

STATE OF MICHIGAN
COURT OF APPEALS

JAMES MOSS,

Plaintiff-Appellant,

and

MRS. JAMES MOSS, a/k/a JANICE MOSS,

Plaintiff,

v

OAKWOOD HOSPITAL, OAKWOOD
HOSPITAL BEYER CENTER, and TOUFIK
TABBARA, M.D.,

Defendants-Appellees.

UNPUBLISHED

June 16, 2000

No. 217241

Washtenaw Circuit Court

LC No. 98-004560-NH

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from a trial court order granting defendants' motion for summary disposition on the ground that plaintiff's action was time barred. We affirm.

We review de novo a trial court's decision granting a motion for summary disposition. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999).

Plaintiff contends the trial court erred by relying on our decision in *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998). In *Scarsella*, we ruled a medical malpractice complaint without an affidavit of merit is insufficient to commence an action for purposes of tolling the limitation period and, consequently, where an affidavit of merit is filed after the expiration of the limitation period the action is time barred, even though the complaint was filed before the expiration of the period of limitation. *Id.* at 64-65. Here, the trial court found plaintiff's affidavit was not filed until after the statute

of limitations on his claim expired; therefore, it concluded that *Scarsella* required dismissal of plaintiff's case.

Plaintiff does not challenge the finding that his affidavit of merit was filed after the running of the limitation period; rather, plaintiff contends that our *Scarsella* decision improperly distinguished controlling authority—*VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998). In *VandenBerg*, we held dismissal was not required for failing to include an affidavit of merit with the complaint. *Id.* at 501-502. The *Scarsella* panel, however, distinguished *VandenBerg* because *VandenBerg* did not involve a statute of limitations problem, whereas *Scarsella* involved the remedy for failing to file an affidavit of merit before the statute of limitations expired. *Scarsella, supra* at 64, n 1. Accordingly, the *Scarsella* panel stated *VandenBerg* was both factually and legally distinguishable. *Id.*

Since the trial court's ruling, our Supreme Court, in a per curiam opinion filed on March 28, 2000, affirmed this Court's decision in *Scarsella*. *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). In fact, our Supreme Court noted that the *Scarsella* panel correctly distinguished *VandenBerg*. *Id.* at 552, n 4. Accordingly, we reject plaintiff's argument that the trial court erred by relying on the correctly decided *Scarsella* decision.

Finally, we decline to address plaintiff's remaining issue because it was neither decided by the trial court nor raised below. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999); *Vander Bossche v Valley Pub*, 203 Mich App 632; 513 NW2d 225 (1994).

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot