

STATE OF MICHIGAN
COURT OF APPEALS

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellants,

v

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.

FOR PUBLICATION

April 19, 2005

9:10 a.m.

No. 251110

Shiawassee Circuit Court

LC No. 01-007289-NH

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiffs, Sue Apsey and Robert Apsey, appeal as of right from a circuit order granting summary disposition to defendants, Memorial Hospital, two of its practitioners, Doctors Russell Tobe and James Deering, and the business entities under which they respectively practice. We affirm.

Plaintiffs commenced this action in November 2001, stating that plaintiff Sue Apsey was admitted to defendant Memorial Healthcare Center for an “exploratory laparotomy,” which resulted in the removal of a large ovarian cyst. Various complications followed. Plaintiffs allege that misdiagnoses and errant reporting attendant to those complications caused Sue Apsey to become “septic,” requiring several follow-up surgeries.

Plaintiffs’ affidavit of merit was prepared in Pennsylvania, using a notary public of that state. A normal notarial seal appears on the document, and it is not disputed that plaintiffs initially provided no special certification to authenticate the credentials of the out-of-state notary public. Instead, plaintiffs provided such certification on July 25, 2003, after the statute of limitations had run on their cause of action. Defendants motioned the trial court for summary disposition with regard to plaintiffs’ medical malpractice claims citing MCL 600.2912d and 600.2102. The court in granting the motions reasoned that the failure to provide the special certification was fatal to the notarization, and, thus, that the affidavit itself was a nullity, rendering plaintiffs’ complaint invalid.

At issue in this appeal is whether MCL 565.262, the general statute governing notarial acts, governs affidavits of merit in medical malpractice cases, or whether the more demanding requirements of MCL 600.2912d apply. Plaintiffs contend that the trial court erred in granting defendants' motion for summary disposition, holding that an out of state affidavit of merit in a medical malpractice case not only must be notarized, but also must be accompanied by a certificate setting forth the notary's authority. We disagree, and on review de novo, we find that the circuit court properly granted defendants' motions for summary disposition.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Statutory interpretation likewise presents a question of law, calling for review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

MCL 600.2912d(1) provides, in part, that:

[T]he 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 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

Subsections (a) through (d) go on to set forth the particulars to which the expert must attest. An affidavit for these purposes must be "confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Holmes v Capital Medical Center*, 242 Mich App 703, 711; 620 NW2d 319 (2000). In the medical malpractice context, a valid affidavit of merit must be filed with the complaint in order to commence action and toll the statute of limitations. *Scarsella v Pollak*, 461 Mich 547, 552-553; 607 NW2d 711 (2000).

In this case, neither the need for an affidavit of merit, nor the requirement that one be notarized, are in dispute. The controversy instead concerns what constitutes a valid out-of-state notarization. In 1924, our Supreme Court reiterated that there is a legislative requirement that, where an affidavit is submitted to a court, and authenticated by an out-of-state notary public, in order for the court to consider the affidavit, the signature of the sister-state notary public had to be certified by the clerk of the court of record in the county where the affidavit was executed. *In re Alston's Estate*, 229 Mich 478, 481-482; 201 NW 460 (1924). Similarly, MCL 600.2102, effective in 1963, states that "where by law the affidavit of any person residing in another state . . . is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated . . ." Subsection (4) specifies that an affidavit taken in a sister state "may be taken before . . . any notary public . . . authorized by the laws of such state to administer oaths therein," adding, "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, under the seal of said court." This language closely mirrors that construed by our Supreme Court in *In re*

Alston's Estate, supra at 481; see also *Wallace v Wallace*, 23 Mich App 741, 744-745; 179 NW2d 699 (1970).

Effective in 1970, Michigan adopted the Uniform Recognition of Acknowledgements Act (URAA), MCL 565.261 *et seq.* “Notarial acts” are defined as “acts that the laws of this state authorize notaries public of this state to perform, including the . . . acknowledgements of instruments, and attesting documents.” MCL 565.262(a). Notarial acts performed in a sister state may function in this state as if performed by a Michigan notary public if performed by “[a] notary public authorized to perform notarial acts in the place in which the act is performed.” MCL 565.262(a)(i). MCL 565.263(1), of the URAA, provides as follows:

If the notarial act is performed by any of the persons described in subdivisions (a) to (d) of section 2, other than a person authorized to perform notarial acts by the laws or regulations of a foreign country, the signature, rank or title and serial number, if any, of the person are sufficient proof the authority of a holder of that rank or title to perform the act. Further proof of this authority is not required.

MCL 565.263(4) states that the “signature and title of the person performing the act are prima facie evidence that he is a person with the designated title and that the signature is genuine.”

If the present inquiry were to be decided based on the URAA, the notarization of the affidavit in question would indisputably be valid. Plaintiffs’ affidavit of merit bears the signature and notary seal of a Pennsylvania notary public. That status in another state carries over to this state, and the signature and title are prima facie evidence of authenticity, MCL 565.263(4). The question, then, is whether MCL 565.262 effects MCL 600.2102, and, if so, in what manner.

When this issue was initially raised before the trial court, only the applicability of MCL 600.2102 was argued. The court recognized the inflexibility of that statute, and decided to grant summary disposition. In a subsequent hearing that the court treated as a motion for reconsideration, plaintiffs argued that MCL 565.262 should apply to the exclusion of MCL 600.2102. The court was not persuaded, and, without elaboration, stated that arguments from MCL 565.262 would not have changed its earlier decision.

The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Haworth, supra* at 227. Statutes that have a common purpose should be read to harmonize with each other in furtherance of that purpose. *Jennings v Southwood*, 446 Mich 125, 136-137; 521 NW2d 230 (1994); *Antrim County Treasurer v State*, 263 Mich App 474, 481; 688 NW2d 840 (2004). Where a specific statutory provision differs from a related general one, the specific one controls. *Gebhardt v O’Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994).

Defendant Deering argues that the specific mention of affidavits in MCL 600.2102 indicates greater legislative specificity than the general mention of notarial acts in MCL 565.262. However, the general language of the latter obviously is a consequence of the statute’s covering acts in some cases performed by others than notaries public, the latter themselves, in and out of state, being expressly mentioned, along with “attesting documents,” in MCL 565.262(a).

Affidavits, and the role of the notary public in executing them, are obviously envisioned. However, “the meaning of the Legislature is to be found in the terms and *arrangement* of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense.” *Gross v General Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995) (emphasis added). It is well, then, to note the structural placement of the two statutory schemes.

The Uniform Recognition of Acknowledgements Act appears among statutes governing conveyances of real property. The emphasis, then, is not on documents submitted to Michigan courts, but on documents that have potentially great legal significance in other contexts, e.g., memorializing agreements or recording conveyances and interests.

But MCL 600.2102 appears within the Revised Judicature Act, MCL 600.101 *et seq.*, and it retains its predecessor’s language concerning affidavits “received in judicial proceedings,” which our Supreme Court construed as strictly requiring that special certification accompany notarizations by out-of-state notaries public. *In re Alston’s Estate, supra* at 481-482. Plaintiffs point out that this statute is sandwiched between provisions governing evidence, and argue that it thus applies only where the affidavit in question is to be read into evidence. However, the statute itself sets forth what is required for a sister-state affidavit “to be read,” not to be read specifically into evidence. “Read” for this purpose means acknowledged and considered by the court, not necessarily read into evidence. See *Berkery v Circuit Judge*, 82 Mich 160, 167-168; 46 NW 436 (1890).

Additionally, MCL 565.268 of the URAA, provides in pertinent part that, “Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state.” The Legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws. *Walen v Dep’t of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993); *Kalamazoo v KTS Industries, Inc*, 263 Mich App 23, 34; 687 NW2d 319 (2004). MCL 600.2102 is a law of this state, which requires more specific recognition requirements for notarial acts; i.e., requires that the signature of a notary public on an affidavit taken out of state be “certified by the clerk of any court of record in the county where such affidavit shall be taken, under seal of said court.” As such, the URAA, enacted after MCL 600.2102, does not diminish or invalidate the more specific and more formal requirements of MCL 600.2102.

For the above reasons, we find that the more specific requirements of MCL 600.2102, of the Revised Judicature Act, control over the general requirements of MCL 565.262, of the Uniform Recognition of Acknowledgements Act. See *Gebhardt, supra* at 542-543. In other words, MCL 565.262 governs notarial acts, including the execution of affidavits, in general, to which MCL 600.2102 adds a special certification requirement when the affidavit is to be read, meaning officially received and considered, by the judiciary. This special certification requirement of MCL 600.2102 is not diminished or invalidated by the subsequently enacted URAA. See MCL 565.262. As such, the trial court correctly regarded the special certification as a necessary part of the affidavit submitted, and correctly dismissed the case for lack of timely submission of that certification.

In *Scarsella, supra*, the Supreme Court was faced with a complete failure to file an affidavit of merit. The Court left for later decisional development the question of the appropriate legal response when a “timely filed affidavit is inadequate or defective.” *Id.* at 553. Such

decisional development from this Court indicates that “whether the adjective used is ‘defective’ or ‘grossly nonconforming’ or ‘inadequate,’” where a plaintiff’s affidavit failed to meet the applicable statutory standards, it “was defective and did not constitute an effective affidavit,” and therefore failed to support a medical malpractice complaint for purposes of tolling the statute of limitations. *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003). See also *VandenBerg v VandenBerg*, 253 Mich App 658, 662; 660 NW2d 341 (2002) (unless a plaintiff has moved for a statutorily provided extension, the plaintiff may not file a medical malpractice complaint without an affidavit of merit then cure the latter deficiency by filing the affidavit after the statute of limitations has run). Consequently, plaintiffs in the instant case should not be permitted to use their belatedly filed certification of their Pennsylvania notary public to cure that defect in their otherwise timely complaint and affidavit.¹

The trial court correctly concluded that plaintiffs’ affidavit of merit failed because of the lack of special certification regarding the out-of-state officer who notarized it.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage

¹ Our position is further supported by *Lee v Putz*, unpublished opinion of the United States District Court, Western District of Michigan, issued December 10, 2003 (File No. 1:03-CV-267), where the district court, applying MCL 600.2102, found in connection with an affidavit of merit notarized by an out-of-state notary that, “[b]ecause an affidavit without the appropriate certification is null and void under Michigan law, Plaintiff has failed to assert a claim that is cognizable in Michigan state courts.” The court further found that the plaintiff could not cure because of the statute of limitations. We note that defendant Deering appended this federal court holding to his brief, however, for reasons not explained, the names of the parties, and the file number, have been redacted. But an unredacted copy is attached to defendant Memorial Hospital’s brief. We further note that, although not binding, this case stands as another recent example where MCL 600.2102 was taken to impose a certification requirement on out-of-state notaries public involved with affidavits of merit in medical malpractice cases. See *Sharp v Lansing*, 464 Mich 792, 803; 629 NW2d 873 (2001). Furthermore, this Court in *Sellers v Goldapper*, unpublished per curiam opinion of the Court of Appeals (Docket No. 196914, issued November 4, 1997), found a defendant’s affidavit to show a meritorious defense to be a nullity under MCL 600.2102(4) for lack of certification of the notary’s signature when the defendant was a New York resident. We view this unpublished opinion by a panel of this Court, requiring an affidavit from an New York resident to meet the requirements of MCL 600.2102(4), as persuasive, because of the limited case law, but note that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1); see also *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).