

# MEDICAL MALPRACTICE UPDATE

May 2005

## **APSEY V. MEMORIAL HOSPITAL: ANOTHER HURDLE FOR MEDICAL MALPRACTICE CLAIMS**

By Cindy C. Boer, Attorney

On April 19, 2005, the Court of Appeals published an opinion that surprised many malpractice attorneys who have obtained Affidavits of Merit from out-of-state experts. In Apsey v. Memorial Hospital, Docket No. 251110, the Court of Appeals dismissed a medical malpractice action because the plaintiff failed to file a certificate of the out-of-state notary's authority with an otherwise proper Affidavit of Merit, as required by a Michigan statute.

The Court of Appeals previously held, in Holmes v Michigan Capital Med. Ctr., 242 Mich App 703, 711 (2000), that an Affidavit of Merit must meet all the requirements of an "affidavit," including a valid notarization. In the Apsey decision, the Court of Appeals went one step further and held that an "affidavit" that is notarized by a foreign notary must be accompanied by a special certificate that verifies the notary's signature and authority to notarize documents in that county.

In Apsey, the plaintiffs' Affidavit of Merit was prepared and signed by a Pennsylvania expert and notarized by a Pennsylvania notary. However, the plaintiffs failed to attach the necessary certificate to authenticate the notary's signature. The defendants brought a motion to dismiss the lawsuit, claiming the Affidavit was invalid and therefore the lawsuit was never properly commenced. The trial court granted the motion, and plaintiffs appealed.

In upholding the trial court's dismissal of the lawsuit, the Court of Appeals turned to MCL 600.2102, a statute effective in 1963, which states that "where by law the affidavit of any person

residing in another state...is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated..." The statute goes on to require that "[t]he signature of such notary public... be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court."

The Court of Appeals rejected plaintiffs' argument that Michigan's adoption of the Uniform Recognition of Acknowledgments Act eliminated the certification requirement. The Apsey plaintiffs also argued that, because MCL 600.2102 is located among statutes which govern the admission of evidence, it only applies when an affidavit is actually "read into evidence" in court. The Court of Appeals disagreed, interpreting "read" to mean that a certificate is required any time the affidavit is acknowledged and considered by the court, i.e., as when an affidavit becomes part of the official court file.

Noting that the Apsey plaintiffs' Affidavit of Merit did not contain the necessary certificate, the Court of Appeals ruled that the trial court correctly dismissed the lawsuit. The statute of limitations had run, and it was too late for plaintiffs to cure the defect.

What does this mean for medical malpractice claimants? With respect to ongoing lawsuits, if the plaintiff filed an Affidavit of Merit by an out-of-state expert, and did not include the special certificate of the notary's authority, the lawsuit was never properly commenced and must be dismissed.

If the statute of limitations has run, the dismissal is final, meaning the plaintiff cannot re-file the lawsuit. If the statute of limitations has not yet run, the plaintiff will get a second chance to commence the action by filing a corrected Affidavit of Merit.

With respect to future lawsuits, this means that plaintiffs (and defendants for that matter) must obtain a certificate of the notary's authority before filing an Affidavit of Merit by a non-Michigan expert. Although the procedure varies slightly from state to state, this means sending the signed and notarized affidavit to the county clerk, who compares the signature on the affidavit to the signature on file for the notary, and verifies that the notary was duly authorized to act as a notary when the affidavit was notarized. The county clerk will then return the original affidavit with the necessary certificate, which can be filed with the court.

The long-term ramifications of Apsey are unclear at this point, since the plaintiffs in that lawsuit are certain to appeal the Court of Appeals' decision. Whether the Supreme Court will uphold this ruling (or whether some interim action will be taken by the Court of Appeals or the Legislature) remains to be seen. In the meantime, however, there will be a flurry of activity at the trial court level as malpractice defense attorneys throughout the state sift through files to see if they have grounds for filing what is now known as the "Apsey" Motion.

*If you have questions regarding the Apsey decision, please call any of the members of the medical malpractice department.*

## CASE LAW UPDATE

*Edited by: Robert W. Tubbs, Attorney*

### **Affidavit of Merit**

*Mullaney v Kistler, D.O., et. al.*, Mich. Ct. App., March 15, 2005 (unpublished). On remand from the Michigan Supreme Court, the Court held that the requirements for a notice of intent, as contained in MCL 600.2912b(4), are substantially similar to the affidavit of merit requirements under MCL 600.2912d(1). Both require "particularized statements of 'details that are responsive to the information sought by the statute'. Therefore, plaintiff's affidavit of merit, which lacked a detailed statement of the actions the defendants should have taken to comply with the standard of care and a statement of the manner in which the breach proximately caused plaintiff's injuries, did not satisfy the statutory requirements. Because the affidavit was non-conforming, plaintiff's complaint did not toll the statute of limitations and the action is now time-barred.

### **Expert Qualifications**

*McQuire v Wasvary, M.D., et. al.*, Mich. Ct. App., January 25, 2005 (unpublished). Plaintiff filed suit against defendant, a board certified general surgeon specializing in colon and rectal surgery, alleging that he failed to properly diagnose and treat a bowel obstruction following a colonoscopy. Plaintiff's

affidavit of merit was signed by a board certified general surgeon who did not specialize in colon and rectal surgery. In affirming the trial court's order granting defendants' motion for summary disposition, the Court held that MCL 600.2169 mandates that 1) if the defendant physician is a specialist in a particular area and the litigation surrounds that area of specialty, then the expert witness must also practice in the same specialty and 2) if the defendant is board certified then the expert must share the same board certification. Plaintiff failed to show that his expert, although a board certified general surgeon, specialized in colon and rectal surgery. Furthermore, plaintiff failed to show that any effort was undertaken to determine if the qualifications of the expert matched those of the defendant physician.

### **Expert Testimony**

*Piontek v Armstrong, D.O., et. al.*, Mich. Ct. App., April 5, 2005 (unpublished). On remand from the Michigan Supreme Court for reconsideration in light of *Halloran v Bhan*, 470 Mich 572 (2004), the Court held that the matter be remanded to the trial court for resolution of remaining questions of fact. In this case, the trial court originally granted summary disposition to defendant on the basis that Defendant was board certified in cardiovascular thoracic surgery and

plaintiff's expert was board certified in general surgery. The Court noted, however, that there was no evidence on the record to support defendant's assertions that he was board certified in cardiothoracic surgery. If it is established that he is so board certified, then plaintiff's expert's qualifications do not match the defendants and, therefore, he is not qualified to give expert testimony. If both physicians are board certified in general surgery, then the expert witness meets the qualifications and summary disposition should be denied. If both are board certified in general surgery and defendant is also board certified in cardiothoracic surgery, then the trial court may deny the motion for summary disposition if plaintiff's counsel reasonably believed that the expert was qualified under MCL 600.2969 to give expert testimony against the defendant.

### **Other**

*Johnson v Henry Ford Hospital, et. al.*, Mich. Ct. App., March 22, 2005 (unpublished). Following a jury trial in this wrongful death action, the trial court entered a judgment based upon the jury's verdict in favor of plaintiff. Several issues on appeal are addressed in the court's opinion. First, the court held that there was sufficient factual support for the jury's verdict and that plaintiff's expert's theories were not simply based on speculation or conjecture. Second, plaintiff's expert, board certified in internal medicine and who divided his time equally between the practices of internal medicine and cardiology, was qualified pursuant to MCL 600.2169 to render an opinion on the standard of care where defendant was board certified in internal medicine. Third, plaintiff's economics expert's testimony as to 1) plaintiff's decedent's loss of earning capacity was sufficiently supported by testimony as to her career goals and 2) plaintiff's loss of income due to quitting work to take care of his son was relevant to quantify the loss of services suffered as a result of decedent's death. Fourth, the lower cap on noneconomic damages under MCL 600.1483 applied to this case because there was insufficient evidence as a matter of law to prove the requisite cognitive impairment. Finally, the court ruled that the trial court abused its discretion in awarding certain costs to the plaintiff which were not authorized by statute.

*Tonowski v Rihawi, M.D., et. al.*, Mich. Ct. App., March 10, 2005 (unpublished). In affirming the trial court's denial of defendants' motion for judgment notwithstanding the verdict the Court first held that plaintiff's experts, although not neurosurgeons, were

properly qualified to render opinions as to the applicable standards of care for an internist and neurologist. Second, the experts' testimony was sufficient to establish plaintiff's claim that as a result of a breach in the standard of care it became reasonably necessary that plaintiff's brother undergo further surgeries. In their opinion, had the brother's subdural hematoma been detected earlier he could have received appropriate treatment as determined by a neurosurgeon. The Court, however, also held that plaintiff's proofs in the form of a letter setting forth hourly rates for nursing care constituted hearsay and improperly admitted. As a result the case was remanded for a determination of damages. The Court further held that that in computing damages could recover damages for attendant care services even though the services may be provided by a family member at no actual charge.

### **Reporting of Child Abuse**

*Rathburn v Children's Hospital of Michigan, et. al.*, Mich. Ct. App., March 1, 2005 (unpublished). Plaintiff, individually and as next friend of her minor son, filed this claim for violation of reporting requirements under the Child Protection Law, MCL 722.621 and for malicious prosecution against plaintiff after defendants reported suspected child abuse to the Family Independence Agency. In affirming the trial court's granting of defendants' motion for summary disposition, the Court held that plaintiff's claims raised questions of medical judgment during the defendants' professional relationship with the minor child and, therefore, the complaint sounded in medical malpractice and was properly dismissed by the trial court. In addition, plaintiff's complaint also fails to state a cause of action upon which relief may be granted. Her complaint does not allege a legal relationship between herself and any defendant that gives rise to a reporting duty to her personally. Therefore, her individual claim fails. MCL 722.623 only provides for a private cause of action for an identified child for damages proximately caused by a failure to report abuse. There can be no claim for malicious civil prosecution against the plaintiff because the subject of the child protection proceeding is the child. Finally, the complaint did not allege that defendants knowingly provided false information. The complaint only makes conclusive averments and "conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action.

## Medical Malpractice

*Lindsey v St. John Health System, Inc., et. al.*, Mich Ct. App., March 22, 2005 (unpublished). Plaintiff brought claims for negligence, breach of warranty, and intentional infliction of emotional distress claiming that during the course of her hospitalization she was treated rudely by the nursing staff and that, after they commented to her that someone could inject a substance into her IV that would kill her, they injected a substance into her IV that made her sick and then deliberately ignored her repeated calls for help. The filing of plaintiff's complaint was not preceded by a notice of intent nor was it accompanied by an affidavit of merit. Plaintiff's negligence and breach of warranty claims were properly dismissed by the trial court because they involved questions of medical judgment not within the common knowledge and experience of a jury and plaintiff failed to comply with the necessary pre-requisites and the statute of limitations for a malpractice action had run. On the other hand, the claim of intentional infliction of emotional distress was not a malpractice claim. The issue for the jury was not whether the nurses' care was negligent, but whether they deliberately engaged in conduct intended to inflict emotional distress.

## Statute of Limitations

*Prins v Ewald, M.D., et. al.*, Mich. Ct. App, April 12, 2005 (unpublished). Following removal of a cancerous tumor in her neck, Plaintiff underwent radiation therapy between November 24, 1997 and January 20, 1998. Although she complained of "terrible terrible pain" from the radiation she was told that this was "something that could be expected." Following subsequent complaints of cognitive difficulties, she was eventually seen by a neurosurgeon who informed her that she may have radiation necrosis; dead brain tissue caused by the radiation therapy. The abnormal area of brain tissue was surgically removed on May 1, 2001. On May 9, 2001 she was informed that a pathology report confirmed the diagnosis of radiation necrosis. Plaintiff filed a notice of intent on November 16, 2001. Although the notice was filed more than two years after the act or omission that formed the basis of her claim, the issue before the Court was whether it was filed within six months after the plaintiff discovered or reasonably should have discovered that she had a claim. Based on plaintiff's deposition testimony that she was told on May 9, 2001 that the dead brain tissue was "definitely" radiation necrosis and that she understood this resulted from her

radiation therapy, the Court held that that statute of limitations had run prior to the filing of the notice of intent and, therefore, defendants were entitled to summary disposition.

*Burton v Reed City Hospital Corp., et. al.*, \_\_\_Mich\_\_\_ (2005). In this five to two decision, the Supreme Court held that a complaint alleging medical malpractice filed prior to the expiration of the 182-day notice period does not toll the statute of limitations. The Court noted that, "The filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit." Furthermore, the failure of defendants to bring their motion for summary disposition until after the period of limitations had run did not constitute a waiver of the statute of limitations defense.

*Pappas v Bortz Health Care Facilities, Inc., et. al.*, Mich. Ct. App., March 3, 2005 (unpublished). Plaintiff brought this claim alleging malpractice in the care of plaintiff's decedent from April 1, 1996 to March 27, 1997 while living at defendants' nursing home. Plaintiff's decedent died on July 13, 2001. Suit was initiated on June 2, 2003. The trial court held that the applicable statute of limitations expired on March 27, 1999 and, therefore, defendants were entitled to summary disposition. The Court of Appeals, however, held that the six month discovery rule may apply. The general test for applying the rule is whether "on the basis of objective facts, the plaintiff should have known of a possible cause of action." This occurs when the patient is aware of the injury and a possible causal link between the injury and an act of omission of the physician. This objective standard is also applied in light of the plaintiff's particular circumstances. In this case, there is a disputed factual question with regard to whether a reasonable person with plaintiff's decedent's condition would have become aware of her injury and its possible cause. If so, then summary disposition would be appropriate. If not, plaintiff's claim was timely filed under the savings provision of MCL 600.5852, which allows a personal representative two years after letters of authority are issued to file suit provided it is commenced within three years after the period of limitations has run.

*Ward v Rooney-Gandy, D.O.*, \_\_\_Mich App\_\_\_ (2005). Although plaintiff's law firm obtained an affidavit of merit to be filed with plaintiff's complaint,

the law firm inadvertently attached to the complaint an affidavit from an unrelated medical malpractice action. In reversing the trial court's order granting summary disposition, the panel's majority held that the doctrine of equitable tolling should apply to the facts of this case. Equitable tolling is applied where the plaintiff has filed a defective pleading within the statutory period or has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass. The doctrine has been developed to prevent unfairness to a diligent plaintiff. In this case the plaintiff timely procured the necessary affidavit of merit and although there was a delay in serving the affidavit on the defendant, the delay did not result in prejudice to defendant. The dissent would have affirmed the trial court for the reason that the incorrectly filed affidavit failed to conform to the law and, therefore, did not toll the statute of limitations. Because the limitations period had lapsed, the claim was time barred.

*McCarty v Midwest Health Center, P.C., et. al.*, Mich Ct. App., March 31, 2005 (unpublished). Plaintiff's decedent underwent a chest x-ray in April 1997 which showed a "suspicious area in the right lung." Although a follow up x-ray was recommended this was not communicated to the decedent. In March 1998 decedent returned for his annual examination and another chest x-ray was performed. This again showed a suspicious finding. Decedent was subsequently diagnosed with lung cancer in September 1998 and he died on July 17, 1999. Plaintiff commenced her lawsuit in October 2001. In affirming the trial court's granting of summary disposition in favor of defendants the Court held that the underlying claim was based upon defendants' failure to inform the decedent about the suspicious chest x-ray in April 1997. The claim accrued in April 1997. A continuing physician-patient relationship does not suffice to extend the period of limitations and absent a showing of an independent act of malpractice after April 1997, which plaintiff has not shown, plaintiff's claim is barred by the statute of limitations. Although the continued failure to advise the decedent of the need for a follow up chest x-ray constituted an ongoing wrong, the continuing wrong doctrine does not apply "to extend the accrual date of a medical malpractice action beyond the act or omission that forms the basis for the claim." The omission occurred in April 1997, not when the alleged follow up contacts should have occurred.

## **Causation**

*Heller v Allen, M.D., et. al.*, Mich. Ct. App., January 27, 2005 (unpublished). Plaintiff's experts testified that although tracheobronchitis was listed as the cause of death, it was not the likely cause of a sudden death. None of the experts could state with a reasonable degree of medical certainty what caused the death. It therefore became impossible for plaintiff to present substantial evidence to support a reasonable conclusion that but for defendant's alleged negligence, decedent would have survived.

## **Causation/Lost Opportunity to Survive**

*Kuper v Metropolitan Hospita, et. al.*, Mich. Ct. App., January 27, 2005 (unpublished). Plaintiff's decedent died from bacterial endocarditis. Plaintiff's experts testified that had the decedent been diagnosed earlier he had an eighty to ninety percent chance to survive and that as of the time of diagnosis he had a fifty-eight to eighty percent chance to survive. Since this difference was at most only thirty-two percentage points it did not reach the fifty percentage point threshold required under MCL 600.2912a(2); "the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%."

## **Governmental Immunity/Gross Negligence**

*Dama v Dietzel, D.O.*, Mich. Ct. App., April 7, 2005 (unpublished). Defendant orthopedic surgeon misidentified the patient's median nerve in her left wrist and excised the nerve, rather than the palmaris longus tendon, resulting in a permanent loss of function in the patient's left hand and arm. The trial court correctly granted defendant summary disposition, however, because defendant was entitled to governmental immunity provided he did not act in a grossly negligent manner. The trial court correctly concluded that reasonable minds could not differ on this point. The focus is on the actions of the defendant and not on the result of those actions. Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Plaintiff presented no evidence to support a finding that defendant simply didn't care about plaintiff's health and safety.

## **Michigan Consumer Protection Act**

*Tipton v William Beaumont Hospital, et. al.*, \_\_\_ Mich App \_\_\_ (2005). Plaintiff brought a claim under the Michigan Consumer Protection Act

(MCPA) alleging that defendant hospital violated the act by failing to inform her that defendant physician had previously been involved in five birth trauma medical malpractice lawsuits. As a result of the violation, plaintiff claimed damages for emotional and mental personal injuries, pain and suffering. In affirming the trial court's granting of defendants' motion for summary disposition, the Court held under the facts presented in this case plaintiff could not

bring a claim under the MPCA. The alleged representations or omissions went to the defendant physician's ability to provide medical care. As a result, the claim raised questions of medical judgment such that the "gravamen" of the case was one of medical malpractice. To apply the MPCA to a claim that is essentially one of medical malpractice would be to render obsolete the well developed law concerning medical malpractice.

## WHO IS DOUG POWE?

### *Licensed to Listen*



Douglas G. Powe is a shareholder in the East Lansing office of Smith Haughey Rice & Roegge. Prior to becoming an attorney in 1984, Doug practiced as an RN in the areas of emergency and critical care nursing. When he decided to make a career change and practice law, concentrating on medical malpractice was a logical choice.

“Because of my experience as a nurse, it was natural for me to focus my legal career on defending hospitals and health care professionals in actions alleging medical malpractice,” Powe says. “I have also been privileged to handle matters for clients that range from attorney and accountant malpractice actions, professional licensing actions, product liability cases, construction cases, auto negligence cases, employment cases, ADR, family actions and criminal and motor vehicle infractions.”

Doug's background enables him to identify with the many challenges faced by his clients, while his reputation as a good listener provides added peace of mind to the individuals and organizations he represents.

“So many of my clients chose their career with the specific intentions of helping others. When working with my clients, I try to reassure them that they are good people with amazing talents and that litigation is not the end of the world,” says Powe. “The most important skills I have are my ability to listen closely to my clients' problems and needs as well as my ability to be particularly attentive to the 'legal and factual' details of a case. Because of these skills, I am able to be the best advocate and counselor that I can be for my clients.”

Doug is a member of the American Bar Association, the State Bar of Michigan, the Ingham County Bar Association, the Michigan Society of Hospital Risk Management, and the Emergency Nurses' Association. He is also a member of the Michigan Defense Trial Counsel.

Doug is married to Diane Cox Powe and has four children: Joshua, Kaitlin, Griffin, and Spencer. He is an active member of All Saints Episcopal Church in East Lansing.

## NEWS AND SUCCESS

**Carol Carlson** is presenting ten seminars throughout western Michigan to healthcare office staff personnel. Her presentation is entitled "Why Patients Sue and How to Avoid It," based on her many years of deposing plaintiffs and asking them why they went to an attorney.

**Brian Kilbane** and **Joe Engel** obtained summary disposition for two clients on grounds that the statute of limitations had run. The issue was whether the NOI tolling period applies to the wrongful death savings provision, which gives the personal representative two years from the date of appointment to commence the action, but no longer than three years after the original statute of limitations runs (a maximum of five years from the date of the malpractice). The plaintiff filed the NOI after the medical malpractice statute of limitations expired, but during the two-year grace period. Although the Complaint was filed after the two-year grace period expired, plaintiff argued he should benefit from the 182-day tolling period, making his Complaint timely. We argued that according to the Supreme Court's decision in *Waltz*, the NOI tolling does not apply to the two-year grace period. Although plaintiff attempted to distinguish *Waltz* on its facts, the judge for the Berrien County Circuit Court held that *Waltz* was controlling and the untimely claims were barred. **Cindy Boer** and **Bill Henn** assisted with the briefs and oral argument.

In February, **Jack O'Loughlin** obtained a no cause verdict on behalf our client surgeon after a two-week jury trial in Kent County, arising from claims relating to choice of procedure, informed consent, and postoperative care for a patient undergoing rectal cancer surgery.

**Jack O'Loughlin, Bill Jewell, and Brian Molde** presented "Medical Malpractice Reform Legislation: 10 Years Later" in April and May.

**Doug Powe** will present "The World of Legal Nurse Consulting" to the 2005 Michigan ENA Annual spring conference in May.

**Rob Tubbs** participated as defense council in a mock trial at the NALS of Michigan Annual Meeting and Educational Conference in Traverse City in April.

**Smith Haughey Rice & Roegge** received the Women's Resource Center's "Employer Recognition Award" in March for its noteworthy contributions to the success of women in the workplace.

**SMITH HAUGHEY RICE & ROEGGE'S  
MEDICAL MALPRACTICE DEPARTMENT**



Albert J. Engel, III. Chair  
616.458.6247



L. R. Roegge  
616.458.7425



Edward R. Stein  
734.913.5387



William W. Jack, Jr.  
616.458.6243



Paul M. Oleniczak  
616.458.5461



John C. O'Loughlin  
616.458.9370



John M. Kruis  
616.458.8304



Paul Van Oostenburg  
616.458.9462



William R. Jewell  
616.458.8203



Brian J. Kilbane  
616.458.0296



Robert W. Tubbs  
231.486.4535



Douglas G. Powe  
517.318.5655



Carol D. Carlson  
616.458.9289



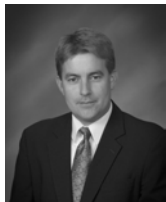
Christopher R. Genter  
616.458.0222



Kevin M. Lesperance  
616.458.3443



Stephanie A. Neal  
616.458.9481



Mark A. Gilchrist  
517.318.5654



Brian A. Molde  
616.458.1499



Cindy C. Boer  
616.458.1331



Cara L. Nieboer  
616.458.0437



Jason R. Sebolt  
616.458.3628



Amanda K. Coulter  
734.913.5517

We invite you to call any of these attorneys directly  
for more information.