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Apsey Update:  
**Out-of-State Notary Certification Requirement  
to be Applied Prospectively**

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On April 19, 2005, the Michigan Court of Appeals held that if an out-of-state affidavit is filed without the appropriate special certification, it will be considered a nullity. If the statute of limitations has run, the claim must be dismissed with prejudice.

Needless to say, this decision caused more than a dull roar in the legal community because of its drastic effect on the majority of medical malpractice cases that were pending in the circuit courts.

The plaintiff, with the support of several amici, requested reconsideration and the Michigan Court of Appeals on June 2, 2005 vacated the April 19, 2005 ruling. The court decided not to review any amicus briefs filed after June 2 and a new opinion was issued on June 9.

The initial *Apsey* decision addressed only the issue of special certification in light of MCLA 600.2102. After reconsideration, the court affirmed its decision that the more specific provisions of MCLA 600.2102 controlled this issue when analyzed in conjunction with MCLA 565.262. Thus, the special certification remains mandatory for out-of-state affidavits filed in support of medical malpractice complaints. The court also stood firm in its holding that a belatedly filed certification would not cure the defective affidavit and would fail to toll the period of limitations.

However, on reconsideration the court held that dismissal of the claim would be "fundamentally unfair and would constitute an unjust technical forfeiture." Except for the notary certification, the *Apsey* claim would not have been dismissed. Thus, the court was now faced with resolving the issue of applying its decision retrospectively or prospectively.

In the interest of fairness and public policy, the court reasoned that because this decision resolved an issue of first impression, because of the possible injustice and inequity that could result from numerous cases being dismissed solely on a technicality, and because several claims were now time barred, the court ruled that its decision would be applied prospectively.

At present, those plaintiffs who are not compliant with MCLA 600.2102(4) have the opportunity to and must file the proper certification. However, any affidavit of merit acknowledged by an out-of-state notary without the proper certification that is initially filed after June 8, 2005 will not toll the statute of limitations.

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