PLUNKETT COONEY

Supreme Court Imposes Deadlines for Challenging Medical Malpractice Pleadings

February 26, 2010

The Michigan Supreme Court recently issued an order amending Michigan Court Rules 2.112 and 2.118, relative to challenges to notices of intent (NOI), affidavits of merit (AOM) and affidavits of meritorious defense, effective May 1, 2010. These amendments will impact defense counsel's ability to challenge defective NOIs and AOM and may make successful pursuit of summary disposition on these issues more difficult.

The amendments consist of the following:

- Under MCR 2.112(L)(2), in a medical malpractice action, unless the court allows a later challenge for good cause:
  - all challenges to a notice of intent must be made by motion at the time the defendant files its first response to the complaint (whether by answer or motion);
  - all challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the signer, must be made by motion within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may also be amended pursuant to MCR 2.118 and MCL 600.2301.
- Under MCR 2.118(D), an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit.
- MCL 600.2301 addresses amendment of process or pleadings before judgment. It provides that the court has the power to amend any process, pleading or proceeding, either in form or substance, “for the furtherance of justice, on such terms that are just” at any time before judgment is rendered. Further, the court “shall disregard any error or defect of the proceedings which do not affect the substantial rights of the parties.”

Chief Justice Kelly authored a concurring opinion, while Justice Markman, joined by Justices Corrigan and Young, dissented from the order. The concurring and dissenting opinions primarily addressed the manner in which the amendments interplay with the Michigan Supreme Court decision in *Kirkaldy v Rim*, 478 Mich 581 (2007), which determined that the proper remedy for a deficient affidavit of merit is dismissal without prejudice, allowing the plaintiff to refile the action within any time remaining on the statute of limitations.

© 2026 Plunkett Cooney, PC

Justice Kelly, in her concurring opinion, noted the amendments were both logical and consistent with the time limits imposed on defendants asserting affirmative defenses. She further discussed the fact that the court rules explicitly favor amendments of pleadings and described affidavits as essentially being pleadings. She stated "there is no legal justification preventing a party in a medical malpractice action from amending an affidavit of merit or an affidavit of meritorious defense when parties in other actions are freely and routinely permitted to do so."

Justice Kelly also addressed the dissenting justices' claim that the amendments are inconsistent with *Kirkaldy* and conflict with the statute of limitations. She maintained that the amendments neither overruled the *Kirkaldy* decision nor were inconsistent with the statute of limitations because *Kirkaldy* held that if an affidavit of merit is successfully challenged, the proper remedy is dismissal without prejudice and the plaintiff is left with whatever time remains on the statute of limitations within which to file a complaint with a conforming affidavit of merit.

Justice Markman's dissent argued that the amendments were inconsistent with the holding in *Kirkaldy*. Whereas *Kirkaldy* held an amended affidavit of merit had to be filed before the period of limitations expired, amended MCR 2.118(D) now provides that an amended affidavit relates back to the date of the original filing of the affidavit.

In Justice Markman's opinion, this creates uncertainty as to whether there is any time limitation on the filing of an amended affidavit of merit. To illustrate this uncertainty, Justice Markman posed the questions: "Can a plaintiff file an amended affidavit of merit even after the period of limitations has expired (or at least would have expired if the case had been dismissed as is required by *Kirkaldy*)? What about the affidavit of meritorious defense? Does the defendant also have an unlimited amount of time in which to file an amended affidavit of meritorious defense? Do the parties even have to file amended affidavits or can the court simply disregard any defects in the affidavits?"

These amendments to the court rules, along with the Supreme Court's recent decision in *Bush v Shabahang*, 484 Mich 156 (2009), offer significant leeway to plaintiffs filing medical malpractice cases and take away an avenue of attack from the defense perspective. In essence, challenges to deficient affidavits of merit may no longer be a vehicle for obtaining summary disposition, even where the statute of limitations is at issue.

If you have any questions regarding this Rapid Report, contact the firm's Medical Liability Practice Group Leader D. Jennifer Andreou or any member of Plunkett Cooney's Medical Liability Practice Group. To review a practice group directory, click here.

© 2026 Plunkett Cooney, PC