STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellees/Cross 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-Appellants/Cross Appellees.

Case No. 129134

C.O.A. No. 251110
L.C. No. 01-007289-NH
Shiawassee Circuit Court

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AMICUS BRIEF OF MICHIGAN DEFENSE TRIAL COUNSEL IN SUPPORT OF PLAINTIFFS-APPELLEES' APPLICATION FOR LEAVE TO CROSS APPEAL

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STATEMENT OF INTEREST

MICHIGAN DEFENSE TRIAL COUNSEL (MDTC) is an organization of approximately 600 attorneys who practice primarily in the defense of tort and employment law cases. Among its corporate purposes are:

> "(d) To develop, maintain and advance the rights of litigants in civil litigation.
>
> "(e) To support and work for improvement of the adversary system of jurisprudence in the operation of the courts.
>
> "(f) To encourage the prompt, fair and just disposition of tort claims."

(Michigan Defense Trial Counsel, Inc., Restated Articles of Incorporation, Article II, ¶¶ [d]-[f]).

The effect of the opinion in the instant case is the legal equivalent of the recent Indian Ocean tsunami. An informal poll among MDTC's practitioners indicates that as many as 95% of the medical malpractice cases filed in Michigan are premised on out-of-state affidavits, virtually none of which are certified in the manner required by the opinion in the instant case. A much smaller, but still extant, percentage of affidavits of meritorious *defense* are from out-of-state experts and suffer from that same purported defect. This panel's decision renders all such affidavits invalid.

Moreover, the opinion has ramifications for defense counsel as well as plaintiffs. Any case that has been lost or settled in the past two years, which could have been won by raising the defense created by this panel's decision, arguably carries the potential for a legal malpractice action. *See Atlanta International Ins Co v Bell*, 438 Mich 512

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(1991).[1] Out-of-state Affidavits of Recognizance and defense expert affidavits are likewise subject to challenge.

MDTC does not bring these matters to the attention of this Court solely as the basis for reversing the Court of Appeal's decision. Rather, the purpose in pointing them out here is to articulate MDTC's interest in this matter, and to underscore the importance of an accurate statutory analysis.

If the statutes at issue compel the result reached, then the situation will have to be remedied by the Legislature. If, however — as MDTC contends — those enactments do not compel such a result, then this Court has a duty to take corrective action so as to rectify a decision which thwarts clear legislative intent.

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[1] MDTC does not suggest that any such suits would be meritorious. The point here is that the effect of the opinion in the instant case is to expose defense counsel to such litigation.

QUESTION PRESENTED

Does MCL 600.2102(4), the substance of which has been unchanged since 1879, operate as an exception to the Uniform Recognition of Acknowledgments Act, which the Legislature enacted in 1969 with the clearly expressed intent to provide, without exception, an additional method of proving notarial acts"?

- The trial court answered, "Yes"
- The Court of Appeals answered, "Yes"
- Defendants-Appellees contend the answer should be, "Yes"
- Plaintiffs-Appellants contend the answer should be, "No"
- Michigan Defense Trial Counsel contends the answer should be, "No".

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INTRODUCTION

The Court is familiar with the facts and procedural history of this case and need not be burdened with repetition of those matters here. The purpose of this introductory statement is, therefore, simply to summarize the analysis that follows.

In a nutshell, the Court of Appeals correctly determined that the provisions of MCL 600.2102 ("§ 2102") and the Uniform Recognition of Acknowledgments Act ("URRA"), MCL 565.261 *et seq.*, can be harmonized. However, the court erred in the manner in which it attempted to accomplish that objective. Specifically, in its attempt to "ascertain and give effect to the intent of the Legislature"[2] by examining "the terms and arrangement of the statute[s]"[3] the Court of Appeals gave short shrift to the all-important *terms* of the statutes and reached a result, based upon inapplicable rules of construction, that is not in conformity with controlling precedent. Both statutes are unambiguous and there is no conflict in their operation. Therefore, it is not necessary to "interpret" the statutes or to "harmonize" them, as both can be applied in strict accordance with their respective terms.

The Michigan Defense Trial Counsel ("MDTC"), as Amicus Curiae, therefore urges the Court to hold that the Legislature, being cognizant of the technological advances and procedural realities that have rendered adherence to the archaic requirements of MCL 600.2102 unnecessarily burdensome — and in some cases impossible — manifestly intended the URAA to be (as it is expressly declared to be) an *additional* method of

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[2] *Apsey v Memorial Hospital, (On Reconsideration),* 266 Mich App 666, 673; ____ NW2d ____ (2005).

[3] *Id.* (emphasis in original).

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proving notarial acts, and that MCL 600.2102, is not to be construed as an unstated exception to the subsequently enacted URAA.

ARGUMENT

I.

The Uniform Recognition of Acknowledgments Act (URAA) applies in determining the validity of the affidavit of merit, because it does not conflict with MCL 600.2102(4) but rather, supplements it.

The primary purpose of statutory interpretation is to give effect to the intent of the Legislature. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001); *Roberts v Mecosta County General Hospital*, 466 Mich 57, 63; 642 NW2d 663 (2002). In the first instance, that intent is to be determined from the text of the statute. *Wickens, supra* at 60, *Roberts, supra* at 63. Meaning is to be given to every word, and no part of the text is to be rendered nugatory. *Wickens, supra* at 60

The statute which the Court of Appeals found to be exclusively controlling reads as follows:

> In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:
>
> * * *
>
> (4) If such affidavit be taken in any other of the United States or in any territory thereof, it may be taken before . . . any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. *The signature of such notary* public or justice of the peace, *and the fact that* at the time of the taking of such affidavit *the person* before whom the same was taken *was such notary public* or justice of the peace, *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.*

MCL 600.2102(4) (emphasis added).

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The current version of that statute was enacted in 1961, 1961 PA 236, although it replicates in substance prior statutes dating back to the nineteenth century. *See Berkery v Circuit Judge*, 82 Mich 160, 167; 46 NW 346 (1890).

The relevant portions of the URAA read as follows:

> For the purposes of this act, "notarial acts" means acts which the laws of this state authorize notaries public of this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgments of instruments, and attesting documents. *Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by the following persons authorized pursuant to the laws and regulations of other governments* in addition to any other person authorized by the laws of this state:
>
> (a) A notary public authorized to perform notarial acts in the place in which the act is performed.
>
> * * *

MCL 565.262(a) (emphasis added).

> (1) If the notarial act is performed by any of the persons described in subdivisions (a) to (d) of section 2 ... the signature, rank or title and serial number, if any, of the person are sufficient proof of the authority of a holder of that rank or title to perform the act. *Further proof of his authority is not required.*
>
> * * *
>
> (4) *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.*

MCL 565.263(1), (4) (emphasis added). The URAA was enacted as 1969 PA 57.

The first question is whether the two statutes are truly in conflict. Relevant to that question is another provision of the URAA, which the Court appears to have overlooked:

> A notarial act performed prior to the effective date of this act is not affected by this act. *This act provides an* ***additional*** *method of proving notarial acts.* Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state.

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MCL 565.268 (emphasis added).

Before the enactment of the URAA, §2102(4) was the only statutory provision addressing out-of-state affidavits attested by notaries public. As such, it exclusively governed the technical requirements for such affidavits. See *In re Alston's Estate*, 229 Mich 478, 481-82; 201 NW 460 (1924); *Berkery v Circuit Judge, supra.*

However, when it enacted the URAA, the Legislature *explicitly* stated that it was providing an *additional* method of proving notarial acts. "'Notarial acts' include administering oaths and affirmations, and attesting documents." MCL 565.262. There is, therefore, no conflict between the URAA and §2102(4), because an affidavit is valid if it satisfies *either* statute.

That result was reached in a sister state case involving an earlier version of the URAA. *Valley National Bank v Avco Development Co*, 14 Ariz App 56; 480 P2d 671 (1971). It is also supported by the commentary to the 1968 version of the URAA.

> This act does not requirement amendment of existing acknowledgment law in the state unless the state chooses to make an amendment. This act deals only with "recognition of notarial acts" and it is a recognition statute "*in addition to any other recognition statute now in effect in the state.*"

Uniform Recognition of Acknowledgments Act (1968 Act), Prefatory Note (1990 Main Volume), Reasons for Proposed Uniform Act (emphasis added).

This Court has recognized the usefulness of such commentary when the Legislature has enacted a statute based on a Uniform Act. *Thornton v Allstate Ins Co*, 425 Mich 643, 657-58; 391 NW2d 320 (1986); *Miller v State Farm*, 410 Mich 538, 559-60; 302 NW2d 537 (1981). Here, the Legislature adopted the Act verbatim, which should render the commentary even more useful.

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The Court of Appeals expressly recognized that "[i]f the present inquiry were to be decided based on the URAA, the notarization of the affidavit in question would indisputably be valid." *Apsey*, 266 Mich App at 672. Because it satisfies the URAA, however, Plaintiffs' affidavit of merit *is* valid. This Court should, therefore, so hold.

II.

Even if MCL 2102(4) is deemed to be in conflict with the URAA, the latter statute would govern because it is the more recent and because the legislature expressly intended the URAA to occupy the entire field covered in part by MCL 2102(4).

Even if the Court were to reject the proposition that the URAA does not conflict with §2102(4), the URAA would still control under well-settled principles of statutory construction.

First, where two statutes are in conflict, the more recently enacted one controls. *Pittsfield Charter Township v Washtenaw County*, 468 Mich 702, 713; 664 NW2d 193 (2003); *Old Orchard by the Bay Associates v Hamilton Mutual Ins Co*, 434 Mich 244, 259; 454 NW2d 73 (1990); *Southward v Wabash Railroad Co*, 331 Mich 138, 145; 49 NW 109 (1951); *In re Complaint of City of Southfield*, 235 Mich App 523, 527; 599 NW2d 760 (1999). The URAA is the most recent expression of legislative will, and therefore governs the validity of the affidavit of merit in the instant case.

Second, a repeal by implication will be found when the later act was intended to occupy the entire field covered by the prior enactment. *House Speaker v State Administrative Board*, 441 Mich 547, 563; 495 NW2d 539 (1993). *See also Branch v Smith*, 538 US 254; 123 S Ct 1429, 1441; 155 L Ed 2d 407 (2003). The Michigan Legislature made its intention abundantly clear in that regard in the following provision of the URAA:

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> This act shall be so interpreted as to make uniform the laws of those states which enact it.

MCL 565.269.

Uniformity, whether internal or vis-à-vis other states, can be achieved only if the URAA applies to all notarial acts. It is difficult to imagine a clearer expression of legislative intent that a statute occupy the entire field.

The opinion in the instant case utterly ignores the foregoing principles of statutory construction. In their stead, the opinion: (1) *invents* a new "rule" of construction, and (2) misreads the very provision which mandates a result opposite from the one the panel reached.

The new rule of construction should be dubbed "the Legislative Service Bureau Placement Principle." Specifically, the Court of Appeals found it significant that §2102(4) is located in the RJA, whereas the URAA appears among statutes governing conveyances of real property. From that the panel gleans some "emphasis" in the URAA on documents other than those submitted to Michigan courts.

That new "rule" is defective for (at least) two independent and alternative reasons.

First, it violates the first principle of statutory construction, which is to focus on the language of the statutes involved. The sole case cited in the opinion as the basis for the new "rule" does not support utilizing a statute's location in the Michigan Compiled Laws to alter the means of its language or its scope.

In *Gross v General Motors Corp*, 448 Mich 147; 528 NW2d 707 (1995), this Court held that in the context of a product liability design defect claim, venue is proper in the county in which the product was actually designed. The portion of the *Gross* opinion

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quoted by the Court of Appeals[4] appears in the context of a discussion rejecting the argument that the county in which the defendant has its corporate headquarters is a proper venue. At no point in the *Gross* opinion does the Court even allude to the location of the statute in the Michigan Compiled Laws as a relevant consideration.

Second, the new "rule" suffers from a more fundamental flaw. The placing of a Public Act in a particular location in the Michigan Compiled Laws is a *bureaucratic* act, *not* a *legislative* act. The Legislature does not decide where a statute shall be placed; it simply enacts laws. After a bill is enacted into law, the Legislative Service Bureau assigns the statutory compilation number, which dictates its placement in the Michigan Compiled Laws. MCL 24.1(1). See also MCL 4.1108(c). It necessarily follows, therefore, that the location of a statute in the Michigan Compiled Laws cannot rationally be imputed to the Legislature as a legitimate rule of statutory construction. Indeed, this Court has rejected the argument that the compiler's inclusion of a statute in a new version of the Compiled Laws was a relevant consideration in determining whether it had been repealed by implication. *Southward v Wabash Railroad Co*, 331 Mich at 145.

The use of the current compiler's placement decision as a tool of statutory construction thus runs afoul not only of reason but also the pertinent case law. There is no legal or logical basis for considering the location of the URAA in the Michigan Compiled Laws as a basis for ascertaining its scope. The reach of that act is amply demonstrated in its all-encompassing language.

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[4] "[I]n interpreting a statute, 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." *Apsey,* 266 Mich App at 673, quoting *Gross* at 147 (emphasis added in *Apsey*).

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In addition, the Court of Appeals' invocation of MCL 565.268 to support its holding simply misreads the plain text of that statute. The *entire* provision reads as follows:

> A notarial act performed prior to the effective date of this act is not affected by this act. This act provides an additional method of proving notarial acts. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state.

MCL 565.268.

The first sentence limits the temporal reach of the statute to affidavits signed after its effective date.

The second sentence — as demonstrated above — makes clear that the URAA provides an *additional* method of validating affidavits.

The third sentence underscores the second by expressly providing that the URAA does not diminish or invalidate the *recognition* accorded affidavits by other Michigan statutes. The opinion in the instant case actually rewrites the third sentence to substitute "the more specific and more formal requirements of MCL 600.2102" for the term "recognition".

In short, the plain text of §268 makes clear that the URAA provides an additional way to validate the affidavit in question. By substituting its own language for the text of the statute, the Court of Appeals actually turned the enactment on its head.

In sum, assuming that the URAA is in conflict with §2102(4), the former nevertheless applies to the affidavit in question under well-established rules of statutory construction. The Court of Appeals' majority opinion is deeply flawed both in its failure to apply those fundamental principles and in its rewriting of §268 of the URAA.

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III.

Unless it is reversed, the Court of Appeals' ruling will unduly limit and potentially defeat the ability of injured parties to litigate valid claims by making it unnecessarily burdensome or even impossible to satisfy the requirements of MCL 600.2912d.

In this case, the issue of authentication arose in the context of the procedural prerequisite to the filing of a medical malpractice action that is set forth in MCL 600.2912d(1). In considering the issue raised in the Plaintiffs' cross appeal, the Court take into account the ramifications of the Court of Appeals' decision.

Consider the following scenarios.

1. Patient ("Hertz") brings a malpractice action against Dr. B. Hertz files an affidavit of merit acknowledged before a Michigan notary and thereby satisfies MCL 600.2912d(1). After the close of discovery, Dr. B moves for summary disposition and, in support of his motion, submits the affidavit of a barely qualified "expert." Hertz files a response to which is attached the affidavit of his own expert witness — a nationally recognized authority and Virginia resident — who happened to be vacationing in Colorado when called upon to provide the affidavit. If Hertz's expert did not acknowledge the affidavit before a Colorado *judge* and have the judge's signature certified by the clerk of the Colorado court (or have the notary's signature certified by the clerk of a Colorado court if acknowledged before a notary) before sending it to Hertz's attorney (which is no small thing to ask of a vacationing expert) it is invalid, Hertz has failed to establish the existence of a genuine question of fact, and, following the precedent established in *this case*, his claim will be dismissed with prejudice.

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2. Four months earlier the same circuit court granted summary disposition in favor of Patient B (Paine) in his malpractice action against Dr. B, based largely upon the affidavit of Paine's expert, Dr. Morte of Johns Hopkins School of Medicine in Baltimore, MD, who had also provided the requisite affidavit of merit. Dr. B claimed an appeal of right but he did not raise the certification issue in the action by Paine and, therefore, did not preserve it. On appeal he submits a copy of the Court of Appeals' opinion in this case under MCR 7.212(F), and attacks the judgment in Paine's favor on the ground that the certification requirement is *jurisdictional* and, therefore, may be raised for the first time on appeal.

3. Dr. Morte had a heart attack and died shortly after the entry of Judgment in the Paine action. MRE 804(b) identifies certain statements that are not inadmissible hearsay "if the declarant is unavailable as a witness," including

> Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Hertz (see Example #1 above) wishes to use Dr. Morte's affidavit in support of his own virtually identical claim against Dr. B and it is admissible under MRE 804(b) — but under the precedent established in this case it may not be "received in judicial proceedings" because it was not certified by a Maryland court.

4. The Court may take judicial notice of the fact that the Circuit Court for Anne Arundel County in Maryland (which includes the city of Baltimore)

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has no procedure for certification of notaries as described in MCL 600.2102.

(a) The Court of Appeals' decision means that all affidavits acknowledged by Anne Arundel County, Maryland notaries are invalid as a matter of law if "received in judicial proceedings," notwithstanding the impossibility of obtaining certification consistent with § 2102.

(b) For whatever reason, Dr. Morte is the only qualified expert available to the plaintiff but, because the Maryland court will not provide the certification required to satisfy § 2102, plaintiff may be barred from asserting a malpractice claim. *This situation is precisely what the URAA is intended to remedy.*

(c) It defies logic to suggest that a Baltimore resident (such as Dr. Morte) may satisfy § 2102 by *going to another state* (or another county in Maryland, if any) that will provide a certain kind of certification or by imposing upon a Maryland judge and/or court clerk in order to make an affidavit that will be "received in judicial proceedings" in Michigan but not by making the same affidavit in his or her home county that is acknowledged in conformity with the URAA, *the purpose of which*, as stated in the prefatory note of the National Conference of Commissioners on Uniform State Laws, 14 U.L.A. 197, *is to establish a simplified and certain form for taking acknowledgments*, both within and without the state, *and to specify*

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how acknowledgments and other notarial acts taken out of the state could be taken so as to be recognized in the enacting state.

In declining to consider the effect of its ruling the Court of Appeals stated that "these questions are best left for the Legislature." *Apsey,* 266 Mich App at 683. But "these questions" have, in fact, been dealt with by the Legislature. And the opinion of the Court of Appeals is markedly at odds with the Legislature's clearly stated intent.

If, however, this Court concludes that an affidavit "received in judicial proceedings," unlike any other document, can only be "read" if acknowledged in accordance with § 2102, then the Court should hold and declare that that the acknowledgment of a foreign affidavit in accordance with MCL 565.263 but not MCL 600.2102 is merely a *procedural defect* (i) that is waived if not timely raised *and* (ii) *which may be may be cured nunc pro tunc.* See *e.g., Tucker v Clare Bros Ltd,* 196 Mich App 513; 493 NW2d 918 (1992) (failure to object to defective intervention in trial court, at which time any error could have been easily corrected, warranted nunc pro tunc relief to cure procedural defect).This would be consistent with MCL 600.2912d[5] in medical malpractice actions and to hold otherwise in circumstances such those described above (*e.g., disregarding* the existence of a genuine question of fact identified in opposition to a motion for summary disposition without providing the non-moving party an opportunity to cure a non-substantive defect) would be manifestly unjust — particularly where the issue has not been timely raised, which opens the door to overt gamesmanship.

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[5] ("Upon motion of a party for good cause shown, the court in which the complaint is filed m*ay grant the plaintiff ... an additional 28 days in which to file the affidavit required under subsection (1).*" (Emphasis added).)

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CONCLUSION

The Court should find that the Court of Appeals erred in concluding that notarial acts authenticating an affidavit of a person residing in another state that is received in judicial proceedings in this state can only be valid if done in conformity with MCL 600.2102 and are invalid if done as provided by MCL 565.263. Alternatively, the Court should declare that the acknowledgment of a foreign affidavit in accordance with MCL 565.263 but not MCL 600.2102 is merely a *procedural defect* (i) that is waived if not timely raised *and* (ii) *which may be may be cured nunc pro tunc.*

Respectfully submitted,

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