

COA Opinion: Court affirms dismissal of malpractice claim for failure to file adequate affidavit of merit

4. June 2010 By Nicole Mazzocco

On June 3, 2010, the Michigan Court of Appeals published its opinion in [Hoffman v. Barrett, No. 289011](#).

Decedent's estate and personal representative brought a malpractice claim against defendant-physician for providing negligent emergency-room treatment. The trial court dismissed the plaintiff's claim without prejudice for failure to file an adequate affidavit of merit under MCL § 600.2912d. The Court of Appeals affirmed.

On appeal, the defendant made three arguments. First, the defendant asserted that the plaintiff's claim should have been dismissed with prejudice because the statute of limitations had expired. The court disagreed. Because the complaint was filed before the Michigan Supreme Court's decision in *Waltz v Wyse*, 677 NW2d 813 (2004), *Waltz* did not apply. *Waltz* held that that Michigan's tolling statute, MCL § 600.5856, did not extend the limitations period provided in Michigan's wrongful-death savings statute, MCL § 600.5852. Before *Waltz*, the tolling statute did extend the limitations-savings period of MCL § 600.5852. And when the tolling statute is applied to the plaintiff's claim, the statute of limitations had not yet expired when the trial court dismissed the claim. Thus, dismissal without prejudice was proper.

Second, the defendant argued that the plaintiff's notice of intent was insufficient under MCL 600.2912b. To meet the statutory requirements, a notice of intent must explain the plaintiff's claim with the same level of specificity required in a complaint. Here, the notice failed to directly explain why defendant's conduct proximately caused the decedent's death. Nonetheless, the court held that when the notice was viewed as a whole the defendant understood the nature of the plaintiff's claim; the notice provided sufficient allegations describing the decedent's condition and the plaintiff's failure to treat him properly.

Third, the defendant asserted that the plaintiff's expert was not qualified to sign the affidavit of merit or render testimony regarding the standard of care. Because of the early nature of the proceedings, the court declined to address whether the expert could testify regarding the standard of care. However, the court did address whether the expert was qualified to sign the affidavit. The defendant held two board certifications: general surgery and thoracic surgery. The expert was only board-certified in general surgery. But an expert need only have the board certification which was applied in treating the plaintiff's injuries. Here, the court held that the relevant certification was in general surgery. Thus, the expert was qualified.