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April 1, 2009

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

RE: ADM File Nos. 2006-43 & 2007-07
Proposed Amendments of Rule 2.112 of the Michigan Court Rules

Dear Clerk Davis:

At its March 24, 2009 meeting, the Executive Committee of the State Bar of Michigan considered the above rule amendment published for comment. After considering a recommendation from the Civil Procedure and Courts Committee, the Executive Committee adopted the committee's recommendation to oppose the proposal as published, and offer further amendments. The reasoning of the Civil Procedure and Courts committee served as the basis for the position, and is described below.

The proposal published by the Supreme Court would amend MCR 2.112(L), the provision regarding affidavits of merit (required by MCL 600.2912d) in medical malpractice cases. The proposal reads:

(L) Medical Malpractice Actions. In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in MCL 600.2912d, and 600.2912e.

(1) *Sufficiency of Affidavit.* An affidavit of merit filed under MCL 600.2912d is presumed to be valid and tolls the period of limitations. However, if the court determines upon a party's challenge to the sufficiency of the affidavit that the affidavit is deficient, the court shall dismiss the action without prejudice. Following dismissal, the plaintiff may file a complaint accompanied by a conforming affidavit of merit within the time that remains in the period of limitations.

(2) *Notice.* Notice of filing an~~the~~ affidavit under MCL 600.2912d or 600.2912e must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court.

As the Staff Comment indicates, the amendment would essentially perpetuate certain principles regarding affidavits of merit expressed in Kirkaldy v Rim, 478 Mich 581 (2007). But the Court should not feel obligated to codify the Kirkaldy result. In that case the Court was faced with ambiguity arising from the lack of a clear directive in the statute and rules, and it announced an

interpretation that it thought was consistent with the imprecise statute. But in the rule-making process, the Court is free to create procedures that it believes will most effectively promote fair and efficient processing of cases, regardless of whether it would have announced such procedures in deciding an appeal.

Even though Kirkaldy reached a reasonable result in the absence of a rule on the subject, the published proposal has several very undesirable features and should not be adopted in its current form.

First, the remedy of dismissal without prejudice when an affidavit of merit is found insufficient is inappropriate. The plaintiff is then entitled to refile the lawsuit with a proper affidavit, but that leads to enormous inefficiency, requiring the action to be started over. It would be far better to treat challenges to affidavits of merit like similar motions for summary dispositions for failure to state a claim under MCR 2.116(C)(8). When the court finds such a motion to be meritorious, it is not to dismiss, but rather to allow an amendment (unless the information available shows that amendment would be futile). MCR 2.116(I)(5). Any rule on this subject should provide a similar procedure in the case of motions challenging these affidavits.

Second, the published proposal lacks any limits on when challenges can be made to affidavits of merit. The purpose of the statutory requirement is to deter the filing of frivolous lawsuits. Barnett v Hidalgo, 478 Mich 151, 163-164 (2007). Surely that policy is best promoted by rules that encourage prompt determination of the sufficiency of affidavits of merit, rather than leaving the issue open indefinitely, potentially leading to a decision shortly before trial after the expenditure of substantial effort by the parties and the trial court.

Third, the proposal mentions deals only with the affidavit of merit half of the statutory scheme. A balanced rule would also cover affidavits of meritorious defense.

We believe a better approach would be a rule that sets times for raising challenges to affidavits and notices of intent to sue, and provides for amendment rather than the inefficiency of dismissal without prejudice and refilling. Accordingly, we propose the following alternative rule amendments:

Rule 2.112 Pleading Special Matters

(A)-(K) [Unchanged.]

(L) Medical Malpractice Actions.

(1) [Unchanged]

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

Rule 2.118 Amended and Supplemental Pleadings

(A)-(C) [Unchanged.]

(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, amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of original filing of the affidavit.

In addition to solving the problems in the published proposal regarding affidavits of merit and meritorious defense, including a time limit for challenging the notices of intent to sue will avoid the serious problem that the Supreme Court encountered in Boodt v Borgess Medical Center, 481 Mich 558 (2008). The Court held that a defective notice of intent to sue means that a malpractice action could not be commended, so that the filing of the complaint (and affidavit of merit) did not toll the statute of limitations. With no time limit on challenging the notice, the defendant can simply wait long enough that if the challenge is sustained the statute of limitations will have expired. Boodt illustrates the unfairness of that procedure. In Boodt, 11 judges reviewed the sufficiency of the notice. It was found sufficient by six of them (three COA judges and three Supreme Court Justices), and five found it insufficient (the circuit judge and four Justices). That indicates that the issue was close enough that a dismissal that precludes refiling because the statute of limitations has run is an undesirable result. Given the lack of a rule on the subject, the Boodt decision is a reasonable resolution of the case. But it exposes a gap in the statutory procedure that it is entirely appropriate to remedy with a court rule. A fairly short time limit for challenging the notice of intent to sue, as we propose, would deal with this issue.

The proposed alternative is similar to one developed by the State Bar's Civil Procedure and Courts Committee in 2003, approved by the Representative Assembly, and submitted to the Court. The Court published the proposal for comment [469 Mich 1235 (2003)], but ultimately decided not to adopt the amendments. The Court's February 3, 2004, order announcing its decision to close the file does not explain its reasoning. But the order publishing the proposal for comment hinted that the Court was concerned about whether the proposals conflicted with the Court's decision in McDougall v Schanz, 461 Mich 15 (1999) holding that where a statute enacts a procedure that has its basis in policy, that effectively makes the legislatively mandated procedure one of substantive law outside the Supreme Court's rule-making authority.

We believe that the McDougall principle should not be an obstacle to the Court's adopting rules like the one we are proposing . The Legislature's creation of the requirement of affidavits of merit and of meritorious defense appears to have a policy basis – discouraging frivolous prosecution and defense of malpractice action. Under McDougall, the Supreme Court could not enact rules eliminating the requirements that such affidavits must be filed. But that does not mean that the Court cannot adopt rules than implement or facilitate the affidavit requirements where the statute lacks procedural details and the absence of procedural provisions creates practical difficulties in the processing of cases.

The Court has done this in several analogous situations. For example, in MCL 600.2957 and 600.6304, the Legislature created the requirement that fault be allocated among parties and nonparties. That was a policy-based decision, implicating the McDougall principles. But the Supreme Court acted appropriately under its rule-making authority in adopting MCR 2.112(K)(2), which provides that "notwithstanding [the statute] the trier of fact shall not access the fault of a nonparty unless notice has been given as provided in this subrule." Those notice rules implemented the statutory requirement where the statute lacked such procedural provisions.

Similarly, the "Headlee" amendments to the Constitution 1963, Art 9, Secs. 25-34, establish the right to bring actions claiming Headlee violations. The Supreme Court adopted MCR 2.112(M) spelling out pleading requirements in Headlee actions. As the dissent to the order adopting the amendments shows, one can quarrel with the wisdom of those pleading requirements. But there is no suggestion that imposing such requirements is outside the Supreme Court's rule-making authority.

We appreciate the opportunity to offer this position for the Court's consideration.
Please contact me with any further questions.

Sincerely,

Janet Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Edward Pappas, President