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DIAGNOSING THE CHANGING STATE OF MEDICAL MALPRACTICE & NURSING HOME LIABILITY

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Michigan Court of Appeals Affirms the Exacting Requirements For Affidavits of Merit Signed On Behalf of Plaintiffs by Out of State Experts

By Jeffrey H. Chilton

On April 19, 2005, the Michigan Court of Appeals released for publication its decision in the matter of *Aspey, et. al. v. Memorial Hospital et. al.* ___ Mich. App. ___ (Docket No. 251110, rel'd 4/19/05). In *Aspey*, the Michigan Court of Appeals upheld the trial court's decision to dismiss plaintiffs' medical malpractice complaint because the affidavit of merit did not contain a special certification to authenticate the credentials of the out-of-state notary public until after the statute of limitations had run.

In *Aspey*, the Court analyzed whether the general Michigan statute governing notarial acts applies to affidavits of merit in medical malpractice litigation. Adopted by Michigan in 1970, the Uniform Recognition of Acknowledgements Act (MCL 565.261 et seq.) defines "notarial acts" as acts that the laws of this state authorize notaries public of this state to perform, including "acknowledgments of attesting documents." Under this Act, attesting documents from other states have a presumption of validity.

The *Aspey* decision holds that the Revised Judicature Act (MCL 600.2102 et seq.), which governs Michigan medical malpractice actions, controls over the general requirements of the Uniform Recognition of Acknowledgements Act. Pursuant to the Revised Judicature Act, the Court held that in order for an affidavit of merit to be valid when signed by a physician

SECRET WARDLE NOTES:

This decision will be of great importance to all health care professionals, hospitals and their counsel in efforts to dismiss medical malpractice claims. The defendant and their counsel should examine each affidavit of merit filed by plaintiffs with the complaint to ascertain whether it was signed by a physician from another state. In conjunction with this analysis, your attorney should determine whether the statute of limitations period on any particular claim has expired. In such factual situations, when the affidavit of merit has not met the out of state notarization requirements, the health care defendant's attorney should prepare, file and argue a motion for summary disposition demanding that these cases be dismissed with prejudice.

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out of state that the signature of the notary public had to be certified by the clerk of the court of record in the county where the affidavit was executed. Because no special certification to authenticate the credentials of the out-of-state notary public had been filed prior to the running of the statute of limitations, this medical malpractice litigation was dismissed with prejudice.

In light of the *Aspey* decision, every affidavit of merit filed by plaintiffs by an out-of-state physician should be reviewed to determine whether a special certification to authenticate the credentials of an out-of-state notary public has been timely filed. It is anticipated that a significant number of affidavits of merit filed by the plaintiffs' bar in Michigan fail to meet this exacting test. A significant opportunity is available to all health care professionals and their counsel to have many medical management disputes dismissed outright base upon the *Aspey* holding.

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