

United States Court of Appeals, Sixth Circuit.
Sandra ALBRIGHT, Plaintiff-Appellant,

v.

Carl CHRISTENSEN, M.D.; Christensen Recovery
Services; Carl W. Christensen, M.D., PLLC,
Defendants-Appellees.

Decided and Filed: January 31, 2022

OPINION

KAREN NELSON MOORE, Circuit Judge.

Sandra Albright asked Dr. Carl W. Christensen to treat her opioid addiction. Christensen administered three drugs that allegedly caused Albright severe emotional and physical harm. Albright (an Ohio citizen) sued Christensen (a Michigan citizen) and his practice in federal court. Defendants would have us apply Michigan’s affidavit-of-merit and presuit-notice rules for medical-malpractice actions in this diversity action; Albright insists that . . . these rules do not apply in the federal courts. We must confront two well-known cases—*Erie Railroad Co. v. Tompkins*, (U.S. 1938), and *Hanna v. Plumer* (U.S. 1965)—to resolve this classic civil-procedure conundrum. *Hanna* . . . requires us to hold that the Federal Rules of Civil Procedure conflict with Michigan’s affidavit-of-merit and presuit-notice requirements. These state rules therefore do not apply in diversity cases in federal court. Because the district court mistakenly invoked *Erie* and applied the presuit-notice rule in Albright’s case, we **REVERSE** and **REMAND**.

I. BACKGROUND

Sandra Albright was severely injured in a car accident. Albright used opioids to manage her chronic pain due to her traumatic injuries; she became addicted to opioids. Seeking treatment for her addiction, Albright turned to Dr. Carl W. Christensen to administer a one-week in-patient detoxification program. . . . [She now accuses him of negligence].

Invoking the federal courts’ diversity jurisdiction, Albright sued Christensen and his practice in the U.S. District Court for the Eastern District of

Michigan. . . . Defendants filed . . . a [motion for summary judgment,] assert[ing] that Albright’s case is properly viewed as a medical-malpractice [suit] . . . and that Albright had failed to comply with Michigan rules for medical-malpractice actions.

Looking to Michigan law, the district court found that Albright raised a medical-malpractice claim. The district court turned to the question of whether two of Michigan’s rules for medical-malpractice actions—§ 600.2912b and § 600.2912d—apply in diversity cases. Section 600.2912b contains Michigan’s presuit-notice rule . . . : “a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.” Section 600.2912d contains Michigan’s affidavit-of-merit rule: “the plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit signed by a health professional” The district court found that the affidavit-of-merit requirement does not apply in federal court but that the presuit-notice requirement does. Because Albright failed to comply with the presuit-notice requirement, the district court granted Defendants’ “motion for summary judgment” and dismissed Albright’s case with prejudice. Albright appealed.

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IV. ANALYSIS

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B. The Affidavit-of-Merit and Presuit-Notice Requirements

Having decided that Albright has raised a medical-malpractice claim, we now determine whether Michigan’s affidavit-of-merit and presuit-notice requirements apply in federal court.

1. The Multistep Test

To decide which Michigan and federal laws apply in this diversity action, we must follow a familiar multistep choice-of-law framework. Under *Hanna*,

we must first decide whether state law conflicts with a valid federal rule of procedure on point. “The initial step is to determine whether, when fairly construed, the scope of [a federal rule] is ‘sufficiently broad’ to cause a ‘direct collision’ with the state law or, implicitly, to ‘control the issue’ before the court, thereby leaving no room for the operation of that law.” *Burlington N. R. Co. v. Woods* (U.S. 1987) . . . ; see also *Gallivan v. United States* (6th Cir. 2019) (“In other words, do the Federal Rules answer ‘the same question’ as the state rule?”).

If a state law collides with a federal rule, we must determine whether the federal rule applies under the Rules Enabling Act (REA) and relevant constitutional standards per Justice Stevens’s controlling concurrence in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* (U.S. 2010) (Stevens, J., controlling opinion).¹ The relevant question is whether the federal rule is a “general rule[] of practice and procedure” that does “not abridge, enlarge or modify any substantive right” and is “procedural in the ordinary use of the term.” *Shady Grove* (Stevens, J., controlling opinion).

If the state law does not conflict with a federal rule, we must assess whether the twin aims of *Erie* are implicated, namely “discouragement of forum-shopping and avoidance of inequitable administration of the laws.” See *Hanna*. If both *Erie* prongs are met, we would then consider whether an overriding federal interest justifies the application of federal law. See *Byrd v. Blue Ridge Rural Elec. Co-op.* (U.S. 1958)

2. The Affidavit-of-Merit and Presuit Notice Requirements

Relevant to this case are Federal Rules of Civil Procedure 3, 8(a), 9, 11, and 12(b)(6). Rule 3 provides that “[a] civil action is commenced by filing a complaint with the court.” Rule 8(a) requires pleadings to contain “a short and plain statement of the

claim.” Rule 9 specifies when heightened pleadings are required. Rule 11 wards against frivolous claims and defenses. . . . Rule 11 states that “Unless a [federal] rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit” and that an attorney’s signature on, submission of, or advocacy regarding a filing certifies that the argument is nonfrivolous. And Rule 12(b)(6) guarantees that a complaint that alleges sufficient facts will survive a motion to dismiss.

We agree with the district court’s finding that Michigan’s affidavit-of-merit requirement conflicts with the Federal Rules of Civil Procedure. The question in dispute is whether a plaintiff must provide an affidavit of merit in order to state a claim of medical malpractice. Directly relevant here is our recent decision *Gallivan*, in which we tackled an almost-identical Ohio affidavit-of-merit requirement. In *Gallivan*, we explained that Rules 8(a), 9, and 12(b)(6) do not require that plaintiffs file affidavits with their complaints in order to state a claim and held that these Federal Rules exclude other requirements that must be satisfied for a complaint to state a claim. We thus concluded in *Gallivan* that Rules 8(a), 9, and 12(b)(6) answer this question in dispute. We reach the same conclusion in the present case. Our decision is bolstered by Rule 11, which states outright that “a pleading need not be verified or accompanied by an affidavit.” Because § 600.2912d collides with Rules 8(a), 9, 11, and 12(b)(6), we hold that Michigan’s affidavit-of-merit requirement does not apply in federal court.

We disagree, however, with the district court’s treatment of Michigan’s presuit-notice requirement. “Under *Shady Grove*, what matters is whether the ‘one-size-fits-all formula’ for filing and maintaining a complaint set out by the Federal Rules is enough to ‘provide[] an answer’ to the question at issue:” whether Albright must supply presuit notice to file a lawsuit. *Pledger v. Lynch* (4th Cir. 2021).

Of the relevant Federal Rules, Rule 3 most obviously resolves this disputed question. That rule requires only the filing of a complaint to commence an action—nothing more. *Compare* Fed. R. Civ. P. 3 (“A

¹ In *Gallivan*, we wrote: “The Federal Rules are presumptively valid.” . . . And, as the *Gallivan* court correctly pointed out, “the Supreme Court has rejected every challenge to the Federal Rules that it has considered under the Rules Enabling Act.”

civil action *is commenced* by filing a complaint with the court” (emphasis added)) and *id.* advisory committee’s note to 1937 adoption (“[Rule 3] provides that the *first step in an action* is the filing of the complaint.” (emphasis added)), *with* Mich. Comp. Laws § 600.2912b (“[A] person *shall not commence an action* alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.” (emphasis added)); *see also* 4 Wright et al., Federal Practice and Procedure § 1052 (2021) (“In federal actions based on diversity of citizenship jurisdiction, federal courts apply state law to decide when a lawsuit was commenced for purposes of computing limitations periods, as prescribed by the Supreme Court in *Walker v. Armco Steel Corporation* [(U.S. 1980)]. Other than that, what constitutes filing under Rule 3 is governed by federal law.”).

The dissent argues that presuit notice is a *prerequisite* to the commencement of a medical malpractice suit and therefore does not conflict with Rule 3. In interpreting the presuit notice provision, however, the Michigan Supreme Court explained: “Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely [notice of intent] and then filing a complaint and an affidavit of merit” *Tyra v. Organ Procurement Agency of Mich.* (Mich. 2015). The Michigan Supreme Court held that, for the purposes of determining how a civil action is commenced, the specific requirements of § 600.2912b(1) controlled over the more general terms of Mich. Comp. Laws § 600.1901, which is identical to Federal Rule 3. The Michigan Supreme Court’s interpretation of this provision underscores its conflict with Rule 3.

Walker addresses a different question than the one at issue in this case. The *Walker* Court considered whether Rule 3 conflicted with an Oklahoma statute that stated that the date of the commencement of an action for statute-of-limitations purposes turns on when the defendant is served. The Court explained that Rule 3 does not affect a state statute

of limitations. But Section 600.2912b is distinguishable from the Oklahoma statute in *Walker*. The Oklahoma statute affected the commencement of an action only for calculating the statute of limitations: it impacts *when* a lawsuit is commenced. In contrast, the Michigan statute—like Rule 3—affects *how* a lawsuit is commenced. Unlike the Oklahoma statute, the Michigan statute adds steps to the process of commencing an action. Because both Section 600.2912b and Rule 3 govern how a lawsuit is commenced, the two clearly conflict. *See Walker* (“The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.”).

Federal Rules 8(a), 9, 11, and 12 are on point, too. In its interpretation of § 600.2912b, the Michigan Supreme Court explained: “the failure to comply with the [presuit-notice] requirement *renders the complaint insufficient to commence the action.*” *Burton v. Reed City Hosp. Corp.* (Mich. 2005) (emphasis added). The state high court clearly applies § 600.2912b(1) as a pleading requirement.

Because Michigan applies the pre-suit notice requirement as a pleading standard, we are also persuaded by the Fourth Circuit’s recent decision in *Pledger*. The *Pledger* court addressed whether the federal courts must apply West Virginia’s “pre-suit requirements” in diversity cases. Under West Virginia law,

[a]t least 30 days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve . . . a notice of claim on each health care provider the claimant will join in litigation. . . . The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a *screening certificate of merit*. The screening certificate of merit shall be executed under oath by a health care provider

Put another way, West Virginia’s presuit requirement is a hybrid of the two Michigan provisions at issue in Albright’s case. Under West Virginia law, plaintiffs filing medical-malpractice claims must supply presuit notice to any defendant (analogous to § 600.2912b) that must include a certificate of merit (similar to § 600.2912d).

That West Virginia requires the certificate of merit to be served before the complaint is filed did not, however, dissuade the Fourth Circuit. Citing *Gallivan*, the *Pledger* court held that Rules 8(a), 9, 11, and 12 answer the question of “whether a medical malpractice plaintiff must provide pre-suit expert support for his claim” and that [the] West Virginia Code . . . thus does not apply in diversity cases. That the affidavit of merit was required to be served *before* the filing of the complaint, rather than filed *with* the complaint, did not change the fact that the affidavit-of-merit requirement acted as a heightened pleading standard.

The same reasoning applies to the pre-suit notice requirement. Section 600.2912b(4) requires that the notice include:

- (a) The factual basis for the claim.
- (b) The applicable standard of practice or care alleged by the claimant.
- (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
- (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
- (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
- (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

These requirements exceed those in Federal Rule 8(a), which requires only “a short and plain statement of the grounds for the court’s jurisdiction”; “a short and plain statement of the claim showing that the pleader is entitled to relief”; and “a demand for the relief sought.” If Michigan law provided that its requirements be included in the complaint, rather than in the notice, that law would clearly not apply federal court. The Fourth Circuit held in *Pledger* that serving an affidavit of merit before a complaint conflicted with federal pleading requirements. In this instance, too, the state cannot circumvent federal pleading requirements by requiring plaintiffs to serve documents before filing the complaint. Otherwise, the state could create any pleading requirement it chose and label it a notice requirement, and it would apply in federal court. Such a result is inconsistent with both *Hanna* and the Federal Rules of Civil Procedure.

We must next decide whether the Federal Rules 3, 8(a), 9, 11, and 12 violate the REA or the Constitution under Justice Stevens’s controlling test from *Shady Grove*. Our conclusion comes easily. “The Supreme Court has rejected every challenge to the Federal Rules that it has considered under the Rules Enabling Act” and “we have no reason to doubt the validity of the Federal Rules at issue here.” *Gallivan*.

To conclude, we reiterate that the first stage of the multistep test is “do the Federal Rules answer ‘the same question’ as the state rule?” *Gallivan*. The answer is yes. Rules 3, 8(a), 9, 11, and 12(b)(6) answer the two questions in dispute—whether Albright needs to file an affidavit with her complaint in order to state a claim and whether Albright must file a presuit notice to commence an action. Under *Hanna*, “[a]ll that matters is that there is a conflict (check) and a valid Federal Rule (check again).” *Gallivan*. We invoke *Erie* only if no on-point, valid Federal Rule of Civil or Appellate Procedure exists. See *Shady Grove* (Scalia, J.) (“We do not wade into *Erie*’s murky waters unless the federal rule is inapplicable or invalid.”). Pursuant to *Hanna*, we hold that Michigan’s affidavit-of-merit and presuit-notice requirements in diversity cases do not apply in the federal courts.

V. CONCLUSION

Because Michigan's affidavit-of-merit and pre-suit-notice requirements do not apply in diversity actions, Albright did not need to comply with them when she brought her medical-malpractice action. We thus **REVERSE** and **REMAND**.

SILER, Circuit Judge, concurring in part and dissenting in part.

CONCURRING IN PART AND DISSENTING IN PART

... The majority concludes that the Federal Rules of Civil Procedure bar the application of both requirements in federal court. I agree with the majority's two-step framework and its conclusion regarding the affidavit of merit requirement, but because the Federal Rules are silent about pre-suit requirements, I respectfully dissent.

Begin, like the majority, with the question of conflict. A conflict arises when the Federal Rules "provide [a] different answer to the question in dispute." *Passmore v. Baylor Health Care System* (5th Cir. 2016). But none of the Federal Rules governs conduct prior to the commencement of an action. And Michigan's pre-suit notice requirement, unlike its affidavit of merit requirement, governs a plaintiff's conduct before a claim is filed. Nonetheless, the majority finds that "[Federal] Rule 3 most obviously resolves this disputed question."

So, let's turn to the Federal Rule and the Michigan law. On one hand, Federal Rule 3 states that "[a] civil action is commenced by filing a complaint with the court." On the other hand, Michigan's pre-suit law states that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." The majority directs its attention to the language "is commenced" in Federal Rule 3 and "shall not commence" in Michigan's pre-suit notice law. Although that focus is understandable, it is misplaced.

States determine substantive rights. *See* U.S. Const. amend. X. And the phrase "shall not commence" only demonstrates that pre-suit notice is a prerequisite to or an element of a medical malpractice suit. *Burton v. Reed City Hosp. Corp.* (Mich. 2005). As a result, Michigan courts have enforced the Michigan legislature's words as written. *See Trowell v. Providence Hosp. and Med. Ctrs., Inc.* (Mich. 2018).

Consider also the implications of the majority's expansive view of conflict under Federal Rule 3. Can a plaintiff now bring a products liability suit without first purchasing the defective item? After all, both pre-suit notice and actual purchase are actions taken by a plaintiff to make out a claim.

The majority's view, moreover, far exceeds Federal Rule 3's purpose. "[T]he Federal Rules determine the date from which various timing requirements begin to run." *Larsen v. May Med. Ctr.* (8th Cir. 2000). That is, Federal Rule 3 is meant to establish with certainty when a suit has started. The majority employs Federal Rule 3 far afield from its purpose when using it to bar the application of a state substantive element of a claim.

Even if the majority is correct that the pre-suit requirement relates only to the commencement of an action, its conclusion remains incorrect. The commencement of an action is decided by state law, not federal law. In *Walker v. Armco Steel Corp.* (U.S. 1980), ineffective appropriate service failed to toll the statute of limitations and the claim was time-barred. So too here, Albright failed to give appropriate pre-suit notice and her claim may be time-barred. Both statutes matter because of their relationship to the statute of limitations. In other words, a claim's failure to commence because of improper service or a claim's failure to commence because of a lack of pre-suit notice results in the same outcome. The majority gives no reason to treat them differently.

Because the pre-suit notice does not conflict with the Federal Rules, the requirement should apply in federal court if it is substantive. *Hanna v. Plumer* (U.S. 1965). To determine whether the requirement is substantive, the court should look at the "twin aims of the *Erie* rule: discouragement of forum-shopping

and avoidance of inequitable administration of the laws.” Michigan’s law encourages early settlement and seeks to curb medical costs. The pre-suit notice requirement is “intertwined” with Michigan’s malpractice liability scheme and a failure to enforce the requirement would “frustrate the purposes of the statute.” *Baber v. Edman* (5th Cir. 1983). To be sure, the majority’s decision will lead to plaintiffs’ choosing the federal forum.

Unsurprisingly, no United States Court of Appeals circuit has ever found a conflict between Federal Rule 3 and a similar pre-suit requirement. In diversity cases, this court must respect the substantive laws of the States. I would AFFIRM the district court.