STATE OF MICHIGAN

COURT OF APPEALS

KIM SAFFIAN, Plaintiff-Appellee, v ROBERT R. SIMMONS, D.D.S., Defendant-Appellant.	FOR PUBLICATION July 7, 2005 9:05 a.m. No. 250645 Cheboygan Circuit Court LC No. 01-006896-NH Official Reported Version

Before: Zahra, P.J., and Neff and Cooper, JJ.

NEFF, J.

Defendant appeals as of right a default judgment and a previous order denying his motion for summary disposition and reinstating a default. We affirm.

I. Introduction

In this dental malpractice case, we must decide whether defendant had a duty to respond to a summons and complaint given a later judicial determination after an evidentiary hearing that the affidavit of merit filed with the complaint did not comply with MCL 600.2912d(1), but was not "grossly nonconforming." We hold that defendant was not relieved of his duty to timely respond to the summons and complaint. Defendant was properly defaulted when he failed to timely respond, and the trial court properly considered whether defendant had shown good cause and a meritorious defense to warrant setting aside the default. We affirm the trial court's order denying defendant's motion for summary disposition and reinstating the default and we affirm the default judgment.

II. Facts and Procedure

On August 28, 2001, plaintiff filed suit alleging that defendant committed malpractice in performing a root canal. The complaint was accompanied by an affidavit of merit signed by Mark Nearing, D.D.S., whose dental practice is limited to root canals. Defendant failed to timely answer the complaint, and on October 4, 2001, plaintiff filed a default.

On December 10, 2001, defendant moved to set aside the default on the ground that defendant's employee faxed the summons and complaint to defendant's insurance carrier, but that

the fax was not received, and therefore the carrier did not forward the complaint to its counsel for response. Further, plaintiff was not prejudiced, and defendant's affidavit established a meritorious defense based on the facts. At a hearing on the motion, defense counsel argued that the default should be set aside because policy favored setting aside defaults in favor of a fair, reasonable hearing on the merits and this case involved completely innocent circumstances of a failed communication. The trial court granted defendant's motion to set aside the default.[1]

On January 4, 2002, defendant filed an answer to the lawsuit.[2] On March 20, 2002, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the statute of limitations was not tolled by the filing of the complaint because the affidavit of merit did not meet the statutory requirements. While that motion was pending, plaintiff moved for discovery sanctions or reinstatement of the default. The trial court denied defendant's motion for summary disposition, but granted plaintiff's motion to reinstate the default. The trial court concluded that the motion to set aside the default had been improvidently granted and that plaintiff's affidavit of merit, while technically deficient, was sufficient to commence the complaint.[3]

In its opinion and order, the court noted that it earlier set aside the default on the basis of defendant's representations that the fax of the summons and complaint was not received by defendant's insurance carrier and the failure to try this case on the merits would result in manifest injustice to defendant. However, the court observed that, following discovery, defendant's phone records called into question defendant's representation that the summons and the complaint were faxed to the insurance carrier as indicated.[4] Further, the court was misled concerning setting aside the default because defendant now sought dismissal of the case on the ground that the affidavit of merit was signed by an expert in the field of endodontics rather than general dentistry. The court concluded that, unlike *White v Busuito*, 230 Mich App 71; 583 NW2d 499 (1998), in which the plaintiff filed no affidavit of merit with the complaint and, therefore, failed to commence a suit, here the affidavit was filed. Consequently, defendant was not relieved of his obligation to answer or otherwise defend the action and the default was not void *ab initio*. The court denied defendant's motion for reconsideration.

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[1] In an order entered April 12, 2002 (Docket No. 239005), another panel of this Court denied plaintiff's application for leave to file an interlocutory appeal of that decision.

[2] The lower court case register of actions indicates that an answer was filed, although no answer is found in the lower court record submitted on appeal.

[3] The parties agreed to settle plaintiff's claim while preserving defendant's right to appeal.

[4] Defendant's phone records showed that no long distance phone call was made on the date of the alleged fax that would have allowed the machine to process the fax, e.g., to a misdialed number.

III. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

A motion to set aside a default or a default judgment is to be granted only if the movant shows good cause and files an affidavit demonstrating a meritorious defense. MCR 2.603(D)(1). Good cause consists of: (1) a substantial procedural defect or irregularity or (2) a reasonable excuse for the failure to comply with the requirements that created the default. Manifest injustice is not an independent factor in establishing good cause. It is the result that would occur if a default were allowed to stand after a party had demonstrated good cause and a meritorious defense. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). The decision to grant or deny a motion to set aside a default or a default judgment is within the discretion of the trial court. *Park v American Cas Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

IV. Analysis

The statute of limitations for a medical malpractice action is two years. MCL 600.5805(6). To commence a medical malpractice action, a plaintiff must file both a complaint and an affidavit of merit. MCL 600.2912d(1). The affidavit of merit must be "signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]." MCL 600.2912d(1). If the defendant against whom testimony is offered is a general practitioner, the expert witness during the year immediately preceding the occurrence at issue must have devoted a majority of his or her professional time to either or both active clinical practice as a general practitioner or instruction of students in an accredited health professional school or residency or clinical research program in the same health profession in which the party against whom the testimony is offered is licensed. MCL 600.2169(1)(c).

An affidavit of merit that is grossly nonconforming to the statutory requirements is not an affidavit of merit that satisfies the statutory filing requirements and does not support the filing of a complaint that tolls the running of the period of limitations. *Geralds v Munson Healthcare*, 259 Mich App 225, 239-240; 673 NW2d 792 (2003); *Mouradian v Goldberg*, 256 Mich App 566, 573-574; 664 NW2d 805 (2003).

A

It is undisputed that plaintiff's complaint was filed on August 28, 2001, before the expiration of the period of limitations, and the complaint was accompanied by an affidavit of merit signed on July 10, 2001, by Mark V. Nearing, D.D.S. Defendant argues that the affidavit of merit was insufficient to commence the lawsuit and thereby toll the period of limitations because Nearing was not a properly qualified affiant under MCL 600.2169 and the trial court found that plaintiff's counsel did not have the reasonable belief that Nearing was qualified, as required for filing under MCL 600.2912d(1). However, whether defendant may have been entitled to dismissal on the basis that the affidavit was deficient and did not toll the period of

limitations is not the threshold question in this case. Defendant failed to timely answer the complaint or otherwise defend the action, and a default was entered. "Once the default of a party has entered, that party may not proceed with the action until the default has been set aside by the court in accordance with [MCR 2.603(D)] or MCR 2.612." MCR 2.603(A)(3).

Cases cited by defendant that address dismissal in the context of the expiration of the period of limitations, an affirmative defense, are inapposite. *Scarsella v Pollak*, 461 Mich 547, 550 n 1, 551-552 n 2; 607 NW2d 711 (2000). "[T]he purpose of a tolling provision is to protect a plaintiff from a statute of limitations defense." *Burton v Reed City Hosp Corp*, 471 Mich 745, 754-755; 691 NW2d 424 2005. A statute of limitations defense must be raised in a defendant's first responsive pleading or in a motion filed before that pleading. MCR 2.116(D)(2); *Burton, supra* at 755. "[T]he remedy against a party who 'fail[s] to plead or otherwise defend' in an action is default." *Id*. at 756, quoting MCR 2.603(A)(1).

Although this Court has held that a complaint filed with an affidavit that is defective for purposes of MCL 600.2912d(1) is insufficient to "commence" a medical malpractice action, *Geralds, supra* at 240, our Supreme Court has repeatedly instructed that cases decided in the context of the tolling of the statutes of limitations are factually and legally distinguishable from cases that do not involve a statute of limitations issue. *Scarsella, supra*. In *Scarsella*, the Supreme Court adopted this Court's opinion, which stated, "*for statute of limitations purposes* in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit."[5] *Id*. at 549, quoting *Scarsella v Pollak*, 232 Mich App 61, 64; 591 NW2d 257 (1998) (emphasis added). Cases not involving a statute of limitations issue are of a different view and must be analyzed accordingly. "While § 2912d states the affidavit of merit 'shall' be filed with the complaint, it does not indicate the action may not be commenced without the affidavit." *VandenBerg v VandenBerg*, 231 Mich App 497, 502; 586 NW2d 570 (1998).

B

Defendant argues that because the affidavit was signed by a person unqualified as an expert witness under MCL 600.2169, the affidavit was invalid; accordingly, he had no duty to answer the complaint, and the default is void *ab initio* under *White*. We disagree.

In *White, supra*, the plaintiff failed to file an affidavit of merit or security for costs[6] with her medical malpractice complaint. The Court observed that the plain language of MCL

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[5] Compare *Mouradian, supra* at 571, quoting the same sentence from *Scarsella*, but omitting the introductory clause ("[P]laintiffs' complaint, filed without the affidavit of merit required by MCL 600.2912d, did not toll the limitations period because 'in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit.'" [Punctuation and citation deleted.]).

[6] The statutory provision in effect at the time the plaintiff's complaint was filed required that a medical malpractice plaintiff file either security for costs or an affidavit of meritorious claim
(continued…)

600.2912d required a medical malpractice plaintiff to file either security for costs or an affidavit of merit with the complaint. Further, a defendant's duty to answer is conditioned on the filing of the affidavit or security for costs. The Court noted that MCL 600.2912e(1) provided that a defendant in a medical malpractice action shall file an answer "within 21 days after the plaintiff has furnished security or filed an affidavit in compliance with section 2912d . . . ." *White, supra* at 76. Likewise, MCR 2.108(A)(6) stated in relevant part that "the defendant must serve and file an answer within 21 days after being served with the notice of filing the security for costs or the affidavit in lieu of such security required by MCL 600.2919d." *White, supra* at 76. Giving this language its plain and ordinary meaning, the Court concluded that "a plaintiff's filing of security for costs or an affidavit of meritorious claim is an absolute prerequisite to the defendant's obligation to answer or otherwise defend the action." *Id*. The Court held that, because the plaintiff never filed an affidavit of merit or security for costs, the defendant's "answer was not yet due" because the twenty-one-day period for filing the answer never began to run. *Id*. at 76-77.

We conclude that *White* does not control in this case. In *White*, an affidavit was never filed, and it was clear that the statutory requirements were not met. In this case, plaintiff filed a presumably valid affidavit of merit with the complaint.[7] According to plaintiff's counsel's affidavit, at the time he filed the complaint, he believed that the affidavit of merit satisfied the statutory requirements.[8] It was only in subsequent judicial proceedings that the affidavit was found to be deficient on the basis of this Court's holding in *Decker v Flood*, 248 Mich App 75; 638 NW2d 163 (2001). In *Decker*, this Court observed that an endodontist is one who specializes in the practice of endodontics, and, thus, is not a general practitioner within the meaning of the statutory limitations on expert witnesses in medical malpractice cases. *Id*. at 83-84. However, *Decker* was not decided until October 26, 2001, after the default in this case was entered, and long after defendant's answer was due.

Moreover, in *White*, the Court expressly noted that although the plaintiff's medical malpractice complaint appeared to be deficient with regard to stating a claim for medical malpractice, the deficiencies did not relieve the defendant of his obligation to file an answer. *White, supra* at 78 n 7. Likewise, the deficiency in the affidavit in this case did not relieve defendant of his duty to file an answer.

To hold that a duty to answer the complaint never arose in this case would open the floodgates to all manner of retrospective claims that a defendant had no obligation to respond to a summons and complaint. Such reasoning would undermine the fundamental purpose of default

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with the complaint. *White, supra* at 75-76.

[7] Defendant's sole challenge to the affidavit is based on the fact that Dr. Nearing limits his practice to endodontics; defendant does not claim that the affidavit is otherwise deficient.

[8] We recognize that, following an evidentiary hearing, the trial court concluded that plaintiff's counsel's belief was not reasonable in light of stipulated facts concerning the extent of plaintiff's counsel's investigation of defendant's credentials and Dr. Nearing's credentials before filing the lawsuit.

and the finality of judgments. It rewards dilatory response to lawsuits in circumstances in which a lawsuit is, by all initial accounts, valid.

Worse, to rule as defendant urges would create the opportunity for defendant to knowingly foster the running of the limitations period by ignoring a lawsuit and then simply bypass the default by attacking the affidavit of merit, depriving plaintiff of the legitimate opportunity to cure a defect if attacked in an answer or affirmative defense. A defendant would suffer no adverse consequences if a postdefault attack on the affidavit were successful. In the meantime, a plaintiff 's claim is laid to rest as the limitation period expires.

The requirement that a defendant answer a complaint tests the adequacy of the complaint and affidavit. If procedural devices permit a complaint to go unanswered to no disadvantage, the test fails in its purpose. We decline to extend the holding in *White,* in which the affidavit was nonexistent, to the circumstances of this case.

C

The remaining question is whether the trial court abused its discretion in failing to set aside the default.

> The ruling on a motion to set aside a default or a default judgment is entrusted to the discretion of the trial court. Where there has been a valid exercise of discretion, appellate review is sharply limited. Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside. [*Alken-Ziegler, supra* at 227 (citations omitted).]

We conclude that the court did not abuse its discretion. Following discovery, the court found that the telephone records called into question defendant's representation that the summons and complaint were faxed to the insurance carrier as indicated and that the fax was not received. After defendant had misled the court concerning setting aside the default, he sought dismissal of the case on the ground that the affidavit of merit was signed by an expert in the field of endodontics rather than general dentistry.

It is clear that the court was not persuaded by defendant's assertion that he had a reasonable excuse for failing to timely answer the summons and complaint. Viewing the record, we find no basis for ruling otherwise.

It is undisputed that defendant was served with the summons and complaint on September 7, 2001. Twelve days later, on September 19, 2001, defendant's employee allegedly faxed the summons and complaint to the insurance carrier. However, defendant's phone records showed no charge for a long distance call on the alleged date of the fax. There was no contact with the insurance carrier to advise it of the summons and complaint, other than the alleged fax, and there was no follow-up to determine whether the fax was received. The insurance carrier had previous notice of the lawsuit because it was provided with the statutory notice of intent to file a claim in March 2001. Considering the facts on which the court acted, an unprejudiced person cannot say that there is no justification or excuse for the court's ruling. *Id.* at 228.

Although not directly relevant to the grounds for setting aside the default, the court's finding that defendant misled the court was germane to the court's considerations. At the hearing in December 2001, defendant argued that the default should be set aside and the case should be heard on the merits. Defendant did not argue the statute of limitations defense or the alleged defect in the affidavit at the time of the hearing even though *Decker* had already been decided by this Court. It was only later, in March 2002, that defendant cited *Decker* as the basis for his motion for summary disposition.

An appellate court may not substitute its judgment in matters falling within the discretion of the trial court. *Alken-Ziegler, supra* at 228. The trial court's decision to reinstate the default is entitled to great deference. *Id*. We find no circumstances warranting reversal.

Affirmed.

Cooper, J., concurred.

/s/ Janet T. Neff
/s/ Jessica R. Cooper