



2005-2007

Medical Malpractice Decisions

A review of notable Michigan
Appellate Court decisions

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Introduction

Medical malpractice tort reform continues to create many Michigan appellate decisions. Most of the 2005 - 2007 Michigan appellate decisions involve one or more of the following topics:

- **Affidavit of merit**
- **Notice of intent**
- **Statute of limitations/tolling**

Continued



Introduction

- **Expert witness qualifications**
- **Ordinary negligence vs. medical malpractice**
- **Reliability of expert witness opinions (*Daubert*)**
- **Lost opportunity**
- **Comparative fault**
- **Informed consent**
- **Damages/setoff/damages cap**



Case Law Update

Expert Witness Qualifications

Woodard v Custer, MD, 476 Mich 545; 719 NW2d 842 (July 31, 2006).

- MCL 600.2169
- Supreme Court interprets the phrase “the same specialty” to mean only a single specialty that must be matched.
- Expert must devote majority of professional time/clinical teaching in the “one most relevant specialty.”

Continued



Case Law Update

Expert Witness Qualifications

Woodard v Custer, MD, 476 Mich 545; 719 NW2d 842 (July 31, 2006).

- Expert cannot devote a majority of time to more than one specialty.
- Expert must match sub-specialty of defendant physician.
- Practical effect of *Woodard*;
 - Affidavits of merit
 - Testifying at trial.



Case Law Update

Affidavit of Merit

Saffian v Simmons, DDS, 477 Mich 8; 727 NW2d 132
(February 6, 2007).

- Material facts.
- Supreme Court holds defendant cannot unilaterally fail to answer complaint based on perceived deficient affidavit of merit.
 - Court determines sufficiency of affidavit of merit, not defendant.

Continued



Case Law Update

Affidavit of Merit

Saffian v Simmons, DDS, 477 Mich 8; 727 NW2d 132
(February 6, 2007).

- Technically deficient affidavit of merit sufficient to commence complaint; default subsequently entered not void.
- *Scarsella* addressed only absent, not defect, affidavit of merit situation.

Continued



Case Law Update

Affidavit of Merit

***Saffian v Simmons, DDS*, 477 Mich 8; 727 NW2d 132
(February 6, 2007).**

- Unclear if *Saffian* court restricting by implication Court of Appeals' decisions that *deficient* affidavit of merit is “grossly nonconforming” under *Scarsella*, and renders the complaint a nullity.



Case Law Update

Affidavit of Merit

***Costa v Community Emergency Medical Services, Inc.*, 475 Mich 403; 716 NW2d 236 (June 28, 2006).**

- Material facts.
- Supreme Court finds governmental defendants need not file affidavit of meritorious defense if immunity applies.

Continued



Case Law Update

Affidavit of Merit

***Costa v Community Emergency Medical Services, Inc.*, 475 Mich 403; 716 NW2d 236 (June 28, 2006).**

- Court rejects argument that a response is required by the use of the word “shall” in the affidavit of meritorious defense statute.
- Purpose of governmental immunity undermined if defendant must respond (immunity from suit implication).



Case Law Update

Affidavit of Merit

***Sturgis Bank & Trust v Hillsdale Community Health*, 268 Mich App 484; 709 NW2d 453 (January 6, 2006).**

- In nursing malpractice case, plaintiff submits affidavits of nurse and nurse practitioner;
- Defendant objects;
- Nurse not qualified to opine on “proximate cause;”
- “Qualification” requirement for affidavit of merit limited to matching specialties, not ability to testify on proximate cause.



Case Law Update

Affidavit of Merit

***Bates v Gilbert*, unpublished Court of Appeals case (August 16, 2005), applications pending in Michigan Supreme Court.**

- Physician can sign his/her own affidavit of meritorious defense in compliance with statutory requirement.
- Medical entity, sued vicariously, must still attach affidavit of meritorious defense signed by qualified expert.
- Plaintiff charged with “reasonable belief” of matching qualifications taken from Public Health Code (list of medical occupations).



Case Law Update

Affidavit of Merit

Apsey v Memorial Hospital (On Reconsideration), 266 Mich App 666; 702 NW2d 870 (August 25, 2005)

- Special certification requirement applies to an affidavit taken in a sister state.
 - Signature of notary public shall be certified by clerk where affidavit is taken;
 - Signature and certification must be under seal of said court.
- Special certification necessary part of affidavit of merit requirement;

Continued



Case Law Update

Affidavit of Merit

Apsey v Memorial Hospital (On Reconsideration), 266 Mich App 666; 702 NW2d 870 (August 25, 2005)

- Court's decision applies prospectively;
- Plaintiff's allowed to "cure" previously-submitted affidavits;
- Matter pending in Michigan Supreme Court;
- Conflict panel convened in Court of Appeals.



Case Law Update

Notice of Intent

***Mayberry v General Orthopedics, P.C.*, 471 Mich 1; 704 NW2d 69 (October 4, 2005).**

- Second notice of intent tolls period of limitations when earlier notice sent with more than 182 days remaining in the limitations period.

Continued



Case Law Update

Savings Provision

***Mullins v St. Joseph Mercy Hospital*, 271 Mich App 503; 722 NW2d 666 (October 2, 2006) (conflict panel).**

- *Waltz v Wyse* applied retroactively;
 - Court of Appeals cites to three cases in which the Supreme Court so ordered.
 - Debate on whether orders, versus opinions, have precedential value.
 - Sharp divide in the Court of Appeals on this point.
 - Application pending in Supreme Court.
 - *Mullins* issue tied to *Eggleston* and *Ward* issues.



Case Law Update

Savings Provision

***Ward v Siano*, 272 Mich App 715; __ NW2d __ (November 14, 2006) (conflict panel).**

- Equitable tolling unavailable in *Waltz* situations:
 - Equitable tolling applies to individual cases, not portfolio;
 - “[W]holesale disregard” of retroactivity of *Waltz*.

Continued



Case Law Update

Savings Provision

***Ward v Siano*, 272 Mich App 715; __ NW2d __ (November 14, 2006) (conflict panel).**

- Separation of powers concerns; *Devillers*.
- *Bryant*-type treatment rejected.



Case Law Update

Legitimate Basis for Opinions of Expert Witnesses

Clerc v Chippewa County War Memorial Hospital, 267 Mich App 597; 705 NW2d 703 (August 4, 2005)

- Plaintiff uses “backwards cancer staging” to establish survivability if cancer earlier diagnosed.
- No evidence of speed or rate (lineal vs variable) of growth.
- Plaintiff granted extra opportunity to avoid “novel scientific principle” and lack of reliability.

Continued



Case Law Update

Legitimate Basis for Opinions of Expert Witnesses

***Clerc v Chippewa County War Memorial Hospital*, 267 Mich App 597; 705 NW2d 703 (August 4, 2005).**

- Plaintiff's counsel *declined* such opportunities during course of hearing.
- Case pending on application in Michigan Supreme Court.



Case Law Update

Legitimate Basis for Opinions of Expert Witnesses

***Cochrum v William Beaumont Hospital*, unpublished Court of Appeals decision (February 16, 2006).**

- Court clarifies MRE 702 and *Daubert* standards.
- MRE 702 incorporates *Daubert* test and replaces requirement of “general recognition with a requirement of scientific reliability.”
- Correctly decided; inconsistent with result in *Clerc* re opportunity to present evidence of reliability.



Case Law Update

Lost Opportunity

Compton v Pass (unpublished).

- Material facts.
- Court retains *Fulton* “50% plus” threshold.
- Plaintiff may not combine individual losses per morbidity.
- Application pending.



Case Law Update

Comparative Negligence

***Shinholster v Annapolis Hospital*, 471 Mich 540; 685 NW2d 275 (2004).**

- Michigan Supreme Court holds that patient's pre-treatment conduct may constitute comparative negligence in the medical context.
- Effect of a finding of comparative negligence on joint and several liability.
- Setoff vs allocation of fault to non-parties.



Case Law Update

Informed Consent

***Wlosinski v Cohn, M.D.*, 269 Mich 303; 713 NW2d 16 (2006).**

- Physician needed not disclose “track record” to satisfy informed consent;
- Submission of “track record” to jury contaminated consideration of other malpractice theories (improper surgery, etc.); new trial granted;
- Court recognizes difference between doctor’s negligence and treatment’s failure;
- Court accepts public policy argument.



Case Law Update

Allocation of Fault

***Bell v Ren-Pharm, Inc.*, 269 Mich App 464; 713 NW2d 285 (2006).**

- Where defendant is jointly and severally liable, damages may not be allocated to fault of a named non-party.
- Rationale:
 - Joint and several liability remains in most medical cases;

Continued



Case Law Update

Allocation of Fault

***Bell v Ren-Pharm, Inc.*, 269 Mich App 464; 713 NW2d 285 (2006).**

– Phrase “the liability of each *defendant* is joint and several” not limited to fault of other defendants, but includes non-parties.

- Defendant liable for fault allocated to non-party if joint and several liability applies.
- Defendant still entitled to set-off. *Markley v Oak Health Care*, 255 Mich App 245; 660 NW2d 344 (2003).



Case Law Update

Damages Cap

Smith v Botsford General Hospital, 419 F3d 513 (6th Circuit, November 22, 2005).

- Michigan's damages cap applies to EMTALA action premised on failure to stabilize.
- Non-economic damages of \$5.0 million reduced to \$359,000.
- Sixth Circuit gleans Congress' intent from express terms of statute:

Continued



Case Law Update

Damages Cap

***Smith v Botsford General Hospital*, 419 F3d 513 (6th Circuit, November 22, 2005).**

- “Damages available for personal injury *under the law of the State in which the hospital is located.*”
- “Damages available” relates to remedies, including damages cap.
- Michigan’s “medical” damages cap applies to failure to stabilize EMTALA case:



Case Law Update

Damages Cap

***Smith v Botsford General Hospital*, 419 F3d 513 (6th Circuit, November 22, 2005).**

- Professional medical judgment;
- Use of expert testimony;
- Plaintiff filed petition with United States Supreme Court.



Case Law Update

Damages Cap

Jenkins v William Beaumont Hospital, ___ Mich ___; ___
NW2d ___.

- Medical malpractice damages cap applies in a wrongful death action premised on medical malpractice.



Case Law Update

Damages Cap

Shinholster v Annapolis Hospital, supra.

- Conditions which trigger “higher cap” measured at the time of the asserted malpractice, not entry of the judgment.
- Little explanation of precise meaning of terms governing “higher cap;”
 - Example: “permanent.”



Case Law Update

Exemplary Damages

***Flanagan v Dr. Goldberger*, Macomb County Circuit Court
No. 03-2495-NH.**

- Plaintiff seeks exemplary damages on failure to disclose resultant surgical condition (misplaced cervical screw);
- Court allows jury to consider exemplary damages on claim of “fraudulent concealment;”
- Court allows separate jury verdict questions on non-economic damages re: (1) asserted malpractice; and (2) fraudulent concealment;

Continued



Case Law Update

Exemplary Damages

***Flanagan v Dr. Goldberger*, Macomb County Circuit Court
No. 03-2495-NH.**

- Court finds exemplary damages, awarded under theory of fraudulent concealment, not subject to damages cap.
- Case settled; judgment vacated.



Case Law Update

Pending Issues (Supreme Court)

- Whether defendant can sign his own affidavit of merit (*Bates v Gilbert*).
- Whether affidavit of merit requires qualified expert on proximate cause (*Sturgis Bank v Hillsdale Community Center; Bates v Gilbert*).
- Whether more than one affidavit of merit is allowed (*Bates v Gilbert*).

Continued



Case Law Update

Pending Issues (Supreme Court)

- Whether *Vega* rule applies retroactively (*Long v Children's Hospital*).
- Whether dismissal with prejudice on first *Waltz* action is *res judicata* (*Washington v Sinai Hospital*).

Continued



Case Law Update

Pending Issues (Supreme Court)

- Whether successor personal representative allowed new two-year period (*Washington v Sinai Hospital*).
- Whether *Daubert* standards loosened when scientific/medical authority is unavailable (*Clerc v Baker*).
- Whether plaintiff may use a board-certified general surgeon who is a medical doctor, not a D.O., against the defendant board-certified general surgeon who is an osteopathic doctor (*Raab v Joyce*).



National Law Journal Top Med-Mal Verdicts (2005)

<u>Rank</u>	<u>State</u>	<u>Amount</u>
3 rd	Texas*	\$606.1 Million
8 th	New York**	\$212.6 Million
35 th	Connecticut	\$36.5 Million
55 th	South Carolina	\$28.5 Million

*High/low reduces to \$2.0 Million

**Reduced to \$10.6 Million because of liability of settling defendants.



National Law Journal Top Med-Mal Verdicts (2005)

<u>Rank</u>	<u>State</u>	<u>Amount</u>
56 th	Texas	\$28.3 Million
58 th	Arizona	\$28.0 Million
72 nd	Florida	\$24.0 Million
73 rd	Massachusetts	\$23.7 Million
74 th	Massachusetts	\$23.4 Million
76 th	California	\$22.2 Million
88 th	New York	\$20.0 Million



National Law Journal Top Med-Mal Verdicts (2006)

<u>Rank</u>	<u>State</u>	<u>Amount</u>
6	Florida	\$216.8 Million
33	New York	\$47.3 Million
55	New York	\$31.5 Million
56	Illinois	\$31.3 Million
59	Pennsylvania	\$30 Million
59	South Carolina	\$30 Million

Continued



National Law Journal Top Med-Mal Verdicts (2006)

<u>Rank</u>	<u>State</u>	<u>Amount</u>
65	New York	\$29.3 Million
67	Florida	\$28 Million
78	Illinois	\$24.7 Million
84	D.C.	\$22.6 Million
90	Pennsylvania	\$20 Million
98	New Jersey	\$18.5 Million



Michigan Medical Malpractice Verdicts

- None in Top 100 in 2003
- One in the Top 100 in 2004
- None in Top 100 in 2005
- Non in the Top 100 in 2006
- Larger Michigan verdicts reversed (*Craig*) or reduced (*Jenkins*)
- Out-state verdicts also reduced



Conclusion

- Tort reform measures appear to have decreased the frequency and severity of medical malpractice litigation.
- Judicial interpretation consistent with the intent of the Michigan Legislature is the key component of this decrease.
- Notable Court of Appeals decisions likely to be reviewed by Michigan Supreme Court in 2006-2007.