

STATE OF MICHIGAN
IN THE SUPREME COURT

MARY KIRKALDY and
WILLIAM KIRKALDY,

Plaintiff-Appellants,

Supreme Court No. 129128

-vs-

Court of Appeals No. 225735

RAINA M. ERNSTOFF, M.D., and
RAINA M. ERNSTOFF, M.D., P.C.,

Lower Court No. 98-839111-NH

Defendant-Appellees,

And

CHOON SOO RIM, M.D., and RIIM &
SOL, M.D., P.C., Jointly and Severally,

Defendants.

SAURBIER & SIEGAN, P.C., SUITE 402, 400 MAPLE PARK BOULEVARD, ST. CLAIR SHORES, MICHIGAN 48081 (586) 447-3700

129128

DEFENDANT-APPELLEES' SUPPLEMENTAL BRIEF
PURSUANT TO THE COURT'S ORDER OF 3/30/07

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Pursuant to this Court's Order dated March 30, 2007, the parties have been instructed to brief three very specific issues in this case. Accordingly, Appellees, Raina M. Ernstoff, M.D. and Raina M. Ernstoff, M.D., P.C., submit this supplemental brief responding to those specific issues.

ARGUMENTS

I

THE FILING OF A MEDICAL MALPRACTICE COMPLAINT WITH A DEFECTIVE AFFIDAVIT OF MERIT DOES NOT TOLL THE STATUTE OF LIMITATIONS UNDER MCL 600.5856.

MCL 600.2912d(1) requires that a complaint for medical malpractice must be accompanied by "an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section MCL 600.2169." The statutory requirements are specific and designed to prevent the use of unqualified experts simply to get a case to court. MCL 600.2912d(1) and §2169 must be read together. If a plaintiff is allowed to file an Affidavit of Merit that ignores the directive of §2169, the Legislature's intent in enacting §2912d(1) and §2169 is eviscerated.

MCL 600.2169(1)(b) provides:

(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist

who is board certified, the expert witness must be a specialist who is board certified in that specialty.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in that specialty.

The purpose of the statutory requirement is, in part, to ensure that “expert witnesses actually practice or teach medicine.” That is, “to make sure that the expert has firsthand practical expertise in the subject matter about what they are testifying.” *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 219; 642 NW2d 346 (2002). This Court in *McDougall v Schanz*, 461 Mich 15, 24-27; 597 NW2d 148 (1999), stated, the “*statute operates to preclude certain witnesses from testifying solely on the basis of the witness’ lack of practice or teaching experience in the relevant specialty.*” (Emphasis supplied.) The Legislature enacted §2169 to “protect the integrity of our judicial system by retaining real experts instead of ‘hired guns.’” *Id.* at 25, n 9.

This Court’s analysis and expressed importance of §2169 in *McDougall*, *supra* is instructive in regard to Affidavits of Merit and compliance with §2912d(1). This Court turned

to an excerpt from a Michigan Senate Report in expressing the importance of compliance with MCL 600.2169. That Report provides:

As a practical matter, in many courts merely a license to practice medicine is needed to become a medical expert on an issue.

This has given rise to a group of national professional witnesses who travel the country routinely testifying for plaintiffs in malpractice actions. These “hired guns” advertise extensively in professional journals and compete fiercely with each other for the expert witness business. For many, testifying is a full-time occupation and they rarely actually engage in the practice of medicine. There is a perception that these so-called expert witnesses will testify to whatever someone pays them to testify about.

This proposal is designed to make sure that expert witnesses actually practice or teach medicine. In other words, to make sure that experts will have firsthand practical expertise in the subject matter about which they are testifying. In particular, with the malpractice crisis facing high-risk specialists, such as neurosurgeons, orthopedic surgeons and ob/gyns, this reform is necessary to insure that in malpractice suits against a specialist the expert witness actually practices in the same specialty. This will protect the integrity of our judicial system by requiring real experts instead of “hired guns.”

McDougall, supra, at 26 (quoting Report of the Senate Select Committee on Civil Justice Reform (9/26/95)).

A court’s purpose when interpreting statutes, is to discern and give effect to the legislature’s intent as expressed in the statutory language. *Gladych v New Family Homes, Inc.*, 468 Mich 594; 664 NW2d 705 (2002). If the language is unambiguous, the court presumes that the legislature intended the meaning clearly expressed, no further construction is permitted. *Id.* at 597. There can be no question in enacting §§ 2912d and 2169, that the Legislature intended to protect the judicial process and ensure that experts who sign the Affidavit of Merit and participate in a medical malpractice case are properly qualified to do so.

Statutes that relate to the same subject or share a common purpose are "*in pari materia*" (literally, "upon the same matter or subject"). *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Such statutes must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Webb, supra*, at 274. When construing statutes that are *in pari materia*, the court's goal is to further legislative intent by finding an harmonious construction of the related statutes, so that the statutes work together compatibly to realize that legislative purpose. *People v Stephan*, 241 Mich App 482, 497; 616 NW2d 188 (2000).

MCL 600.2912d and 600.2169 have consistently been read *in pari materia* by the courts of this state. In discussing whether an attorney could form a reasonable belief under §2912d(1) that an expert was qualified under S2169, the Court in *Geralds v Munson Healthcare*, 259 Mich App 225, 235; 673 NW2d 792 (2003) held,

Quite frankly, it is this Court's opinion that, if you are going to retain an expert witness, no matter how favorable the referral from a brother or sister lawyer, no matter how favorable the witness testified for you personally on a prior case where you may have retained his or her services, there is an obligation, a core standard of care obligation, to confirm, before you retain the expert in any given case, to determine whether or not that expert is, in fact, Board Certified, maintains the requisite clinical practice, was Board Certified at the appropriate time, in order to offer opinions for you in this case. These are questions which must be asked. This Court does not believe that you can simply reasonably rely upon referrals or the fact that a person may be on a particular board or not.

See also, *Halloran v Bahn*, 470 Mich 572; 683 NW2d 129 (2004),¹ and *Grossman v Brown*, 470 Mich 593; 685 NW2d 198 (2003).

¹ In *Halloran* this Court has expressed the importance of meeting the §2169 requirements of physicians signing an Affidavit of Merit. The defendant physician was board certified in internal medicine with an added qualification of critical. Plaintiff's expert, however, was board certified in anesthesiology with an added qualification in critical care. *Id.* at 575. Although the subspecialties matched, this Court ruled that the statute requires that the expert and defendant hold the same primary board certification. *Id.* at 576.

More interesting was the thought given to the difference between a practicing internist and anesthesiologist. This Court stated:

Since the statutes must be read together, a physician who signs an Affidavit under §2912d must conform to the requirements of §2169. If the physician does not meet the requirements of §2169, the physician must be disqualified, unless the plaintiff or plaintiff's attorney can justify a reasonable belief that the expert met §2169's requirements. *Geralds, supra*, 231. See also, *Watts v Canady*, 253 Mich App 468; 655 NW2d 784 (2002). There is no other way to read those statutes.

Accordingly, when reading §§2912d(1) and 2169(1)(b)), an Affidavit that does not meet the mandates of §2169 is completely non-conforming. To hold otherwise, would open Pandora's box as plaintiff attorneys could file defective affidavits on the grounds they believed the physician signing the affidavit met §2169. The courts have recognized that such a practice will defeat the purpose of §2169 – “to insure that in malpractice suits against a specialist the expert witness actually practices in the same specialty” and “protect the integrity of our judicial system by requiring real experts instead of ‘hired guns’.” *McDougall, supra*, at 26. See *Geralds, supra*, *Grossman, supra*.

Plaintiff in this matter was required to meet the requisites of §2912d(1), and §2169. The expert who signed the affidavit of merit did not qualify under MCL 600.2169, and the Court of Appeals found that the plaintiff's attorney could not have formed a “reasonable belief” under §2912d that the expert met the §2169 mandates. Thus, even under the “reasonable belief” exception on §2912d as explained in *Grossman*, the affidavit of merit was still defective.

Consider the facts of *this case*: there may be an enormous difference between critical care as practiced by an *internist* and critical care as practiced by an *anesthesiologist*. Indeed, one would expect that a patient requiring a medical diagnosis during critical care would rather be treated by an internist than an anesthesiologist. Likewise, one would expect that a patient being anesthetized during critical care would rather be treated by an individual trained in anesthesiology than one trained in internal medicine. Thus, the practice of critical care may be quite different depending on the physician's underlying specialization.

Saffian v Simmons, 477 Mich 8; 727 NW2d 132 (2007), cannot be read to provide a inference that the Affidavit of Merit must be sufficient for tolling purposes, as argued by the Plaintiffs. In *Saffian*, the defendant did not follow the Court Rules by responding to the Complaint by moving for summary disposition. Had the defendant complied with the Court Rules, the outcome presumably would have been different. Clearly this court did not reverse its prior rulings that a defective affidavit was sufficient to support a Complaint, it simply followed the general rule that a court will not rule on the pleadings unless the matter is brought to its attention by the opposing party.

Accordingly, and in conclusion, this Court has impressed the importance of matching of the expert to the defendant, which is what the statute requires. Through *Halloran* and *Grossman*, this Court has already determined that a “defective” Affidavit of Merit is only sufficient in cases where plaintiff’s counsel in fact could justify a reasonable belief that the expert met the §2169 requirements. Reading the common statutes MCL 600. 2912d(1) and MCL 600.2169(1)(b) together, a non-defective Affidavit of Merit is required in order to toll the Statute of Limitations under MCL 600.5856(a), unless one can meet the “reasonable belief” standard. This is the only way to protect the integrity of the judicial system and pursue the intent of our Legislature.

II

A MEDICAL MALPRACTICE COMPLAINT FILED WITH A DEFECTIVE AFFIDAVIT OF MERIT CANNOT BE CURED WITHOUT REFILING THE COMPLAINT.

Courts of this state have consistently ruled that medical malpractice complaints must be filed with a valid and statutorily conforming affidavit of merit in order to commence litigation. “Generally, a civil action is commenced and the period of limitation is tolled when a complaint

is filed.” See MCR 2.101(B) and MCL 600.5856. *Scarscella*, 461 Mich at 549. “However, medical malpractice plaintiffs must file more than a complaint; they ‘shall file with the complaint an affidavit of merit’” MCL 600.2912d(1). See also MCR 2.112(L). *Id.* “Use of the word ‘shall’ indicates that an affidavit accompanying the complaint is mandatory and imperative.” *Oakland County v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997). *Id.* “We therefore conclude that, for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit.” *Id.*

In *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2003), this Court expressed the requirement that the requisite Affidavit of Merit be signed by an expert who met the qualifications of MCL 600.2169, thereby matching the defendant physician. It is axiomatic that if the expert is not a match to the defendant, then the Affidavit of Merit is not valid under § 2912d to commence the lawsuit. *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003) (citing *Holmes v Michigan Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000).)

The court also considers whether the statute of limitations is or is not at issue. There is a disagreement between this Court and the Court of Appeals as to the proper procedure in instances when an affidavit is defective, but statute of limitations is not at issue. The Court of Appeals held in *Vandenberg v Vandenberg*, 231 Mich App 497; 586 NW2d 570 (1998) that where the statute of limitations is not at issue, a medical malpractice lawsuit does not need to be dismissed for failure to file an Affidavit of Merit. This Court, however, held in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999), “a plaintiff who files a medical-malpractice complaint without the required affidavit is subject to a dismissal without prejudice,

and can refile properly at a later date. However, such a plaintiff still must comply with the applicable period of limitation.” *Id.* at 551. Both *Vandenberg* and *Dorris* achieve the same equitable result in cases in which the statute of limitations is not at issue, although *Vandenberg*’s decision on the procedure is arguably incorrect since a Complaint filed with a defective affidavit is invalid, and does not commence the action.

In the cases pertaining to Affidavits of Merit that have come before the Court of Appeals, the Affidavits are not merely flawed or slightly deficient. Instead the issues decided have been in regard to whether the plaintiff’s expert signing the affidavit is qualified to provide standard of care testimony under §2169 because he or she is not a match to the defendant physician. As pointed out in Argument I, above, this Court has insisted on the matching of the expert in order to preserve the “integrity of our judicial system by requiring real experts instead of ‘hired guns.’” *McDougall v Schanz*, 461 Mich at 26. The integrity of this system cannot be upheld if a plaintiff can file an Affidavit of Merit from any physician just to get into the courthouse door.

An Affidavit of Merit that is defective because the expert is not a match to the defendant physician is no affidavit at all under MCL 600.2169.² Accordingly, that Affidavit is insufficient to commence a medical malpractice lawsuit. Again, this is not merely a flaw in the filing; it is a complete disregard for this Court’s holding that a medical malpractice must file “more than a complaint; they shall file with the complaint an affidavit of merit.” *Scarsella, supra*, at 549.

Accordingly, any complaint filed with a defective affidavit must be refiled with a correct and proper affidavit, one signed by an expert that matches the qualifications of the defendant physician as required by MCL 600.2912d and MCL 600.2169.

² The Court of Appeals has recognized a difference between defective and “grossly nonconforming.” *Kirkaldy v Rim*, 266 Mich App 626; 702 NW2d 686 (2005).

The lower court in this case held that *Scarsella v Pollak*, 461 Mich 547, 635; 607 NW2d 711 (2000), did not necessarily support the holdings of *Mouradian* and *Geralds* (that a non-conforming affidavit does not toll the statute of limitations). *Scarsella*, p 550, held,

Plaintiff contends that he should have been allowed to amend his September 22, 1996, complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, see MCR 2.118(D), making timely the newly completed complaint. We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirement. Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1); MSA 27A.2912(4)(1), that the plaintiff "shall file with the complaint an affidavit of merit," as well as the legislative remedy of MCL 600.2912d(2); MSA 27A.2912(4)(2), allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint.

As such it is clear that this court requires that affidavits of merit comply with §2912d, and that failure to file a conforming affidavit requires dismissal.

III

GERALDS V MUNSON HEALTHCARE, 259 Mich App 225 (2003), WAS CORRECTLY DECIDED BY THE COURT OF APPEALS.

The Court of Appeals undertook a thorough and sound analysis of the law in *Geralds v Munson Healthcare*, 259 Mich App 225 lv den, 470 Mich 873; 687 NW2d 292 (2004), and correctly decided the issues therein. The court found that the failure of the *Geralds* plaintiff to ask "the four word question, "Are you board certified?" (*Id.* at 233) did not meet the reasonable belief test. The *Geralds*' holding follows this Court's analysis in *Grossman v Brown*, 470 Mich 593; 685 NW2d 198 (2004). In *Grossman*, this Court determined that plaintiff's counsel had met the "reasonable belief" standard because he had used all resources available to him to

establish that his expert was a proper match to the defendant physician. Mr. Gerald's attorney did not do so.

Further, the Court of Appeals also noted the importance of expert matching and the duty imposed on plaintiff's counsel to ensure the expert is properly qualified.

A core standard of care obligation, to confirm, before you retain the expert in any given case, to determine whether or not that expert is, in fact, Board Certified, maintains the requisite clinical practice, was Board Certified at the appropriate time, in order to offer opinions for you in this case. These are questions which must be asked.

Geralds, supra, at 235.

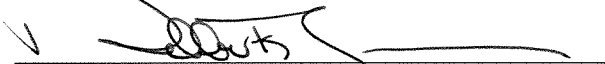
RELIEF REQUESTED

Based on the foregoing, Plaintiff's Affidavit of Merit was completely non-conforming, as it was signed by a physician that did not match the defendant physician, and Plaintiff's counsel did not have a "reasonable belief" that the expert was properly qualified, and therefore, was insufficient to commence the action. This Court has and does require that a plaintiff meets the statutory requirements or possess a reasonable belief that he or she has met those requirements. Without this, the Legislative intent is not followed.

Accordingly, Defendants respectfully request that Plaintiff's Application for Leave to Appeal be denied.

Respectfully submitted,

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