

STATE OF MICHIGAN
IN THE COURT SUPREME COURT

JAMES WADE

Plaintiff-Appellee

Supreme Court No. 151196
Court of Appeals No. 317531
Iosco County Circuit Court No. 12-29148 NH

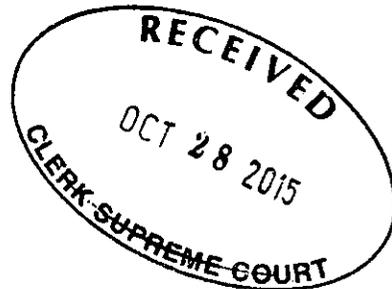
v

WILLIAM McCADIE, D.O.; and
ST. JOSPEH HEALTH SYSTEM d/b/a
HALE ST. JOSEPH MEDICAL CLINIC

Defendants-Appellants

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JURISDICTION SUMMARY

Jurisdiction was conferred upon the Court of Appeals by MCR 7.203 (A) (2). The Order Granting Defendant's Motion for Summary Disposition was entered June 19, 2013, in the Iosco County Circuit Court by the Honorable Ronald M. Bergeron. The Order Denying Plaintiff's Motion for Reconsideration was entered July 10, 2013, in Iosco County Circuit Court by the Honorable Ronald M. Bergeron. Those orders adjudicated all claims.

Jurisdiction is conferred upon the Supreme Court by MCR 7.305 (H) (1) to determine whether or not leave to appeal will be granted or other action will be taken on Appellants' application for leave to appeal.

STATEMENT OF QUESTIONS PRESENTED

I.

DOES THE 91-DAY EXTENSION PROVIDED IN MCL 600.2912b (5) FOR FILING AN AFFIDAVIT OF MERIT APPLY WHERE PLAINTIFF CLAIMS THAT DEFENDANTS DID NOT PRODUCE ALL MEDICAL RECORDS WITHIN 56 DAYS AFTER RECEIPT OF THE NOTICE OF INTENT AS REQUIRED BY MCL 600.2912b (5)?

Plaintiff-Appellee says Yes

Defendant-Appellant says No

The Court of Appeals says Yes

The Trial Court says No

II.

WERE DEFENDANTS OBLIGATED UNDER MCL 600. 2912b (5) TO EXPLAIN TO PLAINTIFF THAT CERTAIN RECORDS COULD NOT BE PRODUCED BECAUSE THEY HAD BEEN DESTROYED?

Plaintiff-Appellee says Yes

Defendant-Appellant says No

The Court of Appeals says Yes

The Trial Court says No

III.

ARE BILLING RECORDS COMPILED INCIDENT TO MEDICAL CARE MEDICAL RECORDS FOR PURPOSES OF MCL 600.2912b (5)?

Plaintiff-Appellee says Yes

Defendant-Appellant says No

The Court of Appeals says Yes

The Trial Court says No

STATEMENT OF FACTS

On February 23, 2012, Gregory Brown, M.D. met with Appellee James Wade to discuss the results of his extensive diagnostic workup. Dr. Brown informed Appellee that he believed that he was suffering from “renal failure likely related to poorly controlled hypertension”. Dr. Brown also opined that his poorly controlled hypertension had likely been “longstanding”. Dr. Brown advised Appellee that his hypertension had “not been sufficiently treated” by his primary care physician for many years. (See Exhibit 1.) (Appellee’s cause of action did not accrue on “April 21 or 25, 2011”, it accrued on February 23, 2012, when he first discovered that Appellant William McCadie, D.O. might have mistreated his hypertension for years causing his renal failure.)

With that information in hand, Appellee retained the undersigned to investigate a possible medical malpractice claim against Appellant McCadie, who had been his primary care physician for more than 30 years. During most of that time Appellant McCadie had been an employee of the St. Joseph Mercy Health System d/b/a Hale St. Joseph Medical Clinic (SJHS-previously known as the Hale Clinic, P.C. and the Huron Forest Medical. The investigation began with a simple medical records request dated April 2, 2012, forwarded to Appellants. (See Exhibit 2.) In response to that request Appellant SJHS forwarded a request for payment dated April 23, 2012, to cover the cost of copying 134 pages of medical records. The undersigned paid the requested charge on April 26, 2012, assuming that the complete chart covering Appellee’s care and treatment at the clinic would be provided. (See Exhibit 3.)

After those records were thoroughly reviewed by the undersigned, there were a couple of obvious omissions. First, no billing or payment records were provided. Second, the first clinical

note for medical care was dated November 19, 1979; however, the first record of any laboratory test results was dated March 13, 1992. (See Exhibit 4.) Since Appellee had been advised by Dr. Brown that his hypertension had likely been poorly controlled over a long period of time resulting in renal failure, it was critical for the undersigned to review Appellants' serial clinical assessments of blood pressure levels between 1979 and 2012, which were needed to correlate changes blood pressure readings with laboratory test results intended to measure kidney function. The clinical summaries including blood pressure readings appeared to be complete and *were* provided in response to the initial request for medical records. The laboratory test results provided in response to the initial request were not complete, since the laboratory test results for BUN and creatinine levels obtained between 1979 and 1992 **were not** provided. Those test results were essential in correlating changes in blood pressure levels with changes in Appellee's kidney function testing over the 30 years of treatment. They were also critical in determining whether or not the changes in kidney function might be due to other causes. Final, the billing information, which was needed in order to compare dates in the clinical record with dates when charges were assessed, was *not* provided in response to the initial request for records. Even though it appeared as if the undersigned had been provided with a complete clinical chart, often times patients are charged for visits that are not documented in the clinical assessment section of the chart, which would indicate that their record keeping was suspect. In addition, when no laboratory records were provided for 1979-1992, it was important to see if the patient or the patient's insurer was charged for testing during that time.

Since Appellee had been advised by Dr. Brown on February 23, 2012, that there was reason to believe that he had been poorly treated by Appellant over many years, the applicable statute of limitations date was August 23, 2012, as set forth in MCL 600.5838a (2), which is the

discovery statute. Following discussions with an expert it was determined that the records provided were insufficient to render a definitive opinion as to when the negligence first occurred without the complete chart; therefore, a notice of intent was filed on August 21, 2012, pursuant to MCL 600.2912b (4) and served on both Appellants pursuant to MCL 600.2912b (2). (The document was dated August 20, 2012; however, the document was actually mailed on August 21, 2012. See Exhibit 5.) In that notice of intent the undersigned made it perfectly clear to Appellants that the packet of medical records, which had already been provided, was incomplete. Specifically, the notice of intent contained the following statements: "Some medical records have already been provided; however, the clinic notes [begin] with November 19, 1979, but the laboratory results begin with [1992]. As a result the undersigned would request the entire chart be provided." (See Exhibit 5, page 1. The notice of intent mixed up the dates; however, those mistakes were cleared up in later correspondence. See below.) In addition, the following statement was made regarding the billing and payment records, "The term medical record includes....billing and payment records". (See Exhibit 5, page 1.) MCL 600.2912b (5) specifically required that Appellants provide "claimant access to *all medical records* related to the claim that are in the control of the health professional or health facility" within 56 days after receipt of the notice of intent". (Emphasis added.)

Since the notice of intent was received by Appellants on August 22, 2012, access to *all medical records* had to be provided no later than October 17, 2012. (See Exhibit 5.) It is undisputed that no additional records were provided to the undersigned on or before October 17, 2012. On September 17, 2012, which was a full month before the 56-day requirement for production of *all medical records* expired, counsel for Appellants ironically sent a letter to the undersigned requesting that Appellee fully comply with the requirements placed upon him by

MCL 600.2912b (5) and provide a complete copy of “*all medical records* in his control”. Yet there was nothing in that letter that indicated that Appellants intended to comply with their statutory obligations and provide Appellee with access to *all medical records*. (See Exhibit 6.) In response to counsel’s letter the undersigned obtained Appellee’s signature on the medical records release forms and returned them to counsel for Appellants. In the cover letter enclosing the executed medical records release forms dated September 25, 2013, the undersigned corrected the date errors in the notice of intent; and requested that counsel for Appellants promptly forward the records requested in the notice of intent. In addition, the undersigned offered to meet with counsel to exchange records at a time convenient for both parties. (See Exhibit 7.) It should be noted that that letter was dated September 25, 2012, which was still within the 56-day period of time set forth in MCL 600.2912b (5), during which both parties were required to provide access to *all medical records*. Again, there is no dispute that counsel for Appellants did **not** agree to provide access to *all medical records*; nor did counsel for Appellants notify the undersigned that some of the records had been destroyed.

Before the 182-day notice of intent period expired, the undersigned again reached out to counsel for Appellants (the fourth request) in a letter dated January 2, 2013. In that letter, the undersigned referenced the earlier letter requesting cooperation in exchanging *all medical records* pursuant to MCL 600.2912b (5); and the undersigned again extended an offer to meet and to exchange *all medical records* in their possession. (See Exhibit 8.) There is no dispute that counsel for Appellants did not respond in any form to the repeated offers to meet and exchange *all medical records*.

When the 182-day notice of intent period expired, Appellee filed his complaint in this matter, and named Appellants as defendants. That complaint was filed on February 22, 2013,

and it was filed without an affidavit of merit pursuant to the provisions of MCL 600.2912d (3), which permitted a 91-day extension of time to file an affidavit of merit, if the health care providers had failed to comply with the provisions of MCL 600.2912b (5) in a timely manner. In the instant case Appellants and their counsel had clearly failed to comply with the provisions of MCL 600.2912b (5), when they failed to provide the laboratory test results obtained between 1979 and 1992; and when they had failed to provide the billing and payment information. Plaintiff filed his affidavit of merit on May 24, 2013, which was within the 91 days permitted. The Affidavit of Merit was executed on May 22, 2013. (See Exhibit 9.)

Appellants were served with a request for production of certain documents on March 13, 2013 and March 4, 2013 respectively, which obviously included a request to produce the relevant medical records. (See Exhibit 10.) Pursuant to MCR 2.310 Appellants were to have complied with that request within 42 days, since the requests were served with the Complaint by certified mail.

Finally, on April 24, 2013 (the 42nd day following service of the request for production on one of the Appellants) counsel for Appellants and the undersigned met to exchange *all medical records* within the parties' control. During that meeting it was apparent that counsel for Appellants did not have the missing laboratory records and did not have the billing records. Counsel for Appellants indicated that she did not know why those records were not in her file; and that she would attempt to learn from her clients as to why those documents had not been provided to her. Ironically, the undersigned offered and counsel for Appellants accepted for copying *all medical records* in control of the undersigned. In a letter dated May 15, 2013, which was more than three weeks later, counsel for Appellants informed the undersigned for the first time that the missing laboratory records collected between 1979 and 1992 no longer existed,

because they had been destroyed. Counsel for Appellants in that letter did not explain why the laboratory records had been destroyed, while the clinical records covering the same period of time were supposedly maintained intact. Nor did counsel for Appellants offer to provide the billing records covering the entire 30+ years of treatment. (See Exhibit 11.)

On May 3, 2013, counsel for Defendants filed their motion for summary disposition pursuant to MCR 2.116 (C) (7). In that motion, Defendants claimed that Plaintiff had not timely filed his complaint, because Plaintiff had not filed an affidavit of merit with the complaint as required by MCL 600.2912d (1). Oral arguments were held on June 3, 2013, before the Honorable Ronald M. Bergeron in the Iosco County Circuit Court. During oral arguments the undersigned stated that if Appellants intended to claim that they had provided the billing and payment information, an evidentiary hearing would be necessary to resolve that issue. The Court then turned to counsel for Appellants and asked if they were claiming that they had in fact provided the billing and payment records to Appellant or to the undersigned. Counsel for Appellants responded by clearly stating that that was not their claim. Counsel for Appellants clearly stated that they had never provided the billing and payment records to Appellee or to the undersigned. (Tr. pages 22-23.)

Following oral arguments Judge Bergeron granted Appellants' motion for summary disposition, and detailed his reasoning for granting that motion on the record. (Tr. page 23.) The Order Granting Defendants' Motion for Summary Disposition was entered on June 19, 2013. Appellee filed a Motion for Reconsideration dated July 8, 2013. The Honorable Ronald M. Bergeron denied Appellee's Motion for Reconsideration in an order dated July 10, 2013. Appellee filed his Claim of Appeal on July 31, 2013. The court reporter filed the transcript on August 28, 2013. Appellee filed a Motion to Extend Time to File Brief on October 18, 2013,

which was granted by the Court of Appeals on October 30, 2013, which granted Appellee an extension until November 20, 2013, to file his brief. The Court of Appeals issued its decision on January 29, 2015, after oral arguments heard on November 13, 2014. Appellants filed this application for leave to appeal on March 11, 2015. Appellee did not file a brief in opposition to Appellants' application for leave to appeal, choosing to stand on its earlier brief and the Court of Appeals unpublished decision. On September 16, 2015, this Court ordered the clerk to schedule this matter for oral arguments on whether to grant the application or take other action pursuant to MCR 7.305 (H) (1) and gave the parties 42 days to file supplemental briefs addressing three specific issues.

STANDARD OF REVIEW

Appellate review of decisions granting summary disposition pursuant to MCR 2.116 (C) (7) is *de novo*. *Maiden v Rozwood*, 461 Mich 109, 119 (1999) and *Titan Ins Co v Hyten*, 491 Mich 547, 553 (2012). Moreover, issues of statutory construction are also reviewed *de novo*. *Romain v Frankenmuth Mutual Ins. Co.*, 483 Mich 18, 25 (2007).

INTRODUCTION

It is important to highlight the legislative history and legislative purpose behind the statutes that are being discussed in this litigation. In 1993 the Michigan Legislature passed the relevant statutes and amendments that are applicable to this litigation. MCL 600.2912d was originally enacted in 1987 as part of the initial medical malpractice reform effort by the

Legislature. It was amended in 1993 in part to add § (3), which is the relevant portion of the statute in this litigation. MCL 600.2912b was enacted in 1993 as part of the Legislature's package of new statutes and amendments intended to tweak its earlier efforts at medical malpractice reform. The Legislature believed that if notice of intent requirements were added to the earlier package of reforms the amount of litigation could be decreased since the claimant and the health professional or health facility would be given a time out period during which they could exchange information leading to resolution of their differences through settlement. It should be noted that MCL 600.2912b (5) contains two identical clauses regarding the disclosure of *all medical records*. One provides that the claimant *shall* provide "access to *all medical records* related to the claim that are in the claimant's control"; and the other provides that the health professional or health facility *shall* provide "claimant access to *all medical records* related to the claim that are in the control of the health professional or health facility". (Emphasis added.)

When MCL 600.2912b was enacted in 1993, the Legislature realized that they had to ensure that the claimant and the health professional or health facility fully cooperated and exchanged *all medical records* that each party had in their control, in order to facilitate open discussions regarding the merit of the claim; therefore, § (3) was added to the previously enacted MCL 600.2912d, so that the health professional or health facility would have reason to cooperate in the settlement effort and the claimant would not be prejudiced if the health professional or health facility decided to play games and not fully cooperate in the settlement effort. The Legislature believed that if the 182 day notice of intent period came to a close and the health professional or health facility had not provided claimant access to "*all medical records* related to the claim that are in the control of the health professional or health facility" as required

by MCL 600.2912b (5), then the claimant would need additional time to secure any missing records that had not been provided and time to secure the necessary affidavit of merit. It should be noted that the Legislature also realized that the claimant might not want to fully cooperative in the process, so it enacted § (3) as an amendment to MCL 600.2912e in 1993, which was identical to the provisions of MCL 600.2912d (3), except for changing the identity of the offending party and the name of the party entitled to additional time to file an affidavit of merit.

In drafting both of those amendments the Legislature was clearly sending a message to the parties, i.e. we believe that complete disclosure of *all medical records* is essential to the process of resolving these matters without the necessity of litigation. If the health professional or health facility did not provide the “*all medical records* related to the claim that are in the control of the health professional or health facility” within 56 days after receipt of the notice of intent, the claimant would be allowed an additional 91 days to comply with the affidavit of merit requirement. It should be repeated that MCL 600.2912b (5) also required that the claimant to provide “access to *all of the medical records* related to the claim that are in the claimant’s control”.

Even though history has demonstrated that the health professionals and health facilities have not participated in the process as expected, led by the defense bar and the insurance carriers; the clear legislative purpose and history is well known and should not be overlooked when trying to determine the Legislative intent. The majority in the Court of Appeals panel in the instant case had no problem finding that the phrase “*all medical records*” contained in MCL 600.2912b (5) was synonymous with the term “medical records” that appears in both MCL 600.2912d (3) and MCL 600.2912e (3), since the latter two statutes specifically referenced the earlier statute; however, Judge Meter in his dissent felt that those two statutes should be read to

say that the health professional, the health facility, and the claimant need only provide access to those medical records that were “necessary to prepare an effective affidavit”.

The undersigned hopes that Judge Meter’s decision was based upon his misreading of the evidence. Judge Meter and counsel for Appellants have repeatedly pointed to the fact that Plaintiff was able to file an Affidavit of Merit within the 91 days after filing his Complaint without having obtained any additional information. That assertion is absolutely incorrect. The Complaint in this matter was filed on February 22, 2013, without an affidavit of merit attached. At that time the undersigned did not know why the records requested in the notice of intent had not been provided pursuant to MCL 600.2912b (5); and the undersigned did not know why counsel for Appellants had ignored three specific requests to exchange *all medical records*. On April 24, 2013, counsel for Appellants and the undersigned first met regarding the medical records issue. It was at that time that the undersigned first learned that counsel for Appellants did not have the missing records or the billing records in their file; but still had not been informed that the records had been destroyed. That revelation was followed by a letter from counsel for Defendants dated May 15, 2013, in which counsel stated that the requested laboratory data had been destroyed. In the same letter counsel for Appellants made no mention of the billing records. So, between the filing of the Complaint on February 22nd and the execution of the Affidavit of Merit on May 22nd, the undersigned had learned many critical facts that had not been known when the complaint was filed. Specifically, it was learned that despite being served with the notice of intent and two letters requesting an exchange *all medical records*, counsel for Appellants did not even know that the requested laboratory test results had been destroyed. Still further, it was learned that counsel for Appellants were again refusing to produce the billing records. The undersigned then knew that given the time constraints at that

point, it would be necessary to prepare an affidavit of merit limited by the fact that certain records were not going to be available; however, the undersigned had wanted to expand the claims of negligence and proximate cause beyond the ones contained in the Affidavit of Merit as filed. In fact, this litigation might not have been filed at all if the laboratory and billing records had indicated that Appellants' negligent conduct had commenced more than six years earlier, given the statute of repose limitations; however, with Appellants' assertion that the critical laboratory and billing records were not going to be produced, the undersigned was forced to file a limited Affidavit of Merit that did not draw upon the missing information. So, Appellants and Judge Meter were wrong to conclude that the undersigned had the same information when the Affidavit of Merit was filed as when the Complaint was filed.

If the term "medical records" contained in MCL 600.2912d (3) is not synonymous with the term "all medical records" contained in MCL 600.2912b (5), then who will be charged with determining what records are "necessary to prepare an effective affidavit of merit" as suggested by Defendants, Judge Meter and the trial court, when, as the majority stated, one of the parties engages in "gamesmanship"? (See opinion, pages 4-5.) Do the health care professionals and health facilities led by their counsel and insurance carrier get to decide what information is sufficient to prepare the affidavit of merit and other critical documents are not necessary.

It should be further noted that Appellants have flagrantly violated the obligations the Legislature has placed upon them, which the Legislature felt were critical in making their reform efforts successful. Not only did they fail to comply with the requirements of MCL 600.2912b (5), which clearly states that the parties "*shall*" provide access to *all medical records*; they also failed to comply with the requirements imposed upon them by MCL 600.2912b (7), which clearly states that the health professional or health facility "*shall*" file a written response to the

claimant's notice of intent within 154 days after receipt of the notice of intent. This Court in *Roberts v Mecosta County General Hosp*, 466 Mich 57, 65-66 (2002) clearly stated that the word "shall" is unambiguous and denotes mandatory conduct. Appellants, as do most health professionals and health facilities, refused to provide that notice of meritorious defense. Imagine what might have happened if they had fully complied with their statutory obligations, would so much time and effort have been expended? The Legislature's purpose might have been admirable; however, when the health professionals and health facilities, through their insurance carriers and legal counsel, game the system and elect not to participate in the process while forcing claimants to strictly comply with the same statutes they flagrantly ignore, it is clear that the system is broken.

This Court in *Driver v Naini*, 490 Mich 239, 254-55 (2011), reminded all of us of the legislative purpose for the extensive medical malpractice reforms that we deal with every day:

"The legislative purpose behind the notice requirement was to provide a mechanism for promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of the costs..."

This Court took much of the above quotation from the Senate Legislative Analysis and from the House Legislative Analysis. Appellee would assert that the term "***all medical records***" used in MCL 600.2912b (5) and the term "medical records" used in MCL 600.2912d (3) and MCL 600.2912e (3) are synonymous and the Legislature intended to have them read in that way, which is clearly consistent with the legislative purpose.

It is interesting that Defendants now argue that they complied with the provisions of MCL 600.2912b (5), even though they did not produce ***all medical records*** and did not inform the undersigned that some of the records had been destroyed. It is curious that the clinical notes

for the period 1979-1992 were provided but the critical laboratory results obtained during that same period were taken out of the chart and destroyed. Of course there has been no testimony taken as to why that process occurred or when it occurred. Why were the clinical notes not destroyed? When were the laboratory test results destroyed? Why did Appellants refuse to provide the billing records? More significantly, Appellants in their September 17, 2012 letter, which was sent in response to Appellee's notice of intent, asked claimant to comply fully with the provisions of MCL 600.2912b (5) and provide them with a "complete copy of *all medical records* in your control". How ironic, they wanted Appellee to provide "*all medical records in [his] control*"; they did *not* ask Appellee to provide "documents necessary to prepare an effective affidavit". (See Exhibit 6.) The undersigned would suggest that if Appellee had not fully complied with MCL 600.2912b (5) and provided "*all medical records*" in his control in a timely manner Appellants would likely have delayed filing their affidavit of meritorious defense pursuant to MCL 600.2912e (3), just as Plaintiff did in the instant situation. Why was the term "*all medical records*" used in their letter dated September 17, 2012, when they sought to get all of the information they wanted from the undersigned, while claiming later that that they did not have to be equally forthcoming in responding to Appellee's requests?

If an experienced medical malpractice attorney is requested to investigate a claim on behalf of a client, he or she must acquire as much information as possible in order to properly assess many different factors. Using the instant case as an example, it was imperative that all of Appellee's records needed to be gathered, especially those maintained by Appellants, who had been providing Appellee with his primary care for more than 30 years. Appellee was informed by a subsequent treating physician that his hypertension had been mismanaged for many years and that that mismanagement had resulted in renal failure. That fact made it imperative that all

of Appellee's records needed to be obtained, because it was important to know when he first had elevated blood pressure readings; how he responded to non-drug therapies; whether he was ever treated with drugs; if he had been, how he responded; if he been taken off the medications or had his medications been changed over the years; were there any laboratory test results that indicated that he might be experiencing renal dysfunction due to uncontrolled hypertension; how often was he monitored; was he ever asked to keep logs of his own blood pressure readings; how did he respond to weight loss recommendations; did he have any other medical problems that might be causing kidney dysfunction; did his kidney function testing results change from time to time or remain static; and many other considerations. In addition to raw laboratory data, the undersigned needed to know exactly when there were laboratory results that indicated that he might be demonstrating changes in kidney function; and the undersigned needed to know if those indicators returned to normal after adequate treatment. Those factors all contribute to both negligence and causation issues. They also factor into statute of limitations issues as well. If, for instance, Appellee had developed changes in kidney function that tracked periods of time when his blood pressure levels were not being properly controlled, then that might have been the beginning of Appellant's negligence. If that date was outside the six year statute of repose period, the undersigned would likely not have pursued this case. If it would be difficult to demonstrate a proximate cause between the uncontrolled hypertension and the kidney function changes, the undersigned would not likely want to pursue the matter. For instance, if Appellant had demonstrated changes in kidney function in the 1980's and his blood pressure levels had been regularly within the normal range at the same time, proximate cause would likely have been difficult to prove. On the other hand, if in the 1980's the lab results demonstrated a loss of kidney function, and his blood pressure readings were also high then Appellee's cause of action

would have accrued outside the permissible statute of repose limit of six years, and the undersigned would not have pursued this matter. If the earlier records had demonstrated that Appellee had another kidney threatening condition diagnosed such as uncontrolled diabetes at some time in those earlier years, then the undersigned may not want to have pursued this matter. These are the issues that need to be addressed thoroughly during the workup or notice of intent periods of time; and it was essential that all of the records be gathered in order to fully assess those issues.

ARGUMENT I

THE COURT OF APPEALS CORRECTLY HELD THAT THE 91-DAY EXTENSION PROVIDED IN MCL 600.2912d (3) FOR FILING AN AFFIDAVIT OF MERIT APPLIES WHERE PLAINTIFF CLAIMS THAT DEFENDANTS DID NOT PRODUCE ALL MEDICAL RECORDS WITHIN 56 DAYS AFTER RECEIPT OF THE NOTICE OF INTENT AS REQUIRED BY MCL 600.2912b (5).

In clear and unambiguous language the Michigan Legislature in MCL 600.2912b (5) mandated that the health professional or the health facility “***shall*** allow claimant access to ***all medical records*** related to the claim that are in the control of the health professional or health facility”. (Emphasis added.) In similarly clear and unambiguous language the Legislature in MCL 333.26263 (i) defined medical record as: “information oral or recorded in ***any form*** or medium that ***pertains to a patient’s health care***, medical history, diagnosis, prognosis, or medical condition and that is ***maintained by a health care provider or health facility in the process of caring for the patient’s health.***” (Emphasis added.)

There is no dispute as to the following facts:

- 1: The undersigned was ***not*** provided with ***all of Appellee’s medical records*** regarding his medical care and treatment provided between November 19, 1979, and February

7, 2012, despite an informal request for such records dated April 2, 2012; despite a notice of intent served on August 21, 2012, which included requests for certain specific medical records; despite a letter requesting access to his medical records dated September 25, 2012; despite a second letter dated January 2, 2013, requesting his medical records; despite a request to produce served on March 4, 2013, which requested specific medical records; and despite statements by counsel on the record during oral arguments confirming that Appellants had not provided billing and payment records as requested. (See Exhibits 2, 5, 6, 7, 8, 11, and Tr. pages 22-23.)

2. The undersigned was *not* provided with the laboratory test results covering the period between November 19, 1979 and March 13, 1992, nor was the undersigned provided with the billing records covering the period from November 19, 1979 to February 12, 2012, despite an informal request for such records dated April 2, 2012; despite a notice of intent dated August 20, 2012, which requested specific medical records; despite a letter requesting access to Appellee's records dated September 25, 2012; despite a second letter dated January 2, 2013, which requested the same records; and despite a request to produce served on March 4, 2013, requesting the same records. (See Exhibits 2, 5, 6, 7, 8, and 11.) It was not until May 15, 2013, that counsel for Appellants first informed the undersigned that the requested documents had been destroyed. (See Exhibit 11.) When the laboratory results were not produced pursuant to MCL 600.2912b (5), it was only reasonable to believe that they existed and had not been produced, especially when counsel for Appellants failed to respond to two very specific requests to meet and to exchange records. (See Exhibits 7 and 8.)

In clear and unambiguous language the Michigan Legislature in MCL 600.2912d (3)

permitted Appellee to forego filing an affidavit of merit with his complaint, if Appellants had failed to provide access to *all medical records* within 56 days after receiving a notice of intent filed pursuant to MCL 600.2912b (4). Based upon the above facts, it is clear that Appellants did not provide access to *all medical records* in their control within 56 days after receiving a notice of intent in this matter. There can be no dispute that Appellants have not provided the billing and payment records, which are certainly included in the definition of “medical record” provided by the Legislature as part of the Medical Records Access Act, which went into effect in 2004 and was amended in 2008. The Legislature was certainly aware of the provisions of MCL 600.2912b (5) regarding medical records, which contained no definition of “medical record”. There is also no dispute that Appellee asserted that Appellants did not provide access to all of the medical records within 56 days following receipt of the notice of intent in his response to their motion for summary disposition.

In clear and unambiguous language the Michigan Legislature in MCL 600.2912d (3) granted Appellee an additional 91 days in which to file the requisite affidavit of merit, after the date the complaint was filed. In the instant case Appellee filed his affidavit of merit on May 24, 2013, which was within the specified period of time contained in MCL 600.2912d (3).

ARGUMENT II

THE COURT OF APPEALS CORRECTLY HELD THAT DEFENDANTS
WERE OBLIGATED UNDER MCL 600.2912b (5) TO EXPLAIN TO THE
PLAINTIFF THAT CERTAIN RECORDS COULD NOT BE PRODUCED
BECAUSE THEY HAD BEEN DESTROYED.

Appellee stands on the majority opinion regarding this issue. Obviously, it is an issue that has not been raised before; however, the rationale provided by the Court of Appeals is

reasonable. In addition, had Appellants filed their notice of meritorious defense as required by MCL 600.2912b (7), and actively participated in the procedures contemplated by the Legislature when it passed the medical malpractice reforms, it is likely that the absence of the laboratory test results would have been obvious; and it is equally likely that the billing records would have been supplied in a timely manner. When it came time to file the Complaint, Appellee was obviously justified in concluding that the records had simply been withheld, since Appellants resisted multiple efforts to obtain those records. It would not be reasonable for the undersigned to conclude that the lab reports were destroyed for convenience or misplaced given that the clinical notes for all 30+ years were provided. It is worth noting that Judge Meter chose not to dissent regarding this issue. Again, the legislative purpose called for the parties to cooperate in exchanging records and debating the merits of the claim. That was not done by Appellants; instead, they chose to obfuscate and deny information to Appellee. They should not be rewarded for such conduct. Even if they had no duty to provide the laboratory test results, which were supposedly destroyed, the billing statements covering the entire 30+ years of care have never been produced.

ARGUMENT III

THE COURT OF APPEALS CORRECTLY FOUND THAT BILLING RECORDS
ARE MEDICAL RECORDS FOR PURPOSES OF MCL 600.2912B (5).

Again, Judge Meter chose not to dissent from the majority opinion on this issue. It should also be noted that this issue was not raised in the trial court. The Legislature has defined medical records in the following way:

“Medical Record means *information* oral or recorded *in any form* or medium

that *pertains to a patient's health care*, medical history, diagnosis , or medical condition and that is *maintained by a health care provider or health facility in the process of caring for the patient's health.*" (MCL 333.26263-Emphasis added.)

The HIPAA law and regulations describe medical records as "protected health information". The regulations adopted incident to the HIPAA law define health information as follows:

"Health Information means any information, including generic information, whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider....
- (2) Relates to past, present, or future physical or mental health condition of an individual...or past, present, or future payment for the provision of health care to an individual." (45 CFR 160.103-Emphasis added.)

Given those two definitions of medical records, it appears quite clear that billing records would be deemed to be medical records that needed to be provided as part of "*all medical records*" pursuant to MCL 600.2912b (5).

From a practical point of view, the billing records took on added significance when it was revealed that the laboratory test results gathered over 13 years were missing. That meant that the billing records might be the only source of information regarding whether or not Appellee was seen on the more occasions than indicated in the clinical record; and the billing records might reflect what lab tests were billed during that period of time. It is hard to argue that the billing records are not important to the overall review of the care provided. The University of Michigan published a brochure in 2010 regarding HIPAA compliance. In one of the sections it made the following statement: "HIPAA protects more than the official medical record. A great deal of

other information is also considered PHI, such as *billing* and demographic data.” (See Exhibit 12-Emphasis added.)

CONCLUSION

Appellee would argue that the Court of Appeals majority was correct in its decision. When the purpose of the legislation is appreciated, it should be clear that Appellants’ conduct in regard to this litigation process should not be condoned. The statutes are clear and there should be no distinction between the terms “all medical records” and “medical records” when the statutes are read in a reasonable manner with an eye on the purpose of the legislation. This Court should not substitute Judge Meter’s and the trial court’s addition of the phrase “medical records necessary to prepare an effective affidavit”, when the two terms can be read as synonymous.

There can be no question that the Legislature intended to permit the party that had been denied critical records additional time to get those records or an explanation as to why there were no records; and additional time to get the affidavit of merit executed and filed.

RELIEF REQUESTED

Appellee requests that this Court affirm the majority decision rendered by the Court of Appeals.

Respectfully submitted,



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Dated: October 28, 2015

STATE OF MICHIGAN
IN THE COURT SUPREME COURT

JAMES WADE

Plaintiff-Appellee

Supreme Court No. 151196
Court of Appeals No. 317531
Iosco County Circuit Court No. 12-29148 NH

v

WILLIAM McCADIE, D.O.; and
ST. JOSPEH HEALTH SYSTEM d/b/a
HALE ST. JOSEPH MEDICAL CLINIC

Defendants-Appellants

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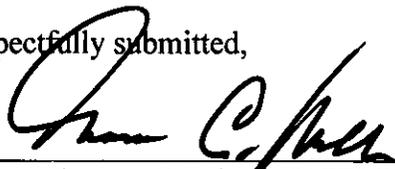
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PROOF OF SERVICE

The undersigned certifies that a copy of Appellee's Brief was served upon counsel for Appellants by regular mail on October 28, 2015, addressed to the above address.

Respectfully submitted,



Thomas C. Miller (P17786)
Attorney for Plaintiff-Appellee

Dated: October 28, 2015

