

STATE OF MICHIGAN  
COURT OF APPEALS

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ALISHA WOOD, Personal Representative of the  
Estate of BRADLEY WOOD, Deceased,

Plaintiff-Appellant,

v

ALFRED K. BEDIAKO, M.D.; HILLSDALE  
OBSTETRICS & GYNECOLOGY, P.C.; and  
HILLSDALE COMMUNITY HEALTH  
CENTER,

Defendants-Appellees.

FOR PUBLICATION  
October 26, 2006  
9:00 a.m.

No. 267190  
Hillsdale Circuit Court  
LC No. 04-000512-NH

Official Reported Version

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Before: Zahra, P.J., and Neff and Owens, JJ.

ZAHRA, P.J. (*concurring*).

I concur in the majority's decision reversing the trial court's order granting defendants summary disposition. I write separately because I do not deem the affidavit of merit filed with the complaint pursuant to MCL 600.2912d to be invalid. Consequently, I would not decide the question whether plaintiff's complaint should be dismissed for failure to file a valid affidavit of merit with the complaint.

MCL 600.2912d(1) provides in part that

the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice . . . .

In *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000), this Court addressed the formal requirements of an affidavit, stating, "To constitute a valid affidavit, a document must be (1), a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."

In this case, the affidavit of merit filed with the complaint did not contain a completed jurat, which is "[t]he clause written at the foot of an affidavit stating, when, where, and before whom such affidavit was sworn." Black's Law Dictionary (6th ed). "Jurat" is also defined as a "[c]ertificate of officer or person before whom writing was sworn to," which commonly designates a "certificate of competent administrating officer that writing was sworn to by person who signed it." *Id.*

In *Wise v Yunker*, 223 Mich 203; 193 NW 890 (1923), our Supreme Court addressed a claim that an affidavit was invalid because the notary public failed to sign her name in the jurat. The Supreme Court reiterated the oft-cited rule governing defective jurats, stating:

"The jurat is simply a certificate evidencing the fact that the affidavit was properly made before a duly authorized officer. Although it has been said that strictly speaking it is no part of the affidavit, but simply evidence that the latter has been duly sworn to by the affiant, common prudence would dictate that a properly executed jurat be attached to every affidavit. Its omission, however, in the absence of a statute to the contrary, is not fatal to the validity of an affidavit, so long as it appears either from the rest of the instrument or from evidence *aliunde*<sup>1</sup> that the affidavit was in fact duly sworn to before an authorized officer. This rule is based upon the principle that a party should not suffer by reason of the inadvertent omission of the officer to perform his duty." [*Wise, supra* at 206, quoting 1 Ruling Case L, p 769.]

MCL 600.2912d(1) does not expressly require a jurat, but only "an affidavit of merit signed by a health professional . . . ." Compare this with MCL 211.83(1) ("verified affidavit") and MCR 2.113(A) ("an affidavit must be verified by oath or affirmation"). See also *Merrifield v Paw Paw*, 274 Mich 550, 552; 265 NW 461 (1936) (statute expressly required certified or verified complaint); *Kelley v City of Flint*, 251 Mich 691, 695-696; 232 NW2d 407 (1930) (ordinance required duly verified complaint).

The majority concludes that "the unnotarized affidavit filed with the complaint in this case was not valid" under MCL 600.2912d(1) for purposes of commencing a medical malpractice action. *Ante* at \_\_\_\_\_. In doing so, the majority relies on *Holmes*, which distinguished *Wise* on the basis that, "[i]n *Wise*[, *supra*], the affidavit in question was not, as here, completely devoid of a jurat." *Holmes, supra* 711-712. Admittedly, the affidavit of merit in this case is also completely devoid of a jurat. However, *Holmes* also stated that, "[b]ecause no indication exists that the doctor confirmed the document's contents by oath or affirmation before a person authorized to issue the oath or affirmation, the document does not qualify as a proper affidavit." *Id.* at 712.

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<sup>1</sup> "Evidence aliunde" is defined as "[e]vidence from outside, from another source. In certain cases a written instrument may be explained by evidence *aliunde*, that is, by evidence drawn from sources exterior to the instrument itself, e.g., the testimony of a witness to conversations, admissions, or preliminary negotiations." Black's Law Dictionary (6th ed), p 73.

Here, however, not only does evidence aliunde exist that Dr. Berke duly swore to the affidavit of merit before a notary public, but evidence of this event is contained in the lower court record. In response to one defendant's motion for summary disposition, plaintiff filed a copy of the affidavit of merit containing the completed jurat. Further, defense counsel admitted, at the summary disposition hearing, that Dr. Berke testified in his deposition that he swore to and signed the affidavit of merit before a notary public. Indeed, no one disputes that Dr. Berke signed the affidavit of merit under oath before a notary public. Thus, because there is evidence aliunde and evidence in the lower court record that Dr. Berke signed the affidavit of merit before a notary public under oath, *Holmes* is simply not applicable. And because a "decision of the Supreme Court is binding upon this Court until the Supreme Court overrules itself," *O'Dess v Grand Trunk W R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996), citing *Hauser v Reilly*, 212 Mich App 184, 187; 536 NW2d 865 (1995), *Wise* must be followed.<sup>2</sup> Accordingly, plaintiff's affidavit of merit filed with the complaint cannot be held invalid.

Moreover, I question the majority's analysis of whether the affidavit of merit was valid under *Holmes*. As mentioned, "To constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Holmes, supra* at 711.

A careful reading of this test reveals no requirement that a notary public sign an affidavit; rather, the affidavit must be "confirmed by the oath or affirmation of the party making it . . . ." Here the affidavit of merit indicates that "MICHAEL BERKE, M.D., being first duly sworn, depose[s] and state[s] as follows . . . ." Dr. Berke signed the affidavit. Further, the test merely provides that the affidavit of merit be "taken before a person having authority to administer such

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<sup>2</sup> Further, in cases cited by defendants, courts specifically indicated that the lower court record did not show that the affiant confirmed the affidavit's content by oath or affirmation before a notary. See *Holmes, supra* at 712 ("[N]o indication exists that the doctor confirmed the document's contents by oath or affirmation before the person authorized to issue the oath or affirmation . . . ."); *Jewell v Pinson*, unpublished opinion per curiam of the Court of Appeals, issued September 1, 2005 (Docket No. 255661), slip op at 1 ("[N]one of the affidavits were notarized, nor was there any indication that the affidavits were made under oath or affirmation.") (emphasis added); see also *Knobloch v Langholz*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2002 (Docket No. 231070), slip op at 2 ("[P]laintiff provides no other evidence that [the affiant's] statement was made before a person duly authorized to administer an oath.").

Further, defendants' reliance on *Glancy v David Steinberg*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2003) (Docket Nos. 237963 and 237976), is without merit. In *Glancy, supra*, slip op at 2, the notary public testified that "while she signed the jurat on each affidavit acknowledging that the affidavit was subscribed and sworn before her, she did not know either affiant, Gonzales or Thomas, she did not witness their signatures, she did not verify the affiants' identities, and she did not administer an oath to either affiant."

oath or affirmation," not that the affidavit be signed or verified by the notary public. Accordingly, under the test stated in *Holmes*, I would find the affidavit of merit valid.

Finally, I conclude that the affidavit filed with the complaint was effective because there would be sufficient evidence to sustain a perjury charge, assuming statements in the affidavit were willfully false. See *Clarke v Wayne Circuit Judge*, 193 Mich 33, 35; 159 NW 387 (1916) (recognizing the contrapositive of this statement). MCL 750.423 provides:

Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall wilfully swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required, shall be guilty of perjury, a felony, punishable by imprisonment in the state prison not more than 15 years.

Here, Dr. Berke is "authorized" as an expert under MCL 600.2912d to execute an affidavit of merit in support of a medical malpractice claim. Although the jurat on the affidavit of merit filed with the complaint was not completed, the affidavit of merit filed with the complaint itself need not provide the entire basis of a perjury charge. Defense counsel indicated to the trial court that Dr. Berke testified at his deposition that he signed a notarized affidavit of merit. Further, the notary public who is shown on the later-submitted affidavit of merit can testify that, on a particular day, Dr. Berke subscribed and swore to her the contents of the affidavit of merit filed with the complaint. Therefore, while I believe that plaintiff's counsel was not prudent in submitting an unnotarized affidavit of merit with the complaint, I nonetheless find the affidavit valid.

/s/ Brian K. Zahra