

STATE OF MICHIGAN
IN THE COURT OF APPEALS

SUE H. APSEY and ROBERT APSEY, JR.,

Court of Appeals No: 251110

Plaintiffs-Appellants,

Shiawassee Circuit Court

v.

LC No. 01-007289-NH

MEMORIAL HOSPITAL, d/b/a/ MEMORIAL
HEALTHCARE CENTER, RUSSELL H. TOBE,
D.O., JAMES H. DEERING, D.O., JAMES H.
DEERING, D.O., P.C. AND SHIAWASSEE
RADIOLOGY CONSULTANTS, P.C.,

Defendants-Appellees.

AMICUS CURIAE BRIEF OF
THE STATE BAR OF MICHIGAN

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STATEMENT OF QUESTIONS PRESENTED

- I. DID THE PER CURIAM PANEL ERR IN CONCLUDING THAT AN OUT-OF-STATE AFFIDAVIT VALID UNDER THE UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT (URAA), MCL 565.261, *ET SEQ*, WAS INVALID AND A NULLITY?

Plaintiffs-Appellants answer “Yes”
Defendants-Appellees answer “No”
Amicus Curiae State Bar of Michigan Answers “Yes”

- II. SHOULD THE PER CURIAM PANEL’S DECISION THAT UNCERTIFIED OUT-OF-STATE AFFIDAVITS VALID UNDER THE URAA ARE DECLARED INVALID BE APPLIED PROSPECTIVELY ONLY WHERE RETROACTIVE APPLICATION WOULD RESULT IN SUBSTANTIAL INJUSTICE BECAUSE LITIGANTS AND OTHERS HAVE RELIED UPON THE PLAIN LANGUAGE OF THE URAA?

Plaintiffs-Appellants answer “Yes”
Defendants-Appellees answer “No”
Amicus Curiae State Bar of Michigan Answers “Yes”

- III. SHOULD EQUITABLE TOLLING BE APPLIED TO PROVIDE LITIGANTS AND OTHERS WHO HAVE OBTAINED UNCERTIFIED AFFIDAVITS IN RELIANCE UPON THE PLAIN LANGUAGE OF THE URAA AN OPPORTUNITY TO OBTAIN AFFIDAVITS CONFORMING TO THE PANEL’S DECISION WHERE TOLLING IS NECESSARY IN ORDER TO AVOID SUBSTANTIAL INJUSTICE WHERE LITIGANTS AND OTHERS HAVE RELIED UPON THE PLAIN LANGUAGE OF THE URAA?

Plaintiffs-Appellants answer “Yes”
Defendants-Appellees answer “No”
Amicus Curiae State Bar of Michigan Answers “Yes”

INTRODUCTION

In a per curiam opinion issued April 19, 2005, the Court ruled that an out-of-state affidavit was invalid under MCL 600.2102 because, although properly notarized, the affidavit was not certified by the clerk of the local court in the county in which the affidavit was notarized. The immediate result of the Court's opinion is that a facially meritorious action has been dismissed with prejudice and that litigants have been denied their day in court due to what can only be described as a redundant and outdated technicality. In reaching this decision, the Court ruled that another Michigan statute – the more recently enacted Uniform Recognition of Acknowledgments Act (URAA), MCL 565.261, *et seq.*, “[a]n act to establish the recognition to be given in this state to . . . notarial acts outside this state” – that explicitly authorizes use of properly notarized but uncertified out-of-state affidavits, was not controlling or available as an additional method of proving notarial acts. But practitioners and their clients have for decades rightly been relying upon the explicit provisions of the URAA that documents properly notarized outside the state will be given the same effect as those notarized inside the state. The vast majority of the members of the State Bar of Michigan who have supplied out-of-state affidavits have supplied uncertified affidavits in the belief that the plain language of the URAA would be given effect. The State Bar of Michigan submits this amicus curiae brief pursuant to the obligations imposed by State Bar Rule 1 to point out the dramatic, unintended and devastating effect the Court's ruling will have on the administration of justice and the interests of the legal profession and, above all, on the public whose interests both the courts and the legal profession exist to serve.

STATEMENT OF INTEREST

Pursuant to MCL 600.901, the State Bar of Michigan is “a public body corporate the

membership of which consists of all persons who are now and hereafter licenced to practice law in this state.” State Bar Rule 1 provides:

The State Bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state.

Inherent in the State Bar of Michigan’s duty to aid in improving relations between the legal profession and the public is the duty to aid in protecting the public from injustice. As Roberts P. Hudson, the first president of the State Bar of Michigan aptly explained, “No organization of lawyers can long survive which has not for its primary object the protection of the public.” While all three obligations imposed by State Bar Rule 1 compel the submission of this amicus curiae brief, it is the State Bar of Michigan’s duty to the public that is most directly affected by the Court’s decision. The legal profession and the public have a common interest in ensuring that valid claims and defenses recognized by the laws of this state are heard on their merits, and that the individuals, corporations, and others who seek their day in court are not denied justice on the basis of technicalities. Relations between the legal profession and the public, and the public’s perception of the courts of this state and the legal profession in general, will be compromised if the Court’s opinion remains unaltered.

ARGUMENT

I. Michigan’s Practitioners and Their Clients Have Relied on the Plain Language of the URAA Which Should Be Applied Here.

The per curiam panel erred in ruling that the affidavit at issue in this case was invalid. In 1969, the Michigan Legislature adopted the URAA, whose express purpose was “to establish the recognition to be given in this state to acknowledgments and notarial acts outside this state[.]” MCL 565.261. Consistent with this purpose, the Legislature enacted MCL 565.262, a provision explicitly providing that documents notarized outside the state of Michigan by a notary authorized by the laws

of another state are to be given the same effect as documents notarized within the state:

Notarial acts may be performed outside this state for use in this state with the same effect as if performed by . . .

- (a) A notary public authorized to perform notarial acts in the place in which the act is performed.

Id. The URAA does not exclude from its application documents that are to be read in a Michigan court, and the Legislature’s intent that the statute applies to documents to be read in Michigan courts is clear from its reference to the quantum of proof required:

If the notarial act is performed by any of the persons described in subdivisions (a) to (d), the signature, rank, or title, and serial number, if any, of the person are sufficient proof of the authority of the holder of that rank or title to perform that act. Further proof of authority is not required.

MCL 565.263. The URAA did not replace or require the repeal of prior legislation relating to notarial authority acts, but simply provides “an additional method of proving notarial acts. Nothing in the act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state.” MCL 565.268.

Lawyers and their clients, including individuals, businesses, and public entities, plaintiff and defendant alike, have relied upon the plain language of the URAA that an affidavit duly notarized outside the state will be given the same effect as an affidavit notarized within Michigan, including that a notarized affidavit is sufficient to be read in court. The Court’s decision that affidavits valid under the plain language of URAA are not entitled to be given the same effect as those notarized in this state came as a stunning surprise.

Despite the plain language of the URAA that deems the affidavit at issue – and all other properly notarized out-of-state affidavits – valid and that the URAA explicitly states that it is “an *additional* method of proving notarial acts,” the per curiam opinion reasoned that further proof of

the notary's authority in the form of certification was required by MCL 600.2102 before an affidavit could be "read" in court. The panel, which reached this conclusion primarily because the URAA is not located in the Revised Judicature Act, erred in two respects. First, the panel erred in resorting to the location of the URAA to determine the Legislature's intent rather than following the plain language of the statute. The language of the URAA is clear and unambiguous, and the Court should not have resorted to this or any rule of statutory construction where the Legislature's intent was clear from the statute itself. *Slatterly v Madiol*, 257 Mich App 242, 252 (2003).

Second, the per curiam panel failed to consider that the Legislature intended and instructed that the URAA *shall* be interpreted uniformly among the states adopting it: "This act shall be so interpreted as to make uniform the laws of those states which enact it." MCL 565.269. The per curiam panel's holding that affidavits valid under the URAA may *not* be read in a Michigan court violates the uniformity provision because other states adopting the URAA have correctly determined that the URAA is not limited to affidavits in connection with real estate transactions but instead permits all affidavits properly notarized affidavits to be read in court. Illinois, like Michigan, enacted the URAA and the Act was placed within its real property chapter. *See* 765 ILCS 30/2 (West 1994). Illinois courts correctly hold that the URAA applied to validate an out-of-state affidavit even where the Illinois election code required the affidavit to be from an Illinois notary. *See, e.g., Frost v County Officers Electoral Board*, 673 NE2d 443 (IL App 1996)(URAA affidavit taken and notarized in District of Columbia read and given effect in Illinois court). South Carolina, too, has adopted the URAA and the South Carolina Court of Appeals has held that a foreign affidavit was valid and admissible in court as an acknowledged document. *See, e.g., Lister v Nationsbank*, 494 SE 449, 453 (SC App 1998)(URAA permits reading in Court of affidavit notarized in Aruba).

Colorado recognizes that the plain language of the URAA validates out-of-state affidavits. *See, Otani v District Court*, 662 P2d 1088, 1090-91 (Colo S Ct 1983)(out of state affidavit valid under URAA “notarial acts performed by authorized notaries outside of Colorado have the same effect as if performed within the state by a Colorado notary”). Arizona, too, recognizes that out-of-state affidavits are valid under the URAA. *See, Valley Nat’l Bank of Arizona v AVCO Development Co*, 480 P2d 671 (Ariz Ct App 1971). No decision uniform to the Court’s decision has been located in any of the sixteen states having adopted the URAA.

Putting aside that the panel’s decision is inconsistent with the plain language of the URAA, requiring certification of out-of-state affidavits defeats the intent, purpose and policy of the URAA. On a practical level, certification of an out-of-state affidavit by the local court clerk is an antiquated, outdated, expensive, useless and, in some states, apparently impossible technicality. To say that certification of a sister state notary is antiquated is an understatement in 2005 when the United States Supreme Court took judicial notice of even foreign notaries at least as early as 1883. *See Pierce v Indseth*, 106 US 546, 549 (1883) (“the court will take judicial notice of the seals of notaries public, for they are officers recognised by the commercial law of the world. We thus recognize the seal to the document in question as that of the notary in Norway, and as such authenticating [the document] and entitling it to full faith and credit.”) The URAA was not the first act in Michigan to provide for the recognition of out-of-state affidavits, nor is it the last Uniform Act on the subject. In 1982, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Law on Notarial Acts. This act, which contains provisions virtually identical to those in the URAA explicitly validating out-of-state affidavits, has been adopted in a number of states and was intended to replace the URAA. Most states recognize affidavits from other states. That certification is antithetical to

the state of Michigan's courts in 2005 is clear from recent legislation adopting the nation's first "Cyber Court," among whose purposes it is to "allow business or commercial disputes to be resolved with the expertise, technology, and efficiency required by the information age economy." MCL 600.8001. The cost and inefficiency imposed by certification is staggering. Certification presumably requires a notary to travel to the local circuit court, wait in line, and have the court clerk certify the document, resulting in pointless delay and expense, quite the opposite of the "technology and efficiency" recognized by the Legislature as necessary for Michigan to prosper in today's "information age economy." While certification may have served some purpose during the 19th century when the statute was adopted, technology, relations among the states, and the economy have changed significantly and it serves no useful purpose today. Finally, certification by the clerk of the local court is a belt-and-suspenders technicality that in 2005 is simply not necessary and in at least one jurisdiction is literally impossible. While no survey of the laws of the fifty states has been attempted, anecdotally, the undersigned has learned that, by statute, clerks of the court in Florida can no longer certify affidavits. See Tab 1 (Affidavit of Dean M. Googasian), at ¶¶ 1-7. Beginning in 1998, Florida court clerks would no longer certify notarized affidavits. See *id* (attaching August 1, 1998 Notice that Dade County Clerk of Court "will no longer issue certification of notary public authority/commission"). See also, FL Stat Ann 117.103. As a result, no Florida affidavit can comply with the procedure required by the panel that a notarization be "certified by the clerk of the local court" as set forth in MCL 600.2102, and under the Court's ruling it would appear that no Florida affidavit can be "read" in a Michigan court.

II. Justice Demands That Any Certification Requirement Be Prospective Only.

The per curiam panel's opinion is inconsistent with the plain language of the URAA and the policy behind it and should be reconsidered. In the event the Court's decision stands and out-of-state

affidavits are suddenly and surprisingly invalid, the decision should be applied prospectively only, because grave injustice would result if the decision were permitted to apply retroactively. In *Gladych v. New Family Homes*, 468 Mich 594 (2003), the Michigan Supreme Court emphasized that a flexible approach should be taken to the general rule that court decisions are to be given retroactive effect “where injustice might result from full retroactivity.” *Id* at 606, quoting *Pohutski v City of Allen Park*, 465 Mich 675 (2002). The Court’s decision marks a significant and unexpected change in Michigan law and injustice would necessarily result from any retroactive application. In the present action, a facially valid and timely filed medical malpractice case will be dismissed with prejudice and the claim forever barred if the affidavit is retroactively invalidated. Countless other facially valid medical malpractice actions filed with previously valid affidavits of merit will also be dismissed.

But plaintiffs in medical malpractice cases are not the only litigants who rely on out of state affidavits, and the effect on medical malpractice actions is only the beginning of the detrimental effects that will ensue as the Court’s decision logically results in the rejection of countless other valid claims and defenses. The Court’s decision is equally unjust and troubling for corporations and individuals, for plaintiffs and defendants, for doctors and patients, and for governmental entities and citizens. The certification requirement adopted by the Court applies to *all* out of state affidavits to be read in a Michigan court and raises a number of troubling questions. Where a defendant has provided an uncertified out-of-state affidavit in response to a complaint for account stated under MCL 600.2145, is it just to permit the entry of judgment against the defendant despite the existence of a facially meritorious defense? Where a corporation has supported or opposed a motion for summary disposition with an uncertified affidavit from an employee located outside the state, must the trial court now reconsider the motion and rule that the affidavit is a nullity, as here? Are out-of-

state credit card and finance companies who have filed suit seeking to collect on debts relying on uncertified affidavits now barred from obtaining justice in the courts of this state because their affidavits were not certified? Is the affidavit of a records custodian from an out-of-state business now invalid making key documents inadmissible? Only injustice can result from retroactive application of the Court's ruling.

III. Equity Requires That Statutes of Limitation, Pleading and Filing Deadlines, and Any Other Time Periods Be Tolloed If the Decision Stands.

If the Court's decision stands and affidavits properly notarized under the URAA are suddenly invalid, justice and equity require that any pleading or filing deadline, statute of limitation, or other time period during which a litigant had to obtain or file an affidavit be tolled. In *Bryant v. Oakpointe Nursing Center*, 471 Mich 411 (2004), the Michigan Supreme Court held that the statute of limitations for a medical malpractice action should be tolled where the action was timely filed as a general negligence action but the court determined that the action should have been filed as a medical malpractice action. The Court ruled that the "equities" of the case compelled that the plaintiff be permitted to proceed with a medical malpractice action despite the expiration of the two-year statute of limitations for professional negligence. The equities of the present case are substantially more compelling than those in *Bryant*, where the law was simply unclear on whether the particular action filed qualified as medical malpractice or general negligence. Here, the law has been perfectly clear under MCL 565.262 that notarial acts performed by notaries outside the state are valid for all purposes under Michigan law, and practitioners, litigants, and businesses alike have been acting in reliance on this statute.

In *Ward v Rooney-Gandy, D.O.*, ___ Mich App __; __ NW2d __, (2005), the Michigan Court of Appeals applied the doctrine of equitable tolling recognized by *Bryant* to permit a plaintiff

to proceed with a medical malpractice action despite the failure to file a proper affidavit of merit. The plaintiff in *Ward*, who had obtained an affidavit of merit, timely filed a complaint alleging medical malpractice but had inadvertently attached the wrong affidavit of merit to the complaint. The Court ruled that the statute of limitations should be tolled based upon the equities of the case. Black's Law Dictionary defines equity as, among other things "[t]he recourse to principles of justice to correct or supplement the law as applied in particular circumstances" and provides an example: "the judge decided the case by equity because the statute did not fully address the issue."

Equitable tolling should be applied to the statutes of limitations, filing, and other deadlines in the event the Court's decision stands and the plain language of the URAA is not followed. To rule otherwise would be devastating to the interests of justice in this state and to the confidence of the public in the courts and the legal profession. Countless suits and defenses will be lost if plaintiffs and defendants are not permitted an opportunity to obtain and file certified affidavits. The entirely unnecessary cost generated by this decision will fall squarely and unjustly on those who live and do business in this state. If the Court's decision is applied retroactively, or the existing cases are not subject to tolling, numerous claims and defenses will be lost. The vast majority of practitioners within this state who have filed out-of-state affidavits have filed those affidavits without certification in justifiable reliance on the plain language of the URAA. Prior to the issuance of the Court's decision, the standard of care did not require an attorney to submit a certified out-of-state affidavit because practitioners were entitled to rely on the URAA. Accordingly, it was neither a breach of the standard of care for a plaintiff to file and rely upon an uncertified affidavit of merit, nor was it a breach of the standard of care for an attorney defending a medical malpractice action to have advised a client to settle a case or to have permitted judgment to enter against the client without raising this issue and seeking dismissal of the case. Without the ability to establish a breach of the standard of

care in failing to file a certified affidavit, the economic injury will be borne directly and solely by litigants who alone will suffer harm. Relations between the legal profession and the public, and the public's confidence in both the legal profession and the courts, which are essential to the proper functioning of our system of justice, will be devastated as litigants come to realize that they have been deprived of justice on a technicality by the very courts to which they turned for a fair resolution of their disputes. *See, e.g.*, Canon 2 of the Code of Judicial Conduct. The public can only perceive as unfair and irrelevant a judicial system that permits valid claims and defenses in Michigan to be lost on an antiquated technicality contained in a 19th century statute, when the state Legislature has subsequently adopted both the URAA and created the Cyber Court instructing the court to resolve disputes "with the expertise, technology, and efficiency required by the information age economy." MCL 600.8001(2)(b).

RELIEF REQUESTED

Amicus curiae the State Bar of Michigan urges the Court to reconsider its decision and hold the affidavit valid or apply the decision prospectively only and permit equitable tolling.

Respectfully submitted,
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Dated: May 10, 2005

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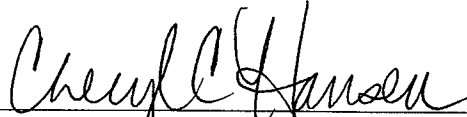
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Defendants-Appellees.

PROOF OF SERVICE

I hereby certify that a copy of **State Bar of Michigan's Amicus Curiae Brief** was served upon Jeffery S. Zilinski, 4500 E. Court Street, Burton, MI 48509 Attorney for Plaintiffs-Appellants; Mark Granzotto, 414 W. Firth Street, Royal Oak, MI 48067, Attorney for Plaintiffs-Appellants; Jose Tomas Brown, 1000 Mott Foundation Building, Flint MI 48502, Attorney for Defendant-Appellee; Loretta A. Subhi, 1715 Abbey Road, Suite A, Lansing, MI 48823, Attorney for Defendant-Appellee; Michael W. Stephenson, 333 Albert Avenue, Suite 500, East Lansing, MI 48823, Attorney for Defendant-Appellee by mailing same by First Class U.S. Mail to their above-stated addresses with postage fully prepaid thereon on May 10, 2005.

I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge, and belief.


Cheryl C. Hansen