-laws under Michigan law.

Feyz v Mercy Memorial Hospital, 264 Mich App 699 (2005).

The plaintiff physician filed suit against the defendant hospital and several hospital administrative employees, alleging a statutory violation of his civil rights, invasion of privacy, breach of fiduciary and public duties and breach of contract. The defendant employees brought a motion for summary judgement on the basis that they were entitled to dismissal through the doctrine of judicial non-reviewability of staffing decisions of private hospitals and the peer review privilege. The trial court agreed and dismissed all claims against defendant employees.

The Michigan Court of Appeals reversed the ruling, in part, because the trial court erred in granting summary disposition on the civil rights counts. The court held that the peer review statute, MCL 331.531, only grants immunity for an act or communication within the peer review committee's scope as a review entity. However, MCL 331.531 does not grant immunity for actions which violate the Civil Rights Act, as such actions are not within the scope of peer review. Also, the doctrine of non-reviewability of staffing decisions by private hospitals is not so broad as to prevent the physician's action.

In conclusion, the court held that "private hospitals are subject to the same breach of contract claims as any other private corporation." Accordingly, if this issue is raised again, the trial court must determine if the breach of contract claim may be based upon a corporation's violation of its own by-laws under Michigan law. If the answer is yes and the plaintiff has adequately pled her claim, then the claim is viable despite the non-reviewability doctrine.

EMTALA Claims:

The case of *Smith v Botsford General Hospital*, 419 F3d 513 (6th Cir. 2005), represents a big victory for defendants in finding that for claims brought under the Emergency Medical Treatment and Active Labor Act (EMTALA), the medical malpractice noneconomic caps apply. Notably, Robert G. Kamenec of Plunkett & Cooney's appellate practice group briefed and argued the appellate case on behalf of the defense.

Smith v Botsford General Hospital, 419 F 3d 513 (6th Cir. 2005).

In *Smith*, the personal representative for the estate of the decedent, Kelly Smith, brought an action against the defendant hospital, alleging that it violated EMTALA when it failed to stabilized the decedent's condition before transporting him to another hospital.

The decedent was a 600 pound man who had fractured his left leg during a rollover car accident. He was transported to the defendant hospital where examining doctors diagnosed him with an open left femur fracture. The defendant did not have the facility to clear a patient of the decedent's size for surgery, nor did it have a CT scanner or an operating table to appropriately manage his care. For these reasons, the defendant decided to transport the patient to another hospital. While in route, the decedent's condition deteriorated, and he died from extensive blood loss.

The plaintiff then filed a claim in the U.S. District Court alleging that the defendant failed to meet the stabilizing requirements under EMTALA, which requires a facility to screen and stabilize emergency patients prior to transfer to another medical facility. EMTALA defines "stabilize" as:

> . . . with respect to an emergency medical condition . . . to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility.

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In support of her claim, the plaintiff argued that the defendant needed to take additional measures to stabilize his progressive blood loss before they transferred him.

Following a trial, the jury found in favor of the plaintiff and awarded $35,000 for economic damages and $5 million for non-economic damages. The defendant appealed.

On review, the U.S. Court of Appeals for the Sixth Circuit analyzed whether Michigan's statutory cap on non-economic damages, set forth in MCL 600.1483, applied to a federal claim for an EMTALA violation. The court looked to the plain language of the EMTALA civil enforcement provision, which states:

> [A]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of [the Act] may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the [s]tate in which the hospital is located . . . [Emphasis present].

Given EMTALA's incorporation of state law, the court next had to determine whether this incorporation necessarily led to the application of the Michigan malpractice damages cap. The court acknowledged that this was an issue of first impression in the U.S. Court of Appeals for the Sixth Circuit, and, in turn, it looked to the U.S. Court of Appeals for the Fourth Circuit's decision in *Power v Arlington Hosp. Assoc.*, 42 F.3d 851 (4th Cir. 1994), for guidance.

In *Power*, the Fourth Circuit determined that state caps apply when the plaintiff's EMTALA claim would be deemed malpractice under state law.

On this basis, the Smith court looked to the Michigan Supreme Court's decision in *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411 (2004) and the two-prong test for determining whether a claim sounds in medical malpractice.

In *Bryant*, the court held that a claim sounds in medical malpractice if it arises out of the scope of a professional relationship and raises questions of "medical judgment." The court then concluded that an EMTALA failure-to-stabilize claim would necessarily entail the exercise of medical judgment and could only be understood through the presentation of expert testimony.

As a result, Michigan's medical malpractice damages cap applies to a failure-to-stabilize claim under EMTALA and the jury's award of $5 million in non-economic damages was reduced to $359,000, the state cap in 2003.