

Gregory W. Moore
T 248.988.5842
F 248.988.2514
Email: gmoore@clarkhill.com

Clark Hill PLC
151 S. Old Woodward
Suite 200
Birmingham, MI 48009
T 248.642.9692
F 248.642.2174

clarkhill.com

August 31, 2009

Corbin R. Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2009-13 – Proposed Amendments to Rule 2.114 and 2.118 of the Michigan Court Rules

Dear Mr. Davis:

We represent the Michigan Osteopathic Association (the “MOA”) and submit the following comments on behalf of the MOA. The MOA has considered ADM File No. 2009-13 and the proposed amendments to Michigan Court Rules 2.112(L) and 2.118(D) pertaining to Affidavits of Merit, Notices of Intent, and Amendments to an Affidavit of Merit or Affidavit of Meritorious Defense.

We appreciate the Court’s proposed amendments to MCR 2.112 and MCR 2.118; however, we respectfully conclude that the amendments are unnecessary because of the precedent set forth under existing Michigan case law and the current Michigan Court Rules (the “Court Rules”) are sufficient to guide the parties and the Court. To the extent that the Court deems such amendments as necessary, then we recommend revisions to the MCR 2.118(D) as set forth below.

Unlike previously proposed amendments to MCR 2.112(L), such as ADM File Nos. 2006-43 and 2007-07, the current proposed amendment to MCR 2.112(L) includes time limits regarding challenges to Affidavits of Merit and Affidavits of Meritorious Defense (collectively referred to as the “Affidavits”). Additionally, the proposed Rule permits filing of revised Affidavits (i.e., for either party) if the court finds that the Affidavit is insufficient. Revising the Affidavits is inconsistent with case law on this matter. This Court in *Kirkaldy v Rim*, 478 Mich 581 (2007) held “if a defendant believes that an affidavit is deficient, then the defendant must challenge the affidavit. If that challenge is successful, the proper remedy is dismissal without prejudice.” *Kirkaldy* at 586 (citing *Sarsella v Pollak*, 461 Mich 547, 551-552; 607 NW2d 711 (2000)).

The Legislature created the requirement of Affidavits of Merit and of Meritorious Defense to discourage frivolous filing and unnecessary defense of medical malpractice claims. Permitting plaintiffs the opportunity to amend Affidavits of Merit and proceed with a case defeats the purpose of existing pleading requirements. A properly prepared and filed Affidavit of Merit is essential to demonstrate the malpractice claim is not frivolous. The ability to amend an Affidavit of Merit deemed defective provides “a mulligan” (i.e., a redo or second chance) to plaintiff’s counsel and eviscerates tort reform policy supporting the Affidavit of Merit. Thus, either the claim meets the threshold pleading requirements or it does not, and the asserted claim should either prevail on the merits or be dismissed. Existing Court Rules provide the requisite elements for filing a proper Affidavit of Merit and a proper Affidavit of Meritorious Defense¹. Each party involved in a medical malpractice claim should be held accountable to comply with the statutory requirements for affidavits and each party should be subject to challenge regarding the respective Affidavits.

At first glance, judicial economy and efficiency appear to support the assertion that noncompliant Affidavits should be amended as opposed to resulting in dismissals without prejudice. However, efficiency is not lost by dismissing claims without prejudice. In fact, efficiency is gained by not proceeding with claims that fail to plead the minimum requirements such as breach of the applicable standard of care, acts or omissions involving the applicable standard of care, and proximate cause between the injury sustained and the alleged breach. The question raised by permitting subsequent amendments to Affidavits may be – What has changed? In other words, if the parties completed their respective due diligence and completed the Affidavit in compliance with the statute prior to filing or answering the complaint, then what present facts or circumstances would be available to change the parties’ position regarding duty, breach causation or damages? Since medical malpractice cases are pled with such specificity, then an amendment to the complaint and/or Affidavit would not likely clarify the claim for either party. Therefore, such claim should either prevail on the merits or be dismissed for failure to state a claim.

Generally, pleadings may be amended in accordance with MCR 2.115 and MCR 2.118. If the Affidavits are considered part of the pleadings, then existing Court Rules and case law provide sufficient instruction to the parties and the Court. Therefore, amendments to MCR 2.112 and 2.118 are not necessary. Under MCR 2.115 and MCR 2.118, each party is granted an opportunity to amend complaints and file related motions; therefore existing Court Rules sufficiently address medical malpractice claims.

The proposed additional language in MCR 2.112 provides special treatment for Affidavits of Merit and Affidavits of Meritorious Defense. If the Affidavits are deemed

¹ See MCL 600.2912d and MCL 600.2912e

part of the pleadings², then existing Court Rules and case law should prove adequate to govern amendments and challenges to the sufficiency of the Affidavits. Because both parties, through various motions (e.g., motions to strike, motions for summary judgment or default), are afforded the same opportunity to prevail over insufficiently filed Affidavits, we conclude that it is not necessary to apply special treatment to the Affidavits.

The language could be better defined for medical malpractice actions. At present, it is somewhat vague in that as long as the amended pleading arises out of the "conduct" set forth in the original complaint, the amended pleading will relate back to the filing date of the original pleading. As such, not only is the plaintiff given a chance to toll the statute of limitations, the plaintiff's attorney is also given a **second chance** to figure out how to style the complaint, the appropriate standard of care, breach thereof, and theory of causation. In the medical malpractice world, we typically deal with a continuum of care wherein a doctor is engaged in a course of treatment over an extended period of time. That continuum allows for creativity in how one styles a cause of action. Accordingly, we want attorneys to get it right the first time and not give them the chance to make, learn from, and consequently correct mistakes. Under the proposed amendment, one might argue that "conduct" constitutes the entire continuum of care, and as such, any portion thereof not brought to issue in the original pleading would still relate back since it arises out of the same "conduct." As a result, MOA would like to see additional language requiring that the original pleading give the physician all of the necessary information to prepare a defense to the subsequently asserted claim. In other words, the amended Affidavit must arise out of the conduct originally pled, **and** the original pleading must give the physician the necessary information to prepare a defense to the subsequently asserted claim. Both prongs must be met for the amendment to relate back. Therefore, MOA recommends that MCR 2.118(D) read as follows:

(D) Relation Back of Amendments. An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit if the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, and the original pleading gives the responding party the necessary information to prepare a defense to the subsequently asserted claim.


² See Barnett v Hidalgo, 478 Mich 151, 160-61, 732 NW2d 472 (2007) describing the Affidavit of Merit as part of the pleadings.

Corbin R. Davis
August 31, 2009
Page 4

We thank the Court for considering our comments on these matters. If the Michigan Osteopathic Association may provide any further information or assistance, please do not hesitate to contact us.

Sincerely,

CLARK HILL PLC

A handwritten signature in black ink, appearing to read 'G. Moore', with a long horizontal flourish extending to the right.

Gregory W. Moore

cc: Fred Anderson, Interim Executive Director,
Michigan Osteopathic Association
Robert L. Weyhing, Clark Hill PLC
Michael W. Matthews, Clark Hill PLC