MEDICAL MALPRACTICE – REQUIREMENTS FOR OUT-OF-STATE AFFIDAVITS OF MERIT – SIGNATURES ON OUT-OF-STATE AFFIDAVITS OF MERIT MUST BE CERTIFIED BY CLERK OF COURT FROM WHICH AFFIDAVIT ISSUES. *Apsey v. Memorial Hospital*, 702 N.W.2d 870 (Mich. Ct. App. 2005).

INTRODUCTION

In *Apsey v. Memorial Hospital*,[1] the Michigan Court of Appeals determined whether an affidavit issued by an out-of-state notary public in a medical malpractice suit required certification of the notary's authority.[2] In *Apsey*, plaintiffs brought suit against Defendant Hospital[3] in a medical malpractice suit claiming Sue Apsey was the victim of "misdiagnoses and errant reporting" which caused her to endure numerous surgeries subsequent to a routine operation.[4] Plaintiffs' affidavit of merit[5] issued from Pennsylvania and was prepared by a notary of that state.[6] Although the affidavit contained a notarial seal, it did not provide authentication of the notary's credentials.[7] The trial court granted the defendant's motion for summary disposition, reasoning that "failure to provide the special certification"[8] required by Michigan law "render[ed] plaintiffs' complaint invalid."[9] Plaintiffs contended the notarization of an out-of-state affidavit of merit was sufficient and the trial court erred in concluding the notarization must be accompanied by certification of the notary's authority.[10] The court of appeals held that certification of a notary's authority in a medical malpractice suit is required by Michigan law and any pending medical malpractice suit can comply with the requirement by filing such certification.[11]

1. 702 N.W.2d 870 (Mich. Ct. App. 2005).
2. *Id.* at 874.
3. *Id.* Plaintiffs also named as defendants two practitioners of Memorial Hospital and the business entities under which both Hospital and practitioners practice. *Id.* at 873.
4. *Id.*
5. *Id.* "[A] valid affidavit of merit must be filed with [a] complaint in order to commence an action and to toll the period of limitations." *Id.* at 871 (citing Scarsella v. Pollak, 607 N.W.2d 711, 714-15 (Mich. 2000)).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 877, 881.

I. BACKGROUND

In a medical malpractice suit, Michigan law requires "the plaintiff's attorney [to] file . . . an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness."[12] When an affidavit of merit issues from a notary public in a state other than Michigan, "the signature of such notary public . . . shall be *certified* by the clerk of any court of record in the county where such affidavit shall be taken."[13] In 1970, Michigan adopted the Uniform Recognition of Acknowledgment Act (URAA),[14] which declared that affidavits of merit taken from notaries public out-of-state may function in Michigan if the notary is "'authorized to perform notarial acts in the place in which the act is performed.'"[15] The URAA contains no certification requirement.[16] Based on these provisions, there is a question as to which statutes' requirements apply to affidavits of merit notarized for medical malpractice cases.

II. ANALYSIS

A. The URAA and Michigan Compiled Laws Section 600.2102, Read Together, Support a Conclusion that the Former Applies to Affidavits in General, While the Latter Applies to Affidavits Submitted to the Judiciary.

Both the plaintiffs and the defendants raised issues of statutory construction because the legislature's intent can often be found in the *arrangement* of a statute.[17] The URAA is found "among statutes governing conveyances of real property"[18] and section 600.2102 is found in the Revised Judicature Act.[19] The court found that neither statutes' requirements are rendered inapplicable based on arrangement because the purposes of both relate to the same matter, out-of-state notarial acts. Therefore, the statutes should be read together, if possible.[20]

The statutes can be read together because they are related by subject matter and when two statutes are related "'a specific statutory provision . . . controls.'"[21] The less formal URAA governs notarial acts in general, and

12. MICH. COMP. LAWS ANN. § 600.2912d (1) (West 2004).
13. *Id.* § 600. 2102(4) (emphasis added).
14. *Id.* §§ 565.251-565.270.
15. *Apsey*, 702 N.W.2d at 875 (quoting § 565.262(a)(i)).
16. *See id.*
17. *Id.* at 876.
18. *Id.*
19. *Id.*
20. *Id.* (citing State Treasurer v. Schuster, 572 N.W.2d 628, 632 (Mich. 1998)).
21. *Id.* at 877 (quoting Antrim Co. Treasurer v. Dep't of Treasury, 688 N.W.2d 840, 846 (Mich. Ct. App. 2004)).

section 600.2102 governs affidavits to be read and considered in judicial proceedings.[22] Therefore, the statutes can be harmonized by allowing the certification requirements in section 600.2102 to expand on the requirements of the URAA in cases where an affidavit will be submitted for consideration by the court.[23]

B. Justice and Equity Require the Holding in this Case Be Applied Prospectively to Avoid the Dismissal of Meritorious Claims.

The general rule in applying judicial decisions is that they "'are to be given complete retroactive effect.'"[24] However, the court noted that when injustice may result from a retroactive application, the court may take a more equitable approach and allow prospective application in cases of first impression where the "resolution [of an issue] was not clearly foreshadowed."[25] Many Michigan attorneys had "been under the impression that the URAA," a subsequent enactment to section 600.2102, "was the applicable statute and that special certification was not required."[26] Therefore, it is clear the issue was not foreseen.

A retroactive application of the holding in this case would have caused many meritorious medical malpractice claims to be dismissed based on failure to provide certification for otherwise acceptable out-of-state affidavits. Such a "technical forfeiture" is unwarranted for plaintiffs whose complaints would not have been dismissed but for lack of certification.[27]

C. Judge Cavanagh's Dissent

Judge Cavanagh's dissent took issue with the majority's interpretation of the URAA and section 600.2102. Judge Cavanagh reasoned that, since the URAA was enacted subsequent to section 600.2102, the URAA should be read to be an additional means of authenticating notarial acts.[28] He claimed that the majority's holding would create confusion and had the potential to become problematic, as many affidavits end up being submitted to the court for consideration during litigation long after the notarial act was performed and, in many cases, litigation is not even anticipated at the time the notary signs the affidavit of merit.[29] He also argued that the URAA "broadens the recognition accorded to notarial acts" and, therefore,

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22. *Id.*
23. *Id.*
24. *Id.* at 879 (citing Ousley v. McLaren, 691 N.W.2d 817, 821 (Mich. Ct. App. 2004)).
25. *Id.* (citing Lindsey v. Harper Hospital, 564 N.W.2d 861, 866 (Mich. 1997)).
26. *Id.*
27. *Id.* at 880 (citing Ward v. Rooney-Gandy, 696 N.W.2d. 64, 69 (Mich. Ct. App. 2005)).
28. *Id.* at 882 (Cavanagh, J., dissenting).
29. *Id.*

found no support for the conclusion that certification, a *limitation* on recognition, was required in medical malpractice suits.[30]

CONCLUSION

The majority's holding is equitable and just as it allows meritorious claims to proceed by simply filing the requisite certification with the court. However, the holding may lead to complications in interpreting statutes that appear to most practitioners to require one thing but, according to the court, require something else.[31] This opinion puts attorneys on notice to ensure that *every* out-of-state notarized document be supplemented by a certification of the notary's authority so that, *should* the case eventually go to trial, the requisite paperwork will be on file.

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30. *Id.*

31. *Id.* at 879-80 n.5 (majority opinion) (stating that an amicus curiae brief submitted by the State Bar of Michigan asserted that most members of the Bar thought it unnecessary to submit formal certification for authority and that the "plain language of the URAA would be given effect.").