

STATE OF MICHIGAN  
COURT OF APPEALS

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RONALD PELUDAT,

Plaintiff-Appellee,

v

SURYA SANKARAN, M.D., d/b/a SURYA  
SANKARAN, M.D., P.C.,

Defendant-Appellee,

and

TAWAS ST. JOSEPH HOSPITAL,

Defendant-Appellant.

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UNPUBLISHED

January 12, 2001

No. 219028

Iosco Circuit Court

LC No. 98-000866-NH

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant, Tawas St. Joseph Hospital, appeals by leave granted from an order denying its motion for summary disposition and motion to set aside order. We reverse.

On February 9, 1998, plaintiff filed a complaint alleging medical malpractice. Specifically, plaintiff alleged that, in August 1995, he suffered from external and internal hemorrhoids. He sought treatment for the condition and was scheduled to have surgery to remove the hemorrhoids on August 31, 1995, at defendant hospital. Defendant Dr. Sankaran performed the surgery. Plaintiff alleged that medical malpractice occurred relative to pre-operative procedures, the operation itself, and post-operative procedures. An affidavit of merit *was not filed* with the medical malpractice complaint. Furthermore, a motion to extend the time for filing an affidavit of merit *was not filed contemporaneously with the complaint*. Instead, on February 20, 1998, eleven days after filing the complaint, plaintiff filed an ex parte motion to allow an additional twenty-eight days to file an affidavit of merit. Specifically, plaintiff acknowledged that an affidavit of merit was a statutory requirement that had not been fulfilled, but claimed that good cause was present for failing to timely file the affidavit and to extend the time frame for filing, by stating in his motion:

3. Plaintiff has forwarded the Notice of Intent and all of Plaintiff's pertinent medical records to a board certified general surgeon who will testify as to the standard of care required by Defendants Surya Sankaran, M.D., and Tawas St. Joseph Hospital.

4. An Affidavit is forthcoming, as counsel for Plaintiff has recently spoken to her [sic] expert general surgeon.

5. MCLA § 600.2912d(2) provides that upon good cause shown, the court in which the complaint is filed may grant the plaintiff an additional 28 days in which to file the affidavit of merit.

6. Plaintiff has shown the requisite good cause in that he was forced to file his Complaint on February 9, 1998, in that the surgery for which the subject of this medical malpractice action transpired on February 11, 1996. Therefore, the Statute of Limitations was rapidly expiring on Plaintiff's cause of action.

7. Plaintiff had to file his Complaint or he would have been forever barred from asserting any claims for medical malpractice against the above named Defendants.

8. Prior to the expiration of the Statute of Limitations, Plaintiff was unable to secure an Affidavit of Merit signed by a board certified health care professional.

9. Plaintiff has shown good cause for an additional 28 days in which to file his Affidavit of Merit pursuant to the requirements of MCLA § 600.2912d(2) afford Plaintiff an opportunity in which to secure an Affidavit.

Despite the fact that the allegations in the motion contradicted the allegations of the complaint, an ex parte order entered on February 20, 1998, that permitted an extension to file the affidavit of merit. The order provided:

This matter having come before the Court on Plaintiff's Complaint filing, and said action having been filed under the new medical malpractice tort reform (MCLA § 600.1483 *et seq.*), after serving the Notice of Intent to File Claim the new Statute having required an Affidavit of Merit to be filed with the Complaint, executed by an appropriate health care professional pursuant to MCLA § 600.2912d(2), the Court, however, having the authority upon good cause shown to afford Plaintiff an additional 28 days in which to file the required Affidavit of Merit, the pertinent medical records having been forwarded to Plaintiff's proposed expert, who has yet to finalize his review, and the Court being otherwise fully advised in the premises;

**NOW THEREFORE;**

**IT IS HEREBY ORDERED** that under the authority granted by MCLA § 600.2912d(2), Plaintiff is granted an additional 28 day period to March 9, 1998, within which to file an appropriate Affidavit of Merit.

Prior to the expiration of discovery, defendant moved for summary disposition and to set aside the order allowing for an extension of time to file the affidavit of merit. Defendant alleged that plaintiff's complaint was null and void due to the failure to file the affidavit of merit with the complaint. Defendant also argued that the ex parte motion to extend the time for filing the affidavit of merit was erroneously granted where plaintiff had failed to make a good cause showing. In response, plaintiff alleged that the case law relied on by defendant was distinguishable. Plaintiff alleged that the trial court had made a finding of good cause regarding the order extending the time to file the affidavit of merit. The trial court denied defendant's motions, and we granted leave to appeal.

Defendant argues that the trial court erred in denying its motion for summary disposition and to set aside the order extending the time frame for filing the affidavit of merit. We agree. Statutory interpretation presents a question of law that we review de novo. *Omelenchuk v City of Warren*, 461 Mich 567, 571, n 10; 609 NW2d 177 (2000). MCL 600.2912b; MSA 27A.2912(2) provides in relevant part:

(1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

MCL 600.5856; MSA 27A.5856 was amended to address the expiration of the statute of limitations during the 182 day notice provision and provides in relevant part:

The statutes of limitations or repose are tolled:

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(d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

An affidavit of merit "shall" be filed with the complaint. MCL 600.2912d; MSA 27A.2912(4). A plaintiff who files a complaint without the affidavit of merit is subject to a dismissal without prejudice and may refile properly at a later date. *Scarsella v Pollak*, 461 Mich 547, 551-552; 607 NW2d 711 (2000). However, the plaintiff must still comply with the period of limitation. *Id.* at 552. When a plaintiff cannot provide the required affidavit with the complaint, the plaintiff may seek relief as provided in MCL 600.2912d(2); MSA 27A.2912(4)(2). *Solowy v Oakwood Hospital*, 454 Mich 214, 229; 561 NW2d 843 (1997). MCL 600.2912d(2); MSA 27A.2912(4)(2) 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).

The Legislature did not define the circumstances that demonstrate "good cause." However, our Supreme Court opined that, a *letter from the expert* indicating that the possible cause of the injury relates to an alleged negligent act but additional review is needed, may satisfy the good cause requirement. *Solowy, supra* at 229, n 6. Where a statute does not define a term, a dictionary may be consulted for guidance. *Richards v McNamee*, 240 Mich App 444, 451; 613 NW2d 366 (2000). In *Richards, supra* at 452, we noted that "good cause" was defined as "(a) legally sufficient reason,"<sup>1</sup> or "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law."<sup>2</sup> Review of the ex parte motion filed, in the present case, reveals that plaintiff failed to demonstrate good cause for failing to timely file the affidavit of merit. The alleged date of medical malpractice occurred on August 31, 1995. On August 14, 1997, plaintiff filed its notice of intent to file the claim. Based on the filing of that notice, the statute was tolled for a period of 182 days. Accordingly, plaintiff obtained an additional extensive period of time outside a traditional two-year statute of limitations period to comply with the statutory requirements. The purpose of the 182 day period is to promote settlement without the need for formal litigation and reduce costs while providing compensation for meritorious medical malpractice claims. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997). There is no indication that plaintiff was delayed in its filing of the affidavit due to attempts to settle the litigation or otherwise comply with the purpose of the statute. In fact, plaintiff provides no details explaining why the filing of the motion was not contemporaneous with the filing of the complaint, but merely concludes that good cause exists. Plaintiff did not name its expert and did not specify when the medical information was received by the expert. Plaintiff's failure to provide a legally sufficient reason for the delay,<sup>3</sup> or stated otherwise, failure to demonstrate good cause for the failure to timely file the affidavit of merit<sup>4</sup> requires that the affidavit be stricken. Furthermore, even if plaintiff was given a second

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<sup>1</sup> Quoting Black's Law Dictionary (7<sup>th</sup> ed), p 213.

<sup>2</sup> Quoting Black's Law Dictionary (6<sup>th</sup> ed), p 692.

<sup>3</sup> Curiously, the ex parte motion was not presented at the time of the filing of the complaint and contained different information than the information contained in the complaint. Plaintiff did not explain, at any time, the delay in the filing of the ex parte motion. Furthermore, plaintiff orally asserted that the disparity in the dates was due to "clerical error." However, there was no affidavit or other information to substantiate that oral assertion. The attorney who filed the pleadings was unavailable to explain the disparity, and an affidavit was not presented from the attorney. When plaintiff's counsel asked the trial court to deny the motion to set aside the extension of time to file the affidavit based on a prior finding of good cause, the trial court did not do so. The failure to explain the delay in the filing and the failure to substantiate the assertion of clerical error contradicts any allegations of good cause.

<sup>4</sup> See also *Richards v McNamee*, 240 Mich App 444; 613 NW2d 366 (2000) and *Bush v Beemer*, 224 Mich App 457; 569 NW2d 636 (1997) where the failure to demonstrate good cause in the context of the Michigan Court Rules resulted in dismissal.

opportunity to demonstrate good cause, the affidavit cannot relate back to the February 9, 1998 filing of the complaint because it would allow plaintiffs to subvert the statutory requirements. *Scarsella, supra* at 550. Accordingly, we reverse the trial court's order denying defendant's<sup>5</sup> motion for summary disposition and motion to set aside the order extending the time for filing the affidavit of merit.

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage

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<sup>5</sup> Although we denied defendant Dr. Sankaran's motion to realign the parties, our decision applies equally to this defendant, who moved for and concurred in the relief requested by defendant hospital below.