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BRIAN POTTER, Plaintiff-Appellee, v RICHARD C. MCLEARY, M.D., GARY AUGUSTYN, M.D., ROBERT DOMEIER, D.O., EMERGENCY PHYSICIANS MEDICAL GROUP, P.C, and ST. JOSEPH MERCY HOSPITAL ANN ARBOR, d/b/a TRINITY HEALTH-MICHIGAN, Defendants, and KRISTYN H. MURRY, M.D. and HURON VALLEY RADIOLOGY, P.C., Defendants-Appellants. BRIAN POTTER, Plaintiff-Appellee, v RICHARD C. MCLEARY, M.D., KRISTYN H. MURRY, M.D., GARY AUGUSTYN, M.D. HURON VALLEY RADIOLOGY, P.C., and ST. JOSEPH MERCY HOSPITAL ANN ARBOR, d/b/a TRINITY HEALTH-MICHIGAN, Defendants, and ROBERT DOMEIER, D.O. and EMERGENCY PHYSICIANS MEDICAL GROUP, P.C., Defendants-Appellants.

No. 262529, No. 263538

COURT OF APPEALS OF MICHIGAN

2007 Mich. App. LEXIS 244

February 6, 2007, Decided

NOTICE: [*1] THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MICHIGAN COURT OF APPEALS REPORTS.

PRIOR HISTORY: Washtenaw Circuit Court. LC No. 03-001226-NH.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff patient brought a medical malpractice action against defendants, a doctor and a hospital, among others. Defendants filed motions for summary disposition pursuant to *MCR 2.116(C)(7)*. The Washtenaw Circuit Court, Michigan, denied the motions, and defendants appealed.

OVERVIEW: On review, defendants contended that denial of their motions for summary judgment was improper as the patient's affidavits of merit did not comply with the requirements of *MCL 600.2129d*. The appellate court agreed, finding that the while the patient's affidavits of merit were signed by appropriately certified medical professionals and included specific statements of the standard of care, indications of how that standard was breached, and what actions should have been taken to comply with the standard of care, they were devoid of any statement of proximate cause. Therefore, the patient filed a complaint without an affidavit of merit sufficient to commence a medical malpractice action, and summary disposition was appropriate under *MCR 2.116(C)(7)* because the action was not properly commenced, and the statute of limitations had expired. The appellate court

rejected the patient's contention that under *MCL 600.2301*, retroactive amendment of the nonconforming affidavit of merit should have been permitted because doing so would have completely subverted the affidavit requirement established by *MCL 600.2912d(1)*.

OUTCOME: The judgment was reversed.

LexisNexis(R) Headnotes

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Procedure > Statutes of Limitations > Accrual of Actions > General Overview

[HN1] The statute of limitations in medical malpractice cases is two years from the date the claim accrued. *MCL 600.5805(6)*.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

[HN2] See *MCL 600.2301*.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Relation Back

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Procedure > Statutes of Limitations > Tolling > General Overview

[HN3] *MCL 600.2912d(1)* expressly requires that a plaintiff "shall" file an affidavit of merit with the

complaint at the commencement of the lawsuit to ensure trustworthy medical expert testimony and to discourage frivolous lawsuits. To this end, a complaint filed without the requisite conforming affidavit is insufficient to sustain a lawsuit, and therefore, the period of limitations is not tolled under these circumstances. Permitting the plaintiff to amend his nonconforming affidavits by providing the omitted and required statements of proximate cause, and then permitting the amended affidavits to relate back to the initial filing of the complaint, completely subverts the affidavit requirement established by *MCL 600.2912d(1)*, and renders superfluous the specific legislative remedy established in *MCL 600.2912d(2)* for circumstances where a conforming affidavit of merit cannot accompany the complaint.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Relation Back Governments > Legislation > Interpretation Torts > Malpractice & Professional Liability > Healthcare Providers Torts > Procedure > Statutes of Limitations > Tolling > General Overview

[HN4] *MCL 600.2301* is a statute that applies generally to pending actions or proceedings, whereas *MCL 600.2912d(1)-(2)* are statutes applying specifically to medical-malpractice actions. When two statutes conflict, the one that is more specific to the subject matter prevails over the more general statute.

JUDGES: Before: Wilder, P.J., and Zahra and Davis, JJ. DAVIS, J. (dissenting).

OPINION BY: WILDER

OPINION:

WILDER, J.

In this consolidated appeal, defendants appeal by leave granted orders denying their motions for summary disposition pursuant to *MCR 2.116(C)(7)*. The dispositive issue on appeal in this medical malpractice action is whether plaintiff's affidavits of merit complied with the requirements of *MCL 600.2912b*. Because they did not, we reverse.

The alleged malpractice took place on June 7, 2001. [HN1] The statute of limitations in medical malpractice cases is two years from the date the claim accrued. *MCL 600.5805(6)*. Presuming the notice of intent was sufficient, n1 the statute of limitations would have been tolled for 182 days from the date of the notice. *MCL 600.2912b(1)*. A notice of intent was sent to defendants Huron Valley Radiology and Murry on May 30, 2003, leaving eight days remaining before the statute of

limitations expired. A notice of intent was sent to defendants St. Joseph, [*2] Domeier, and Emergency Physicians Medical Group on May 13, 2003, leaving 25 days before the statute of limitations expired. The notices tolled the running of the limitations periods, which recommenced on November 30, 2003, and on November 13, 2003, respectively. The limitations period expired on December 8, 2003 for all defendants. Plaintiff's complaint was filed on November 4, 2003.

n1 Although sufficiency of the notices of intent is raised as an issue, we find it unnecessary to address it under the circumstances.

Plaintiff submitted two affidavits of merit with his complaint. Both were signed by appropriately certified medical professionals. They included specific statements of the standard of care, indications of how that standard was breached, and what actions should have been taken to comply with the standard of care. However, both affidavits are devoid of any statement of proximate cause. See *MCL 600.2912d(1)(d)*. Therefore, "[w]e hold that plaintiff's affidavit was defective [*3] and did not constitute an effective affidavit for the purpose of *MCL 600.2912d(1)* and, therefore, plaintiff filed a complaint without an affidavit of merit sufficient to commence a medical malpractice action." *Geralds v Munson Healthcare*, 259 Mich. App. 225, 240; 673 N.W.2d 792 (2003), citing *Scarsella v Pollak*, 461 Mich. 547, 553; 607 N.W.2d 711 (2000) (*Scarsella II*); *Mouradian v Goldberg*, 256 Mich. App. 566, 574; 664 N.W.2d 805 (2003). There is nothing in the record to suggest a conforming affidavit was filed before December 8, 2003. Therefore, summary disposition is appropriate under *MCR 2.116(C)(7)* because the action was not properly commenced, and the statute of limitations has expired.

We reject plaintiff's contention that under *MCL 600.2301*, retroactive amendment of the nonconforming affidavit of merit should be permitted, such that plaintiff's cause of action would no longer be barred by the statute of limitations. *MCL 600.2301* provides that:

[HN2] The court in which any action or [*4] proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

In *Mouradian*, this Court, quoting from *Scarsella II*, concluded that the trial court did not abuse its discretion when it denied plaintiff's request to permit the filing of an amended affidavit to relate back to the date of the filing of the complaint:

"Plaintiff contends that he should have been allowed to amend his September 22, 1996, complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, see *MCR 2.118(D)*, making timely the newly completed complaint. We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirement. Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit [*5] of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of *MCL 600.2912d(1)* . . . that the plaintiff 'shall file with the complaint an affidavit of merit,' as well as the legislative remedy of *MCL 600.2912d(2)* . . . allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint." [*Mouradian, supra at 575, quoting Scarsella II, supra at 550, quoting Scarsella v. Pollak, 232 Mich. App. 61, 65; 591 N.W.2d 257 (2000) (Scarsella I).*]

We adopt this reasoning here, and find unpersuasive our dissenting colleague's view that the instant case is distinguishable from *Scarsella II* and *Mouradian*. [HN3] *MCL 600.2912d(1)* expressly requires that a plaintiff "shall" file an affidavit of merit with the complaint at the commencement of the lawsuit...to ensure trustworthy medical expert testimony and to discourage frivolous lawsuits." *Nippa v Botsford Gen Hosp (On Remand), 257 Mich. App. 387, 394; [*6] 668 N.W.2d 628 (2003)*. To this end, a complaint filed without the requisite conforming affidavit is insufficient to sustain a lawsuit, and therefore, the period of limitations is not tolled under these circumstances.. *Scarsella II, supra at 553*. Permitting the plaintiff to amend his nonconforming affidavits by providing the omitted and required statements of proximate cause, and then permitting the amended affidavits to relate back to the initial filing of the complaint, completely subverts the affidavit requirement established by *MCL 600.2912d(1)*, and renders superfluous the specific legislative remedy established in *MCL 600.2912d(2)* for circumstances where a conforming affidavit of merit cannot accompany

the complaint. Moreover, [HN4] *MCL 600.2301* is a statute that applies generally to pending actions or proceedings, whereas *MCL 600.2912d(1)* and (2) are statutes applying specifically to medical-malpractice actions. When two statutes conflict, the one that is more specific to the subject matter prevails over the more general statute. *Craig v Detroit Public Schools Chief Executive Officer, 265 Mich. App. 572, 575; [*7] 697 N.W.2d 529 (2005)*, citing *Livonia Hotel, LLC v City of Livonia, 259 Mich. App. 116, 131; 673 N.W.2d 763 (2003)*.

Because this issue is dispositive, we need not reach the other issues raised on appeal.

Reversed.

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

DISSENT BY: DAVIS

DISSENT: DAVIS, J. (dissenting).

I agree with the majority that the affidavits of merit filed in this case were defective. As counsel essentially conceded at oral argument, they did not contain any statement whatsoever of proximate cause because they did not state how the physicians' alleged failures related to plaintiff's alleged injuries. Because no conforming affidavit was filed before December 8, 2003, when the limitations period expired, summary disposition under *MCR 2.116(C)(7)* was ostensibly appropriate.

However, I respectfully disagree with the majority's dismissal of the possibility of retroactive amendment of the nonconforming affidavits under *MCL 600.2301*, which states as follows:

The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or [*8] proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

This statute, or its substantially identical predecessor, has been part of Michigan statutory law for almost a century. n1 However, I can find no published case law addressing it in this context. The possibility of amendment was discussed in *Scarsella v Pollak, 461 Mich. 547; 607 N.W.2d 711 (2000)*. However, our Supreme Court in

Scarcella did not address the clear policy implications of *MCL 600.2301*, and the holding was explicitly limited to situations where *no* affidavit was filed whatsoever. *Scarcella, supra* at 550-553. Obviously, there is no logical way to amend a *non-existent* process, pleading, or proceeding, so *MCL 600.2301* would not have applied in any event. The situation before this Court today is different.

n1 A version of this statute, including only the first sentence, was part of the 1846 Revised Statutes, Chapter 104 § 1. The Legislature added the second sentence by 314 PA 1915, which became CL 1915, § 12478; CL 1929, § 14144, and CL 1948, § 616.1. A few inconsequential changes, like using the words "shall be" instead of "is" or "are," were made when it was re-enacted by 236 PA 1961. Because I cannot view these changes as substantive, any cases interpreting or applying the 1915 version of this statute must remain applicable today.

[*9]

Since *Scarcella*, this Court has subsequently concluded that a "grossly nonconforming" affidavit does not count as an affidavit of merit under the statute. *Saffian v Simmons*, 267 Mich. App. 297, 302-303; 704 N.W.2d 722 (2005). However, those cases that subsequently relied on *Scarcella* did not address the significant distinction: where an affidavit is *actually filed*, even if it is eventually ruled defective for one reason or another, it nevertheless exists as something in the record that can be "amended." Thus, whether *MCL 600.2301* can be used to permit retroactive amendment of a nonconforming - though *actually filed* - affidavit of merit after the period of limitations has expired is an issue of first impression.

The general rule created by *MCL 600.2301* and its predecessors is that leave to amend the pleadings "should be denied only in the face of undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *Dowerk v Charter Twp of Oxford*, 233 Mich. App. 62, 75; [*10] 592 N.W.2d 724 (1998). The goal of this rule is to dispose of cases on the basis of parties' substantial rights, rather than on technical errors. *Gratiot Lumber & Coal Co v Lubinski*, 309 Mich. 662, 668-669; 16 N.W.2d 112 (1944). However, "such amendments are not allowed when prejudice would result and when the substantial rights of the parties would be affected adversely." *Phillips v Rolston*, 376 Mich. 264, 268; 137 N.W.2d 158 (1965).

Statutes of limitation are generally considered procedural, not substantive. *People v Sinclair*, 247 Mich. App. 685, 689; 638 N.W.2d 120 (2001). However, this is

only true while the limitations periods are still running; once the limitations period has completely run, the right to defeat a cause of action becomes vested. *In re Straight's Estate*, 329 Mich. 319, 325; 45 N.W.2d 300 (1951); *Gorte v. Department of Transp.*, 202 Mich. App. 161, 167; 507 N.W.2d 797 (1993). A trial court may therefore not "permit an amendment which states a cause of action barred by the statute of limitations." *Bockoff v Curtis*, 241 Mich. 553, 558; [*11] 217 NW 750 (1928).

However, this only precludes stating a completely new cause of action. If "the transactional base of the claim [is] still [] pleaded before the statute runs, thereby giving defendant notice within the statutory period that he must be prepared to defend against all claims for relief arising out of that transaction," then "the basic policy of the statute of limitations" is satisfied even if amendment is permitted. *LaBar v Cooper*, 376 Mich. 401, 406; 137 N.W.2d 136 (1965). In essence, this is a long-standing policy directive that it is unfair to surprise the other party by retroactively amending a pleading to assert something that the party had no reasonable opportunity to defend against.

I see no such limitation here. None of the defendants have challenged whether plaintiff's notices of intent n2 complied with *MCL 600.2912b(4)(e)*, as to "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." Under *MCL 600.2912d(1)(d)*, the affidavit of merit must contain "the manner in which the [*12] breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." Logically, if the notice of intent was adequate in this regard, defendants cannot seriously contend that they would be surprised if the affidavit of merit was retroactively amended to include the same thing. In any event, it is especially hard to believe that defendants could be surprised or prejudiced after carrying on discovery and litigation for more than a year after the complaint and affidavits were filed before bringing this motion.

n2 I recognize, as does the majority, that defendants have raised a challenge to the sufficiency of the notices of intent. However, that challenge is limited to other grounds.

MCL 600.2301 and its predecessors set forth a clear policy that our jurisprudence seeks to resolve disputes on their merits, not on technicalities. It *mandates* that the courts overlook technical errors that "do not affect the substantial rights of the parties." Plaintiff [*13] actually submitted affidavits of merit that complied with the statutory requirements in all but one respect. There would be no surprise or other substantive prejudice to defendants for that technical defect to be retroactively

corrected. Therefore, plaintiff should be afforded the opportunity to amend his affidavits of merit to comply with the statute.

I recognize the majority's argument that doing so would eviscerate the Legislature's remedy under *MCL 600.2912d(2)*. See *Mouradian v Goldberg*, 256 Mich. App. 566, 575; 664 N.W.2d 805 (2003). However, I am unconvinced by it. Again, the situation before us is different. This is *not* a case where plaintiff simply filed a bare complaint without an affidavit and now seeks to go back in time to insert one into the lower court record. This is a case where plaintiff *did* file an affidavit, albeit a

defective one, and moreover had *previously* filed notices of intent that adequately set forth the missing information. An affidavit actually existed in the record, as did the information the affidavit should have contained.

Where correcting a technical defect would not inflict unfair [*14] prejudice upon the other party, I would adhere to our legal system's longstanding and honorable goal of resolving disputes on their merits.

/s/ Alton T. Davis