

August 18, 2009

Hon. Marilyn Kelly  
Chief Justice  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

Re: ADM File No. 2009-13

Dear Chief Justice Kelly:

I am writing to comment in favor of the proposed amendments to MCR 2.112 (with a slight modification) and 2.118 (as proposed) which will aid in returning logic and equity to the procedural requirements for medical malpractice actions.

**The Court Should Adopt The Proposed Amendment to MCR 2.112(L) With A Modification.**

As a lawyer who routinely represents patients in medical malpractice actions, I support the amendment of MCR 2.112(L). The proposed addition would create a time limit for challenges to a notices of intent and affidavits of merit, and explicitly provides a mechanism for amendments to affidavits of merit. Each of these provisions is a welcome addition to the procedural requirements for medical malpractice actions.

The Court has proposed adding the following language to MCR 2.112(L):

In a medical malpractice action, unless the court allows a later challenge for good cause:

- (a) all challenges to a notice of intent to sue must be made at the time the defendant files its first response to the complaint, whether by answer or motion, and
- (b) all challenges to an affidavit of merit or affidavit of meritorious defense, including the qualifications of the signer, must be made within 63 days of service of the affidavit on the opposing party. If the court finds that the affidavit is insufficient, it shall afford the party that filed the challenged affidavit to file a revised affidavit unless the

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information before the court shows that amendment would not be justified. See MCR 2.116(I)(5).

Requiring a defendant to challenge a notice of intent in its first response to a complaint is consistent with time limits imposed upon the assertion of other affirmative defenses. *See, e.g.*, MCR 2.116(1)(affirmative defenses of lack of personal jurisdiction, insufficiency of process or service of process) and (2)(party lacks legal capacity to sue, another action exists between the parties involving the same claim, or claim is barred by release, prior judgment, immunity, statute of limitations, statute of frauds, etc). This promotes judicial economy and efficiency, and as one commentator has observed, ensures “that preliminary issues . . . are disposed of quickly.” *See Mich. Ct. R. Pract.*, §2116.5.

The Court also should adopt the amendment that would permit a party to amend an affidavit of merit. The Michigan Court Rules favor amendments of pleadings. *See* MCR 2.118(A)(2) (“Leave [to amend] shall be freely given when justice so requires.”) The rules require the filing of an affidavit of merit along with a medical malpractice complaint, making the affidavit essentially a pleading. The proposed amendment would bring the procedural rules governing medical malpractice actions into conformity with the rules controlling amendments to other pleadings, which is fair, just, and appropriate. There is no just reason to prevent a party in a medical malpractice action from amending an affidavit of merit when parties in other actions are freely and routinely permitted to amend their pleadings.

Although the substance of the amendment to MCR 2.112(L) would appear to permit a party to amend an affidavit of merit or meritorious defense, I would ask the Court to consider one change to the form of the amendment, as the last sentence of the proposed amendment to MCR 2.112(L)(2)(b) appears to omit a word. The Court should consider changing the last sentence so that it reads in one of the two following ways:

1. If the court finds that the affidavit is insufficient, it shall permit ~~afford~~ the party that filed the challenged affidavit to file a revised affidavit unless the information before the court shows that the amendment would not be justified.

or,

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2. If the court finds that the affidavit is insufficient, it shall give ~~afford~~ the party that filed the challenged affidavit an opportunity to file a revised affidavit unless the information before the court shows that the amendment would not be justified.

While I believe either of these formations suggested for the Court's consideration embody the substance of the proposed amendment, the language in proposal 2 is more consistent with the existing language in MCR 2.116. *See* MCR 2.116(I)(5) ("the court shall give the parties an opportunity to amend their pleadings.")

**The Court Should Adopt The Proposed Amendment To MCR 2.118(D).**

The Court should amend MCR 2.118(D) as proposed. The Court proposes that the following language be added to MCR 2.118(D):

MCR 2.118 Amended and Supplemental Pleadings

\* \* \*

- (D) 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.

The amendment should be adopted as proposed because Michigan courts have long recognized the fundamental fairness of permitting parties to amend their pleadings and to have those amendments relate back to the date of the original filing. Michigan courts have long recognized the principle of relation-back of amendments. *See* GCR 1963, 118. The proposed amendment to MCR 2.118(D) would simply bring pleadings in medical malpractice actions into conformity with pleadings in other matters by providing that amendments to affidavits of merit or meritorious defense would relate back to the date of the original filing of the affidavit. This is fundamentally fair and just.

The Googasian Firm, P.C.

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I am pleased that the Court has proposed these amendments and I appreciate the opportunity to comment on them.

Sincerely,

THE GOOGASIAN FIRM, P.C.



Dean M. Googasian

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