STATE OF MICHIGAN

COURT OF APPEALS

MONICA ESKEW, Personal Representative of the Estate of DAMONE LAMAR SANDERS, Deceased, Plaintiff-Appellant/Cross-Appellee, v PORNPICHIT SETHAVARANGURU, M.D.,[1] Defendant, and VICTOR SORENSON, M.D., and HENRY FORD HEALTH SYSTEMS,[2] Defendants-Appellees/Cross-Appellants.	UNPUBLISHED June 29, 2001 No. 220554 Wayne Circuit Court LC No. 98-836945-NH

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right, and defendants cross-appeal as of right, from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7), dismissing with prejudice plaintiff's claim. We affirm.

In a complaint filed November 13, 1998, plaintiff Monica Eskew, personal representative of the estate of her son Damone Lamar Sanders, alleged that defendants negligently treated

[1] On February 19, 1999, the trial court entered an order dismissing plaintiff's claim against defendant Pornpichit Sethavaranguru, M.D., pursuant to MCR 2.116(C)(7). Plaintiff does not challenge that order on appeal.

[2] Throughout this opinion, defendants Sorenson and Henry Ford Health Systems will be referred to as "defendants."

plaintiff, while pregnant, during the time period in which she was involved in a motor vehicle accident.[3] Plaintiff further alleged that both she and Damone, born prematurely on May 25, 1993, suffered injuries as a result of defendants' negligence. According to the complaint, after being diagnosed with seizures, cerebral palsy and blindness, Damone died on May 18, 1994, of bronchopulmonary dysplasia and other complications.

The procedural history underlying the present appeal is somewhat complicated. Following Damone's death in May 1994, plaintiff was appointed personal representative of his estate on May 17, 1996. Plaintiff provided defendant with the requisite 182-day notice of her intention to pursue a medical malpractice claim on March 3, 1998. See MCL 600.2912b(1). On November 13, 1998, plaintiff filed the instant action but failed to file an affidavit of merit with the complaint as required by MCL 600.2912d(1). Instead, plaintiff included an ex-parte petition seeking an extension of time to file the required affidavit pursuant to MCL 600.2912d(2).[4] For reasons unclear from the record, the trial court did not enter an order responding to plaintiff's petition until November 30, 1998.[5] Without explanation, the trial court's November 30, 1998, order granted plaintiff's request for an additional twenty-eight-days to file the affidavit.

Further complicating matters, on January 19, 1999, plaintiff filed a motion compelling the production of medical records pursuant to MCR 2.314(D) and seeking an additional extension of time to file the affidavit of merit pursuant to MCL 600.2912d(3). The trial court denied plaintiff's motion on January 29, 1999, and defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claim was time-barred because plaintiff failed to file an affidavit of merit in a timely manner. Plaintiff filed the affidavit of Michael L. Berke, M.D., on December 28, 1998.

During the hearing on defendants' motion for summary disposition, the trial court concluded that plaintiff's claim was time-barred because she failed to file the affidavit of merit

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[3] According to the complaint, plaintiff was injured in a motor vehicle accident on May 12, 1993, but had been treating with defendant Sethavaranguru since 1992. It appears from a review of the record that plaintiff was treated by defendants Sorenson and Henry Ford Hospital System following the accident in 1993.

[4] In the ex-parte motion, plaintiff indicated that in spite of the 182-day waiting period that commenced on March 3, 1998, she was unable to obtain the requisite medical records from Dr. Sethavaranguru. Plaintiff's ex-parte motion further stated: "[w]ithout complete records, it is impossible for [p]laintiff's experts to completely and adequately review this case and fully and actually opine regarding issues of causation and damages."

[5] In her brief on appeal, plaintiff states that the trial court's order was delayed because it "took the matter under advisement." During a subsequent hearing on March 26, 1999, the trial court questioned plaintiff's attorney about the explanation for the delay between the filing of the ex-parte petition and the trial court's subsequent order. Specifically, the trial court stated on the record, "I don't know when [the ex-parte petition] was presented to me." A further review of the transcript reveals that the delay between the filing of the petition on November 13, 1998, and the granting of the order on November 30, 1998, may have been attributable to the court's concern that further information regarding the petition motion be supplied by plaintiff before the order was granted.

within the twenty-eight-day extension period. In reaching its conclusion, the trial court drew from its prior ruling with respect to defendant Sethavaranguru's motion for summary disposition granted on February 19, 1999.[6] After making several calculations, the trial court found that the limitation period for plaintiff's claim expired on November 23, 1998. The trial court also concluded that the twenty-eight-day extension period expired on December 11, 1998. Because plaintiff did not file her affidavit of merit by that date, the trial court ruled her claim untimely. In rendering its decision, the trial court rejected plaintiff's argument that the twenty-eight-day extension period accrued on the date the court entered its order granting the extension. Instead, the court reasoned that the additional twenty-eight-day period ran from the date the complaint was filed on November 13, 1998.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> In deciding a motion for summary disposition made under MCR 2.116(C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. [*Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 706; 620 NW2d 319 (2000).]

On appeal, plaintiff contends that the trial court erred in concluding that her claim was time-barred. According to plaintiff, the trial court's conclusion that the twenty-eight-day extension period began to run from the date of plaintiff's complaint was erroneous. In plaintiff's view, an interpretation of MCL 600.2912d compels the conclusion that the twenty-eight-day extension period begins to run from the date of the order granting plaintiff's request. We disagree.

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[6] Defendant Sethavaranguru filed for summary disposition on December 23, 1998. Summary disposition was granted with respect to him only on February 19, 1999. During the February 19, 1999 hearing the trial court made the following factual findings with respect to the running of the limitation period. Specifically, the trial court found that the two-year limitation period initially commenced on May 25, 1993, when Damone was born. See MCL 600.5805(5). However, the trial court also concluded that because Damone's death on May 18, 1994, occurred during the two-year limitation period, the savings provision of MCL 600.5852 operated to suspend the running of the limitation period until plaintiff was appointed to represent the interests of the estate. See e.g., *Lindsey v Harper Hospital*, 455 Mich 56, 60-61; 564 NW2d 861 (1997). Consequently, the court found that the limitation period began to run again on May 17, 1996, when plaintiff was authorized as the personal representative of Damone's estate. The trial court further found that the limitation period was tolled on March 3, 1998, for 182 days when plaintiff served defendants with her notice of intent to pursue a medical malpractice claim pursuant to MCL 600.2912b(1). The court further found that the limitation period was tolled for the eighty-three-day period between March 3, 1998 and May 17, 1998. As a result, the trial court concluded that plaintiff had until November 23, 1998, to file her medical malpractice suit. Plaintiff does not raise a challenge to the trial court's calculations with regard to the limitation period.

MCL 600.2912d provides in pertinent part:

> (1) [T]he 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 [MCL 600.2169] . . . .
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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, of 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). [(footnote omitted) (emphasis supplied).]

As this Court observed in *Vandenburg v Vandenburg*, 231 Mich App 497, 502; 586 NW2d 570 (1998), the Legislature drafted § 2912d in an attempt to deter frivolous medical malpractice suits. To achieve this purpose, the Legislature used the word "shall" in § 2912d to "indicate[] that an affidavit accompanying the complaint is mandatory and imperative." *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Consequently, simply tendering a complaint without including the required affidavit will not function to commence a medical malpractice lawsuit. *Id.* Put another way, the mere filing of a complaint in a medical malpractice action without the affidavit of merit will not operate to toll the two-year limitation period. *Id.* at 552.

In the instant case, the parties do not dispute that plaintiff failed to file the required affidavit of merit with the complaint on November 13, 1998. Nor do the parties dispute that plaintiff properly attempted to utilize the remedial provision of § 2912d by requesting an additional twenty-eight days to file the affidavit of merit. At issue here is whether the twenty-eight-day extension period granted by the trial court commenced on the date plaintiff filed the complaint, or the date the trial court issued its order. This question presents an issue of statutory interpretation, which we review de novo. *Wilhelm v Mustafa*, 243 Mich App 478, 481; 624 NW2d 435 (2000).

Our first task in considering an issue of statutory construction is to examine the language of the statute. *Macomb Co Prosecuting Attorney v Murphy*, ___ Mich ___; ___ NW2d ___ (Docket No. 114444, dec'd 5/30/01) slip op p 10. "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *The Herald Co v Bay City*, 463 Mich 111, 118-119; 614 NW2d 873 (2000). When interpreting § 2912d, we must "consider both the plain meaning of the critical word or phrase [at issue] as well as its placement and purpose in the statutory scheme." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995) (internal quotation marks omitted). The Legislature's intent may be properly discerned by drawing reasonable inferences from the words in a statute. *The Herald Co, supra* at 117.

In our opinion, a plain reading of § 2912d demonstrates that the twenty-eight-day extension period afforded to a plaintiff "upon good cause shown" is additional time granted *from the time the complaint is filed*, not from the time the trial court enters an order. Subsection (1) of § 2912d clearly specifies that "the plaintiff in an action alleging medical malpractice . . . shall file *with the complaint* an affidavit of merit . . . ." (emphasis supplied). In the event the plaintiff is unable to file the requisite affidavit of merit with the complaint, subsection (2) provides that "the court in which the complaint is filed may grant the plaintiff . . . *an additional 28 days* in which to file the affidavit required under subsection (1)." (emphasis supplied). In our view, the Legislature's use of the words "complaint" and "additional" in § 2912d lead to the reasonable inference that the twenty-eight-day extension period is additional time granted from the date of the filing of the complaint.

Similarly, we do not accept plaintiff's contention that the mere filing of a petition requesting the extension of time to file the affidavit of merit tolls the limitation period. In *Bartlett v North Ottawa Community Hospital*, 244 Mich App 685, 692; 625 NW2d 470 (2001), a panel of this Court rejected a similar argument. Specifically, the *Bartlett* Court opined that a review of § 2912d(2) and our Supreme Court's decision in *Solowy v Oakwood Hospital*, 454 Mich 214; 561 NW2d 843 (1997) led to the conclusion that "the *granting* of a motion for additional time [by a trial court] tolls the period of limitation." (emphasis in original).

Moreover, the *Bartlett* Court rejected the plaintiff's claim that the limitation period was tolled until the court rendered a decision on the motion to extend time. In *Bartlett*, the Court's decision appeared to be motivated by its concern that the plaintiff failed to properly notice his motion for hearing. *Id.* at 692-693. We acknowledge that the facts in the instant case are not identical those in *Bartlett*. However, we find the *Bartlett* Court's reasoning to be of guidance in the present appeal. Were we to accept plaintiff's argument that the twenty-eight-day extension period commenced only on the trial court's entry of an order on the petition to extend time, such a decision would in effect allow the tolling of the limitation period during the time in which plaintiff awaited a decision from the trial court. This Court expressly sought to avoid such a result in *Barlett, supra*. *Id.* at 692-693. Consequently, where plaintiff failed to file the affidavit of merit within the twenty-eight-day extension period granted by the trial court, and the two-year limitation period had expired, the trial court correctly dismissed plaintiff's claim with prejudice. *Holmes, supra* at 706-707.

In light of our conclusion that the trial court correctly dismissed plaintiff's claim with

prejudice, we need not consider the additional issue raised by defendants on cross-appeal.[7]

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell

[7] In the alternative, defendants argue that plaintiff did not demonstrate good cause for the granting of the twenty-eight-day extension. This issue is not properly before this Court because it was not decided by the trial court. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549-550; 599 NW2d 489 (1999).