STATE OF MICHIGAN

COURT OF APPEALS

SUSAN MARICLE,

Plaintiff-Appellant,

v

DR. BRIAN SHAPIRO and
GENERAL SURGEONS OF FLINT, P.C.,

Defendants-Appellees.

UNPUBLISHED
January 23, 2001

No. 217533
Genesee Circuit Court
LC No. 98-062684-NH

Before: Saad, P.J., and Griffin and R. B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) based on the statute of limitations. We affirm.

This medical malpractice action arose from the surgery performed by defendant Dr. Brian Shapiro, who is a general surgeon, on May 8, 1996. Dr. Shapiro removed two lymph nodes from plaintiff's neck. Plaintiff alleges that during the procedure, the right spinal accessory nerve was injured, which resulted in severe pain and partial paralysis of her right arm.

Plaintiff apparently requested a general surgeon, Dr. Raymond Ippolito, to review her medical records and to determine if she had a possible claim for medical malpractice against Dr. Shapiro and his employer, defendant General Surgeons of Flint, P.C. On July 31, 1997, Dr. Ippolito sent a two-page letter to plaintiff's counsel, indicating that he had reviewed plaintiff's medical records and the medical care rendered by Dr. Shapiro in 1996. Dr. Ippolito opined that plaintiff suffered an injury to her right spinal accessory nerve as a result of the biopsy performed by Dr. Shapiro and that the injury to the nerve deviated from the standard of care. The letter was signed by Dr. Ippolito and a notary signed below his signature.

Apparently, counsel for plaintiff sent a notice of intent to file a claim to defendants pursuant to MCL 600.2912b; MSA 27A.2912(2) on September 2, 1997. After the 182-day period expired with apparently no response from defendants, plaintiff filed her complaint on

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

March 24, 1998. However, plaintiff did not file an affidavit of merit with the complaint in accordance with MCL 600.2912d; MSA 27A.2912(4).

The summons and complaint were served by registered mail on March 30, 1998. Although the answer was due twenty-eight days later, MCR 2.108(A)(2), counsel for defendants requested a thirty-day extension for filing an answer. Counsel for plaintiff agreed to an extension and the joint answer was sent on May 15, 1998, and filed on May 19, 1998. In their affirmative defenses, defendants asserted that plaintiff failed to file an affidavit of merit with the complaint and that the claim "may be" barred by the statute of limitations.

According to the parties, defendants sent interrogatories requesting plaintiff to identify her experts and to indicate whether any reports had been rendered by the experts. In July 1998, plaintiff sent the answers to the interrogatories and included a copy of Dr. Ippolito's report.

On November 30, 1998, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that the statute of limitations expired before the action was properly commenced. Defendants pointed out that the affidavit of merit was not attached to the complaint, that plaintiff did not request a twenty-eight-day extension to file one, and that plaintiff to date had not yet filed an affidavit of merit. Defendants argued that they were entitled to summary disposition pursuant to *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998), aff'd 461 Mich 547; 607 NW2d 711 (2000).

In response to the motion, plaintiff claimed the affidavit of merit inadvertently was not attached to the complaint when it was filed and that counsel intended to use Dr. Ippolito's report as the affidavit of merit. Plaintiff asserted that counsel for defendants participated in unconscionable conduct by requesting an extension to file an answer to the complaint, and that without the extension, plaintiff's counsel would have learned of the mistake and then filed the affidavit before the statute of limitations expired. Plaintiff also claimed that the affidavit was eventually provided in answers to interrogatories and argued that dismissal of the action was improper pursuant to *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998). At oral argument before the trial court, plaintiff further argued that MCL 600.2912d; MSA 27A.2912(4) was unconstitutional because the Legislature improperly interfered with the power of the Supreme Court regarding practice and procedure.

Ultimately, the trial court ruled that *Scarsella* required dismissal of the action for failure to comply with § 2912d. The trial court also indicated the report of Dr. Ippolito was not a proper affidavit of merit.

On appeal, plaintiff first argues that § 2912d is unconstitutional because it violates the separation of powers clause, Const 1963, art 3, § 2, by infringing upon the exclusive power of the Supreme Court to establish practice and procedure in the courts of this state. Although this argument was only orally made below and the trial court did not render a ruling on this point, the constitutionality of § 2912d presents a question of law, which this Court reviews de novo. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999). This Court should also presume that § 2912d is constitutional "unless its unconstitutionality is clearly apparent." *Id.*

The authority to determine the rules of practice and procedures rests exclusively with the Supreme Court. Const 1963, art 6, § 5. "This exclusive rule-making authority in matters of practice and procedure is further reinforced by separation of powers principles. See Const 1963, art 3, § 2." *Id*. at 27. However, rules of practice set forth in any statute, if not in conflict with any court rule, are effective until superseded by rules adopted by the Supreme Court. MCR 1.104; *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 722; 575 NW2d 68 (1997).

In *Neal*, this Court examined whether § 2912b, which provides that a plaintiff shall not commence a medical malpractice action unless the plaintiff has given written notice not less than 182 days before the action is commenced, was a rule of procedure that directly contradicted MCR 2.101(B), which provides that "[a] civil action is commenced by the filing of a complaint with a court." In ruling that there was no conflict, this Court stated:

> In this case, we conclude that § 2912b(1) does not change the manner in which or how a civil action is commenced in medical malpractice cases. Rather, § 2912b(1) imposes a temporal requirement with which a plaintiff must comply before the plaintiff can commence a civil action in accordance with MCR 2.101(B). Accordingly, we find no conflict between § 2912b(1) and MCR 2.101(B). Thus, if procedural, § 2912b(1) is effective until superseded by rules adopted by our Supreme Court. MCR 1.104. [*Id*. at 723.]

Plaintiff asserts that this Court in *Neal* implied that if legislation did change the manner in which civil actions were commenced, then it would infringe upon the Supreme Court's rule-making power in matters of practice and procedure. Plaintiff argues that because § 2912d changes the manner in which to commence a medical malpractice action, it violates the separation of powers clause. Section 2912d provides, in relevant part:

> 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 600.2912d(1); MSA 27A.2912(4)(1).]

On the other hand, defendants argue that § 2912d merely imposes an additional requirement without directly conflicting with MCR 2.101(B).

We believe that the Supreme Court's subsequent promulgation of MCR 2.112(L), which adopts the Legislature's procedural requirement for filing an affidavit of merit with the complaint, sufficiently disposes of plaintiff's argument. MCR 2.112(L) provides:

> *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).* Notice of filing the affidavit must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner

> provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court. [Emphasis added.]

While MCR 2.112(L) went into effect April 1, 1998, one week after plaintiff filed her complaint, it is clear from the above emphasized language that the Supreme Court intended retroactive application to plaintiff's medical malpractice action. Accordingly, § 2912d is not unconstitutional as proposed by plaintiff.

Next, plaintiff contends that the trial court erred in granting defendants' motion for summary disposition and in dismissing her complaint where she failed to file an affidavit of merit with the complaint. This Court reviews decisions on motions for summary disposition under MCR 2.116(C)(7) de novo to determine if the moving party is entitled to judgment as a matter of law. *Rheaume v Vandenberg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998). In reviewing a motion granted pursuant to MCR 2.116(C)(7), this Court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and construes the pleadings in favor of the plaintiff. *Id.* at 421.

In this case, the alleged malpractice occurred on May 8, 1996. The period of limitations for malpractice claims is two years, MCL 600.5805(4); MSA 27A.5805(4). Plaintiff filed her complaint on March 24, 1998, but did not file the affidavit of merit before the statute of limitations expired on May 8, 1998.[1]

In *Scarsella, supra*, this Court held that, "for statute of limitations purposes" in a medical malpractice case, the mere tendering of a complaint without an affidavit of merit is insufficient to commence the lawsuit and therefore, the trial court did not err in ruling that the plaintiff's claim was time-barred. *Id.* at 64. The Supreme Court adopted the opinion in its entirety, reaffirming that dismissal is the appropriate remedy for failing to comply with § 2912d. *Scarsella v Pollak*, 461 Mich 547, 548-550; 607 NW2d 711 (2000). Contrary to plaintiff's argument, *Vandenberg* and *Scarsella* do not conflict. Unlike *Vandenberg*, where the plaintiff filed the affidavit of merit only a few weeks after the complaint was filed and before the statute of limitations ran, the plaintiff in *Scarsella* failed to file an affidavit of merit with the complaint and did not do so until after the statute of limitations expired. It is clear that the facts of this case fall squarely under *Scarsella* since plaintiff failed to file an affidavit of merit before the statute of limitations expired. Accordingly, we find that the trial court did not err in granting the motion for summary disposition and dismissing plaintiff's claim with prejudice.

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[1] Contrary to both parties' assertions on appeal, the two-year statute of limitations is not "extended" 182 days when a plaintiff files notice of intent to sue in accordance with MCL 600.2912b; MSA 27A.2912(2). Instead, the limitations period is only tolled where the statute of limitations will expire during the 182-day notice period that the plaintiff is prohibited from filing a lawsuit. MCL 600.5856(d); MSA 27A.5856(d). Here, plaintiff sent her notice of intent to sue on September 2, 1997. Because the notice was given more than 182 days before the end of the limitations period, the two-year limitations period was not tolled during the notice period. See *Omelenchuk v City of Warren*, 461 Mich 567, 574; 609 NW2d 177 (2000). Therefore, the statute of limitations did not expire on November 7, 1998, as the parties contend.

While plaintiff argues that the failure to file the affidavit of merit was inadvertent, we find it significant that plaintiff made no attempt to remedy the problem after defendants' answer to the complaint pointed out that no affidavit was attached to the complaint. Certainly, the trial court may have estopped any attempt by defendants to argue that the statute of limitations had already expired in light of their request for an extension to file their answer. However, given plaintiff's failure to immediately request an extension pursuant to MCL 600.2912d(2); MSA 27A.2912(4)(2), we cannot excuse the running of the limitations period based on plaintiff's claim of inadvertence or preclude defendants from asserting that plaintiff's claim was barred.

Plaintiff further argues that no prejudice occurred from the failure to attach the affidavit since defendants had previously received a detailed notice of intent and thus were fully aware of the merits of her claim. However, this Court has noted that substantial compliance with the statutory procedural requirements is not sufficient to toll the statute of limitations. See *Rheaume*, *supra* at 422-423. Clearly, the fact that defendants were sent a notice of intent to sue in accordance with § 2912b does not excuse plaintiff's failure to comply with § 2912d.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns