

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JAMES KEYES and ROSALIE KEYES,

Plaintiffs-Appellants,

v

RUSSELL ROTHROCK, M.D., and BATTLE  
CREEK NEUROSURGICAL SERVICES, P.C.,

Defendants-Appellees,

and

BATTLE CREEK HEALTH SYSTEM,

Defendant.

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UNPUBLISHED  
February 23, 2001

No. 218684  
Calhoun Circuit Court  
LC No. 98-004538-NM

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

In this medical malpractice action plaintiffs appeal as of right from the trial court's grant of summary disposition in favor of defendants, and the court's denial of plaintiffs' motion to amend the complaint. We affirm.

This case arises out of a surgical procedure performed by defendant Rothrock on plaintiff James Keyes on May 9, 1996. On March 20, 1998, plaintiffs sent defendants Rothrock and Battle Creek Health System notice of intent to a file claim pursuant to MCLA 600.2912b. Then on October 23, 1998, plaintiffs filed their complaint against defendants Rothrock, Battle Creek Neurosurgical Services, and Battle Creek Health Services. Plaintiffs alleged injuries attributable to defendant Rothrock's negligence in performing the May 9, 1996 procedure.

Although plaintiffs had obtained an affidavit of merit from Donald C. Austin, M.D., which was signed and notarized on September 21, 1998, by virtue of a clerical error the affidavit was not attached to the complaint when it was filed on October 23, 1998. Plaintiffs did not file the affidavit with the lower court until November 25, 1998, eighteen days after the statute of

limitations had run on plaintiffs' claim.<sup>1</sup> The trial court granted defendants' motion for summary disposition on the ground that plaintiffs failed to comply with MCL 600.2912d(1); MSA 27A.2912(4)(1), which requires the filing of an affidavit of merit with a medical malpractice complaint.

Plaintiffs argue that the trial court erred in granting summary disposition. We disagree. We review de novo the decision on a motion for summary disposition under MCR 2.116(C)(8). *VandenBerg v VandenBerg*, 231 Mich App 497, 499; 586 NW2d 570 (1998).

In relevant part, MCL 600.2912d; MSA 27A.2912(4) provides:

(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.

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(2) 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 period of limitations for an action charging malpractice is two years. MCL 600.5805(4); MSA 27A.5805(4). The alleged malpractice upon which plaintiffs' claim is based occurred during the surgical procedure defendant Rothrock performed on May 9, 1996. Therefore, the period of limitations for plaintiffs' claim would have ended on May 9, 1998. See MCL 600.5838a; MSA 27A.5838a. However, the notice of intent that plaintiffs sent to defendants on March 20, 1998, tolled the statute of limitations for a period of 182 days. MCL 600.5856(d); MSA 27A.5856(d). Thus, the period of limitations did not begin to run again until September 18, 1998, at which point plaintiffs had fifty days to initiate the claim against defendants. Under these circumstances, the period of limitations for plaintiffs' claim ended on November 7, 1998.

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<sup>1</sup> The completed affidavit of merit was referenced in the complaint, but attached to neither the complaint filed with the court nor the complaint served on defendants. Apparently, defendants identified the affidavit as missing when the complaint was served on Dr. Rothrock on November 6, 1998. Defendants contacted the court in search of a copy of the affidavit, but were informed that the affidavit was likewise missing from the copy of the complaint filed with the court. Accordingly, defendants drafted their successful motion for summary disposition, dated November 20, 1998 and filed November 23, 1998. Plaintiffs filed the affidavit with the court on November 25, 1998, immediately after being put on notice of its inadvertent omission through receipt of defendants motion for summary disposition on November 23, 1998.

As previously noted, plaintiffs timely filed their complaint on October 23, 1998. They did not, however, file the affidavit of merit until November 25, 1998. When a plaintiff fails to timely file an affidavit of merit with a complaint alleging medical malpractice, the statutory period of limitations continues to run and will expire if the defect is not cured before the period expires. *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 708-709; 620 NW2d 319 (2000); *Scarsella v Pollak*, 232 Mich App 61, 63-64; 591 NW2d 257 (1998), *aff'd* 461 Mich 547; 607 NW2d 711 (2000). Accordingly, the trial court correctly granted summary disposition in favor of defendants because plaintiffs' claim was time-barred when the affidavit of merit was filed.

Plaintiffs next argue that the trial court improperly denied their motion to amend the complaint. We again disagree. We review grants and denials of motions for leave to amend pleadings for an abuse of discretion. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

Plaintiffs' argument with regard to this issue is identical to the argument presented and explicitly rejected in *Scarsella*, where this Court reasoned:

Plaintiff contends that he should have been allowed to amend his . . . complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, see MCR 2.118(D), making timely the newly completed complaint. We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirement. Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1); MSA 27A.2912(4)(1), that the plaintiff "shall file with the complaint an affidavit of merit," as well as the legislative remedy of MCL 600.2912d(2); MSA 27A.2912(4)(2), allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint. [*Scarsella, supra* at 65.]

Our Supreme Court, in affirming *Scarsella*, adopted this Court's opinion in its entirety. 461 Mich at 548. The Court then added two points of clarification strengthening the holding that plaintiffs must strictly comply with the requirement of § 2912d(1). *Id.* at 551-552. Finally, the Court referenced MCR 2.112(L), which also reflects the statutory requirement. *Id.* at 553 n 6.<sup>2</sup>

Pursuant to the holding and clear analysis of our Supreme Court, we conclude that the trial court did not abuse its discretion in denying plaintiffs' motion for leave to amend their

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<sup>2</sup> These clarification points and the Court's additional analysis sought to foreclose potential avenues by which plaintiffs could maneuver out from under the *Scarsella* holding. They in fact render meritless a majority of the instant plaintiffs' arguments.

complaint. Plaintiffs' attempt to remedy their error occurred beyond the limitation period. See also *Holmes, supra* at 709.

Plaintiffs argue that dismissal with prejudice, and denial of leave to amend, was unwarranted in this case because the affidavit was in existence when the complaint was filed and when the period of limitations expired. Focusing on the fact that failure to attach the affidavit was a mere clerical error, plaintiffs assert that this case should be distinguished from *Scarsella* and other decisions in which the plaintiffs made no efforts to comply with the statutory requirement. Plaintiffs further contend that given the circumstances of this case, where a mere "hypertechnical" pleading deficiency is hindering an otherwise meritorious claim, the legislative intent to limit frivolous claims would not be contravened by allowing this action to proceed.

We are bound by the plain language of the statute and the previous decisions of this Court and our Supreme Court. Neither plaintiffs nor amicus curiae<sup>3</sup> have, in support of their arguments, presented case law on point, and nothing in the language of § 2912d(1) or MCR 2.112(L) suggests that it is sufficient for the affidavit of merit to simply be in existence at the time of the filing of the complaint. Because plaintiffs did not file their affidavit of merit until after the expiration of the period of limitations, the trial court properly granted summary disposition in favor of defendants and appropriately denied plaintiffs' motion for leave to amend.

Affirmed.

/s/ Richard Allen Griffin

/s/ Kurtis T. Wilder

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<sup>3</sup> Pursuant to MCR 7.212(H), this Court granted the request of amicus curiae Michigan Trial Lawyers Association to file a brief in this case. In that brief, amicus curiae not only supports plaintiffs' arguments but also presents a detailed constitutional challenge to MCL 600.2912d; MSA 27A.2912(4). Under the court rule, however, the amicus brief is limited to the issues raised by the parties. MCR 7.212(H)(2). Because plaintiffs did not raise a constitutional challenge in their statement of questions presented, and because their argument includes only a single paragraph, devoid of authority, on the issue, we decline to address the multitude of issues presented by amicus curiae.