STATE OF MICHIGAN
IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellees,

v

THE MEMORIAL HOSPITAL, a Michigan Non-Profit Corporation, d/b/a MEMORIAL HEALTHCARE CENTER,

Defendant,

AND

RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., and JAMES H. DEERING, D.O., P.C., d/b/a SHIAWASSEE RADIOLOGY CONSULTANTS, P.C., Jointly and Severally,

Defendants-Appellants.
_____/

Supreme Court No. 129134

Court of Appeals No. 251110

Lower Court Case No. 01-007289-NH

129134

DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF

Respectfully submitted,

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SUPPLEMENTAL ARGUMENT

In light of amicus State Bar of Michigan-Negligence Section's ("State Bar") supplemental brief, defendant-appellants James H. Deering, James H. Deering, D.O., P.C., and Russell H. Tobe, D.O. ("appellants") offer this supplemental brief to respond to these assertions. First, and most importantly, this case involves a Pennsylvania affidavit, and Pennsylvania is not on the list of states identified as precluding compliance with MCL 600.2102. At the very least, then, compliance was possible *in this case*, and this Court must apply the holding of *Apsey v Memorial Hospital (On Reconsideration)* ("*Apsey II*"), 266 Mich App 666; 702 NW2d 870 (2005), to the parties *in this case* to avoid a purely prospective result.[1] Second, the State Bar's constitutional arguments are unsupported and without merit.

Finally, what appellees and all their supporters fail to grasp is that all their arguments regarding why § 2102 does not work, or why it is bad public policy, belong before the Legislature and not this Court. This Court recently reaffirmed as much in *Cameron v Auto Club Ins Ass'n*, ___ Mich ___; ___ NW2d ___ (2006). Policy choices are not within the realm of the judicial branch – especially when our Legislature has already spoken regarding

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[1] Plaintiff-appellees Sue and Robert Apsey ("appellees") continue to assert that the *Apsey II* decision was not prospective, but this assertion belies reason. The *Apsey II* Court itself stated that "[i]n light of the apparent reliance on the URAA by the legal community, **we believe that justice requires a prospective application**." *Apsey II*, 266 Mich App at 680 (emphasis added). Appellees also conveniently ignore that the *Apsey II* Court failed to apply half of its holding – that "**a belatedly filed certification of an out-of-state notary public would not cure the defect in an otherwise timely complaint and affidavit**" – to any party in an existing case, since the court allowed parties to cure the defect in all pending cases. *Apsey II*, 266 Mich App at 678, 682-683 (emphasis added). Apparently, the subtlety of holding that a malpractice plaintiff cannot cure a defective affidavit to make it timely as a matter of law, and then allowing *all* such plaintiffs to do so exactly what the Court just held could not be done, misses appellees.

a matter, as it has here. Appellees, the State Bar, and the rest of the amici in this case are fully entitled to ask the Legislature to repeal § 2102, but they are not entitled to ask this Court to do the same thing by judicial fiat. For these reasons, this Court should reject the State Bar's arguments, reverse in part the *Apsey II* Court's decision, hold that the Court of Appeals lacked the power to issue a purely prospective advisory opinion, and at least apply *Apsey II* to appellees if no one else.

I. THIS CASE INVOLVES A PENNSYLVANIA NOTARY, AND PENNSYLVANIA IS NOT ON THE STATE BAR'S LIST OF STATES WHERE COMPLIANCE WITH § 2102 WAS IMPOSSIBLE. AT THE VERY LEAST, THEN, THIS COURT MUST APPLY THE *APSEY II* COURT'S DECISION TO THIS CASE TO PREVENT IT FROM BEING AN ADVISORY OPINION.

The State Bar offers a list of 24 states where compliance with § 2102 is allegedly impossible. While this reasonably supports an argument that § 2102 is in need of revision, the State Bar – like appellees – continually fail to recognize that this Court is not the Michigan Legislature. This Court *cannot* amend § 2102. As long as § 2102 is on the books, this Court must simply enforce it as written, and leave the policymaking to the policymakers. The State Bar is therefore arguing to the wrong branch of government here, and should go before the Legislature with these assertions.

Regardless of the venue, however, the State Bar's impossibility argument is irrelevant here because *Pennsylvania is not on the list of 24 states in its brief.* This case involves a Pennsylvania notary. Neither appellees nor anyone else has asserted that appellees were absolutely unable to comply with § 2102 here; the arguments have been

focused on purported excuses for non-compliance. So the State Bar's assertion of impossibility[2] – which may be relevant in some hypothetical situations – is irrelevant here.

For these reasons, appellants reaffirm their assertion that *Apsey II* must apply to appellees, even if it does not apply retroactively to other litigants, or the decision will be an advisory opinion that the Court of Appeals was without power to render. Const 1963, art 3, § 8. Compliance with § 2102 was possible, but appellees simply failed to so comply. So regardless of whether this Court deems it appropriate to apply *Apsey II* with full retroactive effect, it should apply to appellees to prevent the *Apsey II* decision from being an unconstitutional advisory opinion by the Court of Appeals.

II. SECTION 2102 VIOLATES NEITHER THE DORMANT COMMERCE CLAUSE NOR THE FULL FAITH & CREDIT CLAUSE, AND APPELLEES NEVER PRESERVED NOR SUPPORTED A CONSTITUTIONAL CHALLENGE BELOW.

Although appellees have never made these arguments, the State Bar now challenges §2012's constitutionality on two grounds. These challenges fail for several reasons.

First, the assertions that § 2102 violates either the dormant Commerce Clause or Full Faith and Credit Clause are wholly unsupported. Appellees never made nor preserved these arguments, nor did they present any evidence of § 2102's effect on interstate commerce at any point below. *Cook v Miller*, 914 F Supp 177, 181 (WD Mich 1996)

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[2] It is not at all clear, however, that obtaining a § 2102 certification is *ever* impossible. The State Bar has submitted no affidavits from any person indicating that circuit courts in these states would refuse to certify affidavits. The standard language for the certificate of authority, if not available from the certifying clerk, can be found in numerous sources including 1A Am Jur, Pleading & Practice Forms (Rev), Form 82. There would be nothing to stop anyone from taking one of these forms along with the affidavit to a judge and asking for a certification to comply with Michigan law. That a court would refuse to execute a form found in a standard, national legal treatise to comply with a sister state's law is difficult to accept.

(rejecting dormant Commerce Clause challenge because "there has been no evidentiary showing that MCL 55.107(2) unduly burdens interstate commerce."). The State Bar cannot take up challenges never made below or for which no evidence exists in the record, and it does not bother to present any evidence to support those challenges here even if they were appropriate at this stage.

Second, the assertion that the Full Faith and Credit Clause requires Michigan to accept an AOM verified by a foreign notary without certification is both wrong and counterintuitive. If this were the case, there would be no need for a URAA at all, because all states would be required to accept out-of-state affidavits without any question. Obviously, this is not the case, or the URAA is itself a nullity.

Moreover, § 2102's certification requirement *does* give full faith and credit to out-of-state notarizations; it simply requires a certification that those notarizations complied with the law of the certifying state. This is an extension of the principle that although a court may take judicial notice of the common law of a sister state, *it has no authority to take judicial notice of another state's statutory law.*[3] *Marshall v RM Owen & Co*, 171 Mich 232; 137 NW 204 (1912). As a result, Michigan and countless other states require certification of a notary's authority from the state that granted that authority. E.g., Georgia (*Behn & Foster v William H. Young & Co*, 21 GA 207 (1857)), Indiana (*Teutonia Loan & Bldg Co v Turrell*, 19 Ind App 469; 49 NE 852 (1898)), New York (*Cohen v Cohen*, 86 NYS2d 168; 193 Misc 1023 (1948)), Illinois (*Keefer v Mason*, 36 Ill 406, 408 (1865)), and Maine (*Holbrook v Libby*, 113 Me 389, 391; 94 A 482, 483 (1915)).

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[3] MCL 600.2114 and MCL 600.2118, allowing judicial notice of statutes of other states, were repealed effective November 2, 1967, and replaced by MCL 600.2114a and MCL 600.2118a which require notice and proof of the statute in order to raise the issue.

Thus, § 2102's certification requirement is nothing more than a method of ensuring that Michigan is giving full faith and credit to the laws of another state and not to the unauthorized signature of a purported notary that lacks the required authority. Once the certification establishes that the affidavit was executed consistently with the laws of the foreign state, Michigan gives it full faith and credit. This is consistent with the United States Supreme Court's interpretation of the Full Faith and Credit Clause in *Chicago & Alton Railroad v Wiggins Ferry Co*, 119 US 615, 622-623; 7 S Ct 398; 30 L Ed 519 (1877):

> Whenever it becomes necessary under this requirement of the Constitution for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. **No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon.** This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in *Hanley v Donoghue*, 116 US 1, in respect to the faith and credit to be given by the courts of one state to the judgments of the courts of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another. [Emphasis added.]

Finally, the assertion that § 2102 violates the dormant Commerce Clause fails for the same reasons, but also because there is no evidence of an interstate notary "market" that § 2102 impermissibly affects.[4] Section 2102 does not violate the Commerce Clause because the Commerce Clause "protects the interstate market . . . from prohibitive or burdensome regulations". *Exxon Corp v Governor of Maryland*, 437 US 117, 127-128

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[4] Appellees cite *Granholm v Heald*, 544 US 460, 125 S Ct 1885, 1905; 161 L Ed2d 796 (2005) as though it provides some insight here. But that decision primarily addressed the interplay between the 21st Amendment and the dormant Commerce Clause, and is therefore largely inapplicable.

(1978). Any assertion that § 2102 somehow burdens a hypothetical interstate notary "market" is both unsupported and specious.

Assuming *arguendo* that appellees and the State Bar had established the existence and impact of § 2102 on such an interstate notary "market" – which they have not – § 2102 is unquestionably legitimate and necessary since Michigan cannot take judicial notice of another's state's laws under *Marshall*, 171 Mich at 238. *Cook*, 914 F Supp at 181 (no commerce clause violation when "the statute serves a legitimate local purpose . . . ."). As noted, § 2102 is merely a method of ensuring that Michigan is giving full faith and credit to the laws of another state and not to the unauthorized signature of a purported notary that lacks the required authority. Any burden this may impose on interstate commere is both incidental and minimal. For these reasons, the State Bar's constitutional challenges are unsupported and erroneous, and this Court should reject them.

III. CRITICISMS OF § 2102 BELONG BEFORE THE LEGISLATURE AND NOT THIS COURT.

In the end, however, all the arguments by appellees and their supporters can be boiled down to one point: they do not like § 2102, and they want this Court to short circuit the legislative process and nullify the statute. All of their varied arguments regarding the antiquity or wisdom of § 2102 are so many throws at the wall to see if any stick. This entire situation could be avoided, however, if these parties took their arguments to the Legislature instead of this Court.

Appellants provided ample authority for this assertion in their response to appellee's cross-application – including *Devillers v ACIA*, 473 Mich 562 ; 702 NW2d 539 (2005) – and will not replicate that argument there. But this Court has recently reaffirmed that rule once again in *Cameron v Auto Club Ins Ass'n*, ___ Mich ___; ___ NW2d ___ (2006).

In *Cameron*, the appellants asked this Court to refuse to enforce MCL 500.3145 as written because of extra-textual policy reasons. This Court declined the request, and reiterated that policy criticisms of a statute belong before the Legislature:

> **What this all comes down to is that the proponents of the dissents' positions who have petitioned this Court for assistance are simply in the wrong place. They should go to the Legislature**. There the increased premium costs to the drivers of this state occasioned by the revisions they seek for this mandatory insurance can be measured against the important goals of, among other things, affordability of this mandatory insurance. We have neither the tools nor the authority to strike that balance and we recognize it. It may be that the proponents of change will prevail in the Legislature or it may be that in the Legislature's wisdom the benefits will not justify the burden of increased premiums and potentially more uninsured drivers that will be occasioned by the changes sought. **But, again, it must be emphasized, no one on this Court, or any other, has warrant to impose our view on the balance striking and make it law. The Legislature and the Legislature alone has that power.** That it has struck this balance in the past in a way that strikes the dissents as "inexplicable and unsupported" or "absurd" is, as we have explained here, and before in these types of cases, irrelevant. [*Cameron*, ___ Mich at ___; emphasis added.]

This Court's statement in *Cameron* provides excellent advice to both appellees and the State Bar here: go to the Legislature and make these same arguments. Section 2102 may be outdated, unruly, overly technical, badly worded, and much more – *but it is still the law*. Appellees were bound to follow it as written. They failed to do so, and this Court cannot now relieve them of their burden. The Legislature may be able to do so, but that is a question for another day.

CONCLUSION

In *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003), this Court enforced MCL 600.5856 as written and overruled previous decisions that had ignored the statute. It did this despite arguments that strict compliance with § 5856 was difficult, and that the statute was antiquated and unruly. It was indeed so, and our Legislature subsequently amended § 5856 in 2004 PA 87 to remove the antiquated provisions.

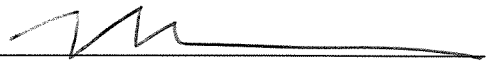
The *Gladych* lesson is clear; the system works better if everyone follows the rules. Enforcing a statute as written allows the Legislature to see the results of its own language and act on those results if they were unintended. This Court should follow its own lesson, enforce § 2102 as written, and allow the Legislature to consider the results. If the result is unintended, the Legislature can act – as it did in response to *Gladych*. Doing so will allow the Legislature to clarify what § 2102 means, as opposed to extra-textual guesswork by this Court or any other judicial body.

For these reasons, this Court should therefore reverse in part the *Apsey II* Court's decision, hold that the Court of Appeals lacked the power to issue a purely prospective advisory opinion, and apply *Apsey II* to the parties, or remand this case back to the Court of Appeals for a judgment so stating. In the alternative, this Court should reverse the purely prospective limitation on *Apsey II* and hold that the decision is entitled to at least limited retroactive effect. Finally, this Court should recognize that the *Apsey II* Court lacked the power to do anything but dismiss this case once it determined that appellees failed to "commence" the action.

Respectfully submitted,

Willingham & Coté, P.C.
Attorneys for Appellees

Dated: August 17, 2006

By: 

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