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## EXPERT WHO SIGNS AFFIDAVIT OF MERIT NEED NOT BE QUALIFIED TO TESTIFY REGARDING PROXIMATE CAUSE

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In the first stages of a medical malpractice suit and filing, finding an expert will be easier and less demanding because of a recent ruling by the Michigan Court of Appeals in *Sturgis Bank & Trust Co. v Hillsdale Community Health Ctr.* (No. 261767, rel'd 10/27/05).

The Michigan Court of Appeals' decision held that affidavits of merit executed by a nurse and nurse practitioner alleging violations of the standard of care were sufficient, even if the nurse and the nurse practitioner did not have the expertise or qualifications necessary to establish proximate cause.

The plaintiff, who is the conservator of the patient's estate, alleged that while the patient was being treated at the defendant hospital for injuries she sustained in an automobile accident, the patient fell out of her bed and allegedly sustained a closed-head injury, brain damage and impaired cognitive functioning, among other injuries. The plaintiff was appointed as limited conservator of the patient's estate and brought suit against the defendant hospital and three members of the nursing staff. (The claims against the nurses were eventually dismissed.)

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 claims were claims of medical malpractice and not ordinary negligence.<sup>1</sup> Further the trial court did reverse 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.

Upon reversal of its original ruling, the trial court reasoned that neither the plaintiff's nurse expert nor the nurse practitioner expert were qualified to offer an opinion that the breach of the standard of care was a proximate cause of the patient's closed-head injury. Further, the trial court determined that the doctor's affidavit was untimely and could not be considered. Since the two affidavits (one from a nurse in the same profession as the accused and one from a doctor to discuss proximate cause) were deemed necessary by the trial court, and the trial court had struck all three of the plaintiff's affidavits, the trial court dismissed the plaintiff's action with prejudice. The plaintiff's motion for reconsideration was denied and the plaintiff filed an appeal.

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 §2912d(1) incorporates §2169 solely with respect to "requirements for an expert witness" as expressly stated in §2912d(1), or in other words, expert qualifications. The appellate court reasoned that although §2169(1) sets forth requirements of qualifications for an expert witness, §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 court further reasoned that although §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 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 that the 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 an expert practicing or teaching in the same health profession as those accused in the wrongdoing and that the affidavit contain the necessary elements listed in §2912d(1)(a) – (d).

The ruling of the Michigan Court of Appeals 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 regarding standard of care and causation at trial. MCL 600.2169 does not speak to whether an initially retained expert may actually testify at trial.

For a complete copy of the U.S. Court of Appeals for the Sixth Circuit decision on *Sturgis Bank & Trust Co. v Hillsdale Community Health Ctr.*, [click here](#).

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<sup>1</sup> The Michigan Court of Appeals upheld the trial court's ruling regarding ordinary negligence.