STATE OF MICHIGAN

COURT OF APPEALS

RALPH CHRISTY and BETTY J. CHRISTY,

Plaintiffs-Appellees,

v

DETROIT OSTEOPATHIC HOSPITAL CORPORATION,

Defendant-Appellant.

UNPUBLISHED
October 29, 1999

No. 205827
Wayne Circuit Court
LC No. 97-704580 NH

Before: Gribbs, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

This Court granted defendant leave to appeal from the trial court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

Plaintiff alleged that he underwent coronary bypass surgery at defendant's hospital in 1984, and that he was found to be HIV positive and infected with AIDS in 1996 as a result of blood replacement therapy received in connection with his 1984 surgery. [1] Plaintiff further alleged that defendant was negligent because it failed to insure that blood donors were properly screened for AIDS, failed to maintain records on the source of the blood, failed to inform him of the risk of being infected with AIDS from a blood transfusion, and failed to test the blood. Pursuant to MCL 600.2912d; MSA 27A.2912(4) (§ 2912d) and MCR 2.112(L), plaintiff accompanied his complaint with an affidavit of merit signed by Dr. Thomas DeLoughery which stated in pertinent part as follows:

> 1. That I am a medical doctor, licensed to practice medicine in several states, and I am Board Certified in Internal Medicine, Medical Oncology, and Hematology.
>
> * * *
>
> 3. That the Standard of Care for a hospital facility in April, 1984, with regard to the administration of Blood Replacement Therapy . . . was to insure that the blood center where the blood was obtained from screened the donors for risk factors for putative AIDS virus including personal sexual preference and drug use and that this

information was used to exclude donors at risk of transmitting AIDS. Furthermore, records should have been kept to allow tracing of the source of all blood products and the donors who donated them. In addition, patients should have been specifically informed of the risk of being infected with AIDS from a blood transfusion.

4. In my opinion, based upon the records, and I have reviewed them from Detroit Osteopathic Hospital, it appears that no such background check was done nor was Mr. Christy told of the risks of contracting AIDS from his blood transfusions.

Plaintiff subsequently filed a first amended complaint to add his wife, Betty Christy, as a plaintiff with a claim for loss of consortium.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) on the ground that plaintiff's affidavit of merit did not comply with MCL 600.2912d; MSA 27A.2912(4), which states, in pertinent part:

> (1) Subject to subsection (2), 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 section 2169* [MCL 600.2169; MSA 27A.2169]. [Emphasis added.]

Section 2169, in turn, provides in pertinent part:

> (1) 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.
>
> (b) Subject to subdivision (c), *during the year immediately preceding the date of the occurrence that is the basis for the claim or action*, devoted a majority of his or her professional time to either or both of the following:
>
> *(i)* The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> *(ii)* The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which

> the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty. [Emphasis added.]

Relying on excerpts of a telephone deposition given by Dr. DeLoughery in a different circuit court case[2], defendant contended that Dr. DeLoughery could not qualify as an expert under MCL 600.2169(1)(b); MSA 27A.2169(1)(b) and sought dismissal on this ground, citing MCR 2.116(C)(8), MCL 600.2912d; MSA 27A.2912(4), and *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996). Defendant also argued that Dr. DeLoughery could not qualify as an expert under MRE 702[3] because his deposition revealed that he was in medical school at the time of the subject occurrence in 1984. Plaintiff contended that 1996, the year in which plaintiff was diagnosed with AIDS, was the operative "occurrence" date for determining Dr. DeLoughery's qualification as an expert for purposes of MCL 600.2169; MSA 27A.2169. Plaintiffs filed Dr. DeLoughery's curriculum vitae and another affidavit dated May 22, 1997, in support of their position. In that affidavit, Dr. DeLoughery stated, in part:

> 3. That as far back as 1984, I do recall patients being brought into Indiana University Medical School, with similar conditions as Mr. Christy, and being part of not only the studying of those conditions, but also and more importantly the proper procedures were [sic] with regard to tracing the blood products before given to a patient.

The trial court denied defendant's motion and defendant filed an application for leave to appeal to this Court, which granted its application. While defendant's application was pending, a suggestion of death was filed in the trial court indicating that plaintiff died on August 22, 1997.

In its sole issue on appeal, defendant contends that plaintiff's expert, who was not a medical doctor at the time of the alleged malpractice in 1984, was not qualified to provide an affidavit of merit pursuant to §2912d and MCL 600.2169; MSA 27A.2169 (§ 2169). At the outset, we note that defendant's labeling of this motion was incorrect. MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine which relief may be granted." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). However, the issue raised in defendant's motion necessarily involved factual assertions contained in documents other than pleadings. Because the trial court considered an affidavit, deposition testimony and other documentary evidence, defendant should have moved for summary disposition under MCR 2.116(C)(10). *Id.* However, the mislabeling of a motion does not preclude our review where the trial court's record otherwise permits it. *Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 57-58; 498 NW2d 5 (1993).

We affirm the trial court's order denying defendant's motion for summary disposition, but for different reasons that those articulated by the trial court. Appellate review of a motion for summary disposition is de novo. *Spiek, supra* at 337. However, we do not believe that a motion for summary disposition is appropriate under the facts of this case. Rather, for reasons as set forth below, we

conclude that defendant's claim is based upon plaintiff's failure to comply with MCR 2.112(L), which provides that, "In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in MCL 600.2912d, 600.2912e; MSA 27A.2912(4), 27A.2912(5). . . ."

This Court previously rejected defendant's contention that *Morrison, supra*, established dismissal as the appropriate remedy for a plaintiff's noncompliance with § 2912d. See *VandenBerg, v VandenBerg*, 231 Mich App 497, 501-502; 586 NW2d 570 (1998). In *Vandenberg*, we stated that dismissal was required in *Morrison, supra*, where the plaintiff commenced a malpractice action without giving the 182-day written notice as required under MCL 600.2912b; MSA 27A.2912(2) (§ 2912b). *Id.* However, we concluded that § 2912d is distinguishable from § 2912b, because § 2912d does not mandate dismissal for noncompliance. *Id.* at 502. "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." *Id.* Shortly thereafter, in *Scarsella v Pollak*, 232 Mich App 61, 64; 591 NW2d 257 (1998), we concluded that "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." We distinguished *Vandenberg* from *Scarsella* because "*Vandenberg* did not involve a statute of limitations problem." *Id.* at 66, n 1. More recently, our Supreme Court held that dismissal without prejudice on a motion for summary disposition was appropriate where a plaintiff failed to file an affidavit of merit as required by § 2912d. *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26, 47-48; 594 NW2d 455 (1999). However, the Court distinguished the plaintiff's failure to file an affidavit of merit in *Dorris* with our decision in *Vandenberg*, in which the plaintiff did not file the affidavit with the complaint, but served defendant with a copy of the affidavit with the summons and complaint. *Id*.

Here, unlike the plaintiffs in *Dorris* and *Scarsella*, plaintiff properly commenced his lawsuit by filing an affidavit of merit. Because defendant does not claim that plaintiff failed to file an affidavit, but rather that the affiant was unqualified to execute the affidavit, we adopt the rule in *Vandenberg* that dismissal is not mandatory. If Dr. Deloughery was not qualified to execute an affidavit as required by MCR 2.112(L), then defendant should move for an involuntary dismissal pursuant to MCR 2.504(B)(1), which provides that "[i]f a plaintiff fails to comply with these rules . . . a defendant may move for dismissal of an action or a claim against that defendant." As we observed in *Vandenberg, supra* at 502, dismissal of a claim is a drastic sanction that should be taken cautiously. "Before imposing dismissal as a sanction, the trial court must carefully evaluate all available options on the record and conclude that dismissal is just and proper." *Id.* Accordingly, under the facts of this case, we conclude that the trial court properly denied defendant's motion for summary disposition. Although the trial court's reasoning was incorrect, this Court will not reverse when the right result was reached for the wrong reason. *Samuel D*

Begola Services, Inc v Wild Brothers, 210 Mich App 636, 640; 534 NW2d 217 (1995).

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski
/s/ Hilda R. Gage

[1] Because Betty J. Christy's claims against defendant are for loss of consortium and therefore derivative of Ralph Christy's claim, in this opinion we will refer to Ralph Christy as "plaintiff."

[2] *Kuehn v Children's Hospital of Michigan*, Wayne Circuit Court Case No. 93-307812 NH.

[3] MRE 702 provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.