STATE OF MICHIGAN

COURT OF APPEALS

PAULINE SHENDUK,

Plaintiff-Appellant,

v

HARPER HOSPITAL and JOSEPH G. TALBERT, M.D.,

Defendant-Appellees.

UNPUBLISHED
October 29, 1999

No. 199547, 200389
Wayne Circuit Court
LC Nos. 96-619269-NH
96-641382-NH

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

In Docket No. 199547, plaintiff Pauline Shenduk appeals by leave granted from an order dismissing her medical malpractice complaint in lower court docket number 96-619269-NH for failure to file an affidavit of merit that complied with MCL 600.2912d; MSA 27A.2912(4). In Docket No. 200389, which involved a later filed but essentially identical medical malpractice complaint, Shenduk appeals as of right an order granting summary disposition in favor of defendants Harper Hospital and Joseph G. Talbert, M.D., based on the statute of limitations. We affirm.

I. Factual Background And Procedural History

In March 1996, Shenduk filed a complaint against defendants Harper Hospital and Dr. Talbert. In this complaint, Shenduk alleged that she reported to Harper Hospital, under the care of Dr. Talbert, on April 1, 1994, and that coronary artery bypass surgery was performed on April 2, 1994.[1] Shenduk further alleged that she was administered the medication heparin from April 1, 1994, to April 4, 1994, and that "[p]latelet counts taken during this period of time were within normal limits." According to the complaint, on April 7, 1994, Shenduk "began to complain of signs and symptoms consistent with deep vein thrombosis in her left lower extremity," and she was administered the medications heparin and coumadin from April 7, 1994, to April 12, 1994. A platelet count taken on April 12, 1994, was "abnormally low at 75,000," while a platelet count on April 13, 1994, was "abnormally low at 61,000." Shenduk alleged that she was "subsequently diagnosed with heparin induced

thrombocytopenia, white clot syndrome and heparin allergy" and that, on April 13, 1994, she "was forced to undergo a left, above the knee, amputation as a result of thrombosis in her left leg due to her reaction to heparin." Shenduk alleged that each defendant was negligent

> in that a reasonable and prudent licensed and practicing health care provider, when presented with a patient exhibiting the medical history and signs and symptoms such as those manifested by Ms. Shenduk, owes a duty to timely and properly:
>
> a. Maintain an awareness of the potential for the development of heparin induced thrombocytopenia, white clot syndrome or heparin allergy and assess a patient's response to heparin by performing platelet counts and tests for platelet associated immunoglobulin G.
>
> b. In the presence of decreased platelet count, increased platelet associated immunoglobulin G, and signs and symptoms of vascular thrombosis, discontinue use of heparin and include heparin induced thrombocytopenia, white clot syndrome or heparin allergy in the [] differential diagnosis.[2]

A document entitled "Plaintiff's Affidavit of Meritorious Claim" was attached to the complaint. This document consisted of an affidavit signed by Louis Fiore, M.D., indicating that in his opinion the acts and omissions that Shenduk alleged to be negligent constituted a violation of the applicable standard of care. This affidavit included no designation or description of the nature of Dr. Fiore's medical practice or training and did not state whether he was a specialist in any area of medical practice.

As we will address in detail below, defendants essentially moved for dismissal of the action in lower court docket number 96-619269-NH on the ground that the purported affidavit of merit filed by Shenduk failed to comply with MCL 600.2912d; MSA 27A.2912(4) and MCL 600.2169(1)(a); MSA 27A.2169(1)(a) because Dr. Fiore was not a board certified specialist in the same medical specialty as Dr. Talbert. Specifically, Dr. Talbert was a board certified thoracic surgeon specializing in cardiothoracic surgery while Dr. Fiore was not. The trial court eventually dismissed the action without prejudice after concluding that the purported affidavit of merit did not satisfy MCL 600.2912d(1); MSA 27A.2912(4)(1) because Shenduk's attorney could not have reasonably believed that Dr. Fiore would qualify as an expert witness in this case under MCL 600.2169; MSA 27A.2169.

On September 25, 1996, Shenduk filed another medical malpractice action in the lower court in docket number 96-641382-NH with a complaint stating essentially identical medical malpractice claims against defendants. However, that complaint was accompanied by an affidavit of merit signed by Thomas O'Grady, M.D., who apparently was board certified in cardiothoracic surgery. The trial court granted summary disposition in favor of defendants under MCR 2.116(C)(7) because the complaint had not been filed within the applicable two-year statute of limitations.

II. Standards Of Review

A. No. 199547 - Dismissal of Complaint

Generally, we review a decision to grant a motion for involuntary dismissal for clear error. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). However, Shenduk argues in part that MCL 600.2169; MSA 27A.2169 is unconstitutional. This is a question of law that we review de novo. *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (rel'd 7/30/99), slip op at 8.

B. No. 200389 - Summary Disposition

We review an order granting summary disposition de novo. *Novak v Nationwide Mutual Ins Co*, 231 Mich App 675, 681; 599 NW2d 546 (1999). In reviewing a grant of summary disposition under MCR 2.116(C)(7), "[w]e must take the well-pleaded allegations in the pleadings and the factual support submitted by the nonmoving party as true, and summary disposition is proper only if the moving party is then shown to be entitled to judgment as a matter of law." *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 527-528; 538 NW2d 424 (1995).

III. No. 199547

A. Compliance With MCL 600.2912d; MSA 27A.2912(4)

Shenduk argues that the trial court erred in dismissing her complaint because Shenduk's counsel reasonably believed that the purported affidavit of merit from Dr. Fiore that was filed with the complaint complied with the requirements of MCL 600.2912d; MSA 27A.2912(4). We disagree.

MCL 600.2912d(1); MSA 27A.2912(4)(1) provides in pertinent part that

> the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney *reasonably believes* meets the requirements for an expert witness under [MCL 600.2169; MSA 27A.2169 (emphasis supplied)].

MCL 600.2169(1); MSA 27A.2169(1), in turn, provides in pertinent part:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. *However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.* [Emphasis supplied.]

In this case, the evidence was undisputed that Dr. Talbert was board certified in general surgery and in thoracic surgery with a specialty in cardiothoracic surgery. In contrast, Dr. Fiore was not board

certified in those areas, although he was board certified in the distinct area of internal medicine. Accordingly, under the clear and unambiguous statutory language of MCL 600.2169; MSA 27A.2169, Dr. Fiore was not qualified to give expert testimony in this case on behalf of Shenduk. Like any attorney practicing in Michigan, Shenduk's counsel should have been familiar with the well-established principle that clear and unambiguous statutory language is to be applied by a court in accordance with its plain meaning. See, e.g., *Rickner v Frederick*, 459 Mich 371, 378; 590 NW2d 288 (1999) ("if the Legislature has crafted a clear and unambiguous provision, we assume that the plain meaning was intended, and we enforce the statute as written"); *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 217; 580 NW2d 424 (1998), quoting *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996) ("If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. Further, we are to give statutory language its ordinary and generally accepted meaning."). Thus, the trial court did not clearly err, *Phillips, supra*, in concluding that Shenduk's counsel could not have *reasonably* believed that Dr. Fiore's affidavit complied with the affidavit of merit requirement of MCL 600.2912d; MSA 27.2912(4) because Dr. Fiore was plainly not eligible to provide expert testimony in this case under MCL 600.2169; MSA 27A.2169.

B. Constitutionality of MCL 600.2169; MSA 27A.2169

Shenduk alternatively argues that the trial court erred in dismissing her complaint because MCL 600.2169; MSA 27A.2169 is unconstitutional. Shenduk's position is that, by setting greater requirements for the admission of expert testimony in a medical malpractice case than those required by MRE 702 for the admission of expert testimony generally, MCL 600.2169; MSA 27A.2169 violates Const 1963, art 6, § 5, which provides that the Michigan Supreme Court "shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." However, the Michigan Supreme Court recently decided this precise issue, contrary to Shenduk's position, in *McDougall, supra*.[3] The Court concluded that a statutory rule of evidence that conflicts with a court rule violates Const 1963, art 6, § 5 only if it involves "'no clear legislative policy regarding matters other than judicial dispatch of litigation.'" *McDougall, supra*, slip op at 17-18, quoting *Kirby v Lawson*, 400 Mich 585, 598; 256 NW2d 400 (1977). Accordingly, if in a given case a particular court rule conflicts with a statutory rule of evidence based on a policy consideration other than court administration, then the court rule must yield to the statutory provision. *Id.* at 18. Applying these principles, the Court concluded that MCL 600.2919; MSA 27A.2169 "reflects wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists," and that it does not violate Const 1963, art 6, § 5. *Id*. at 2, 23. Thus, the trial court's dismissal of the complaint at issue should not be disturbed based on this issue.

IV. No. 200389

Besides repeating the arguments that the trial court erred in dismissing the earlier complaint at issue in No. 199547, which we have already discussed and rejected, Shenduk argues that the trial court erred by granting summary disposition in favor of defendants based on the statute of limitations with regard to the complaint in the later filed action at issue in No. 200389. We disagree.

Shenduk does not dispute that the complaint at issue was not filed until after the running of the statute of limitations, even with the statute being tolled during the pendency of the prior action that was dismissed without prejudice. Rather, she argues that this Court should recognize the doctrine of equitable tolling in accordance with the out-of-state authority of *Hosogai v Kadota*, 145 Ariz 227; 700 P2d 1327, 1333 (1985). However, even assuming arguendo that this Court should so recognize the doctrine of equitable tolling, one of its basic requirements is that the plaintiff diligently filed the second action. *Id.* In this case, Shenduk has failed to provide, either below or in this Court, any reasonable excuse for her failure to timely file the complaint at issue.[4] In this regard, the policy reasons behind the statutes of limitation include penalizing plaintiffs who are not industrious in pursuing their claims and conversely encouraging plaintiffs to pursue claims diligently. *Lemmerman v Fealk*, 449 Mich 56, 65; 534 NW2d 695 (1995). Accordingly, Shenduk has not shown that the trial court erred by granting summary disposition in favor of defendants based on the statute of limitations.

V. Conclusion

In No. 199547, Shenduk has not established that the trial court clearly erred by dismissing her complaint. Under *McDougall*, MCL 600.2169; MSA 27A.2169 is not unconstitutional as violative of Const 1963, art 6, § 5. In No. 200389, Shenduk has not shown that the trial court erred by granting summary disposition in favor of defendants based on the statute of limitations.

Affirmed.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie

[1] While not expressly stated in the complaint, it appears undisputed that Dr. Talbert performed this surgery.

[2] Shenduk later field an amended complaint which added Ronald Kline, M.D., as a defendant. However, it appears that Dr. Kline was never served with process and has never been an active party to this suit.

[3] A majority of this panel previously entered an order holding the present case in abeyance in anticipation of the Michigan Supreme Court resolving the pertinent issue in *McDougall*. We offer no view on the soundness of our Supreme Court's opinion in *McDougall*, but simply apply it as binding precedent.

[4] We note that any difficulty that Shenduk *might* perhaps have had in locating a qualified medical professional to provide the affidavit of merit in connection with the complaint at issue did not provide a reasonable excuse for failing to timely file the complaint. The requirement of filing an affidavit of merit in a medical malpractice action that is provided by MCL 600.2912d(1); MSA 27A.2912(4)(1) is expressly made subject to MCL 600.2912d(2); MSA 600.2912(4)(2), which provides:

> Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

However, Shenduk never sought to avail herself of this provision and accordingly cannot reasonably contend that she was denied an opportunity to timely file a proper affidavit of merit.