STATE OF MICHIGAN

COURT OF APPEALS

ROGER DOWIDAIT and KIM DOWIDAIT,

Plaintiffs-Appellees,

v

DENNIS V. ADAMS, M.D., and ANNAPOLIS HOSPITAL,

Defendants-Appellants,

and

STEVEN M. PAPADOPOULOS, M.D., and JOSEPH D. STERN, M.D.,

Defendants.

UNPUBLISHED
July 20, 2001

No. 217726
Wayne Circuit Court
LC No. 97-736089-NM

Before: Markey, P.J., and McDonald and Kelly, JJ.

PER CURIAM.

Defendants Dennis Adams and Annapolis Hospital appeal by leave granted from the trial court's order denying their joint motions for summary disposition wherein it was argued that plaintiffs' medical malpractice claim was time-barred for failure to file an affidavit of merit before the period of limitation had expired. We agree that plaintiffs' claim lapsed and therefore reverse.

MCL 600.2912d(1) provides that a plaintiff in a medical malpractice action "shall file with the complaint an affidavit of merit . . . ." This affidavit is to be signed by a licensed health care provider certifying the validity of the plaintiff's claim. MCL 600.2912d(1). MCL 600.2912d(2) allows, however, an additional 28 days in which to file the affidavit upon motion of a party and good cause shown. Similarly, if a defendant fails to allow the plaintiff access to necessary medical records within the 56 days provided for in MCL 600.2912b, the plaintiff is allotted 91 days following the filing of the complaint in which to file the required affidavit. MCL 600.2912d(3).

In this case, plaintiffs filed their complaint against defendants on November 7, 1997, just three days before expiration of the two-year limitations period provided for under MCL 600.5805(5). Plaintiffs did not, however, at that same time file the required affidavit of merit, nor did they request an extension of time in which to do so under MCL 600.2912d(2).

In *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), our Supreme Court affirmed this Court's decision in *Scarsella v Pollak*, 232 Mich App 61, 63-64; 591 NW2d 257 (1998), finding that where a plaintiff has failed to move for the 28-day extension provided for under MCL 600.2912d(2), a medical malpractice complaint filed without an affidavit of merit "is insufficient to commence the lawsuit" and toll the statute of limitations. In doing so, the Court adopted the *Scarsella* panel's opinion as a whole, noting, however, that "although a plaintiff who files a medical malpractice complaint without the required affidavit is subject to dismissal without prejudice, and can refile properly at a later day . . . such a plaintiff still must comply with the applicable period of limitation." *Scarsella*, *supra* at 551-552. The Court thus found that where a plaintiff has failed to properly file suit before expiration of the limitation period, dismissal with prejudice is appropriate. *Id*. at 552-553; see also *Holmes v Michigan Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000).

As explained above, plaintiffs in the instant matter filed their complaint on November 7, 1997, just three days before expiration of the limitations period. Plaintiffs failed, however, to also file at that time an affidavit of merit and did not move the trial court for an extension of time in which to do so under MCL 600.2912d(2). Therefore, under *Scarsella*, *supra*, plaintiffs' filing of the complaint was not sufficient to commence their suit and toll the statute of limitations, which would have expired on November 10, 1997.

Plaintiffs contend, however, that because defendants failed to provide access to necessary medical records within the 56 days provided for under MCL 600.2912b, they were entitled to an additional 91 days after the filing of their complaint in which to file the affidavit. Plaintiffs assert this right under MCL 600.2912d(3), a subsection not considered by the Court in *Scarsella*, *supra*, 461 Mich 547, and which provides:

> If the defendant in an action alleging medical malpractice fails to allow access to medical records with the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed *within 91 days* ***after*** *the filing of the complaint*. [Emphasis added.]

We find, however, that even assuming the applicability of MCL 600.2912d(3), plaintiffs' failure to timely file their affidavit within the 91 days provided for thereunder rendered summary disposition of their claim under MCR 2.116(C)(7) appropriate.

At the time plaintiffs filed their notice of intent on May 9, 1997, they also requested from each defendant all medical records related to their claim. It is not disputed that the records from the Annapolis Hospital emergency room were not received by plaintiffs until August 13, 1997, approximately 40 days outside the period provided for under MCL 600.2912b. Plaintiffs thus assert that because defendants failed to timely provide such records, the November 7, 1997, filing of their complaint was sufficient to commence the suit and toll the statute of limitations, as they

were automatically entitled under MCL 600.2912d(3) to an additional 91 days in which to file the affidavit. We do not agree.

As stated above, under *Scarsella*, *supra*, it is necessary for a plaintiff claiming medical malpractice to timely file his affidavit of merit in order to commence his action and stop the running of the statute of limitations. Here, even accepting that plaintiffs were entitled to an additional 91 days within which to file the affidavit, in order to commence the action and stop the running of the limitations period such affidavit was required to have been filed by February 6, 1998. Plaintiffs, however, did not file their affidavit until February 24, 1998, nearly three weeks outside the time provided for under MCL 600.2912d(3). As a result, the period of limitations on plaintiffs' claim expired on February 9, 1998. This remains true despite plaintiffs' argument that pursuant to MCL 600.2912d(2), they were entitled to a further extension of 28 days because they had "in essence" moved for such extension and argued good cause when responding to defendants' February 13, 1998, motion to dismiss. Again, even were we to accept that a plaintiff may combine the periods provided for under MCL 600.2912d(2) and MCL 600.2912d(3), plaintiffs' response to this motion, like their affidavit, was not filed until February 24, 1998 -- after the limitations period already expired.

Plaintiffs nonetheless argue that dismissal in the instant matter is not warranted in light of this Court's decision in *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998), wherein we held that MCL 600.2912d does not mandate dismissal of a plaintiff's claim for medical malpractice for failure to file an affidavit of merit at the time of the filing of his complaint. Again, we disagree.

As noted by the Court in *Scarsella*, *supra* at 550, n 1, "because *VandenBerg* did not involve a statute of limitations problem . . . [that case] is factually and legally distinguishable." In relying on *VandenBerg*, *supra*, plaintiffs in the instant matter fail to recognize that it is not the mere failure to provide an affidavit of merit at the time of the filing of their complaint which warrants dismissal of their claim with prejudice. Rather, it is the fact that because such affidavit was not timely filed *before* expiration of the period of limitations, their claim is now time-barred. As observed above, our Supreme Court has specifically noted that in such situations, dismissal with prejudice is the appropriate remedy. *Scarsella*, *supra* at 552-553.

Plaintiffs further argue that summary disposition of this matter in favor of defendants is inappropriate because to the extent that MCL 600.2912d provides that a medical malpractice complaint filed without an affidavit of merit is insufficient to commence the action and toll the statute of limitations, the statute unconstitutionally infringes on the rule-making powers of our Supreme Court, which has provided under MCR 2.101(B) that the filing of a complaint alone is sufficient to commence a suit and toll the limitations period.

Initially, we note that because this argument was not raised below it has not been properly preserved for review by this Court. See *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992). Nonetheless, we find plaintiffs' challenge to the constitutionality of MCL 600.2912d; MSA 27A.2912(4) to be without merit.

Under Const 1963, art 6, § 5, the Supreme Court is given the exclusive rule-making authority in matters of practice and procedure. *McDougall v Schanz*, 461 Mich 15, 26; 597

NW2d 148 (1999). However, the Court "is not authorized to enact court rules that establish, abrogate, or modify the substantive law." *Id*. at 27. Accordingly, in resolving a perceived conflict between a statute and a court rule, the court rule prevails only if it governs practice and procedure. *Krajewski v Krajewski*, 125 Mich App 407, 414; 335 NW2d 923 (1983), rev'd on other grounds 420 Mich 729; 362 NW2d 230 (1984). However, if the statute does not address purely procedural matters, but substantive law, the statute prevails. *McDougall*, *supra* at 37.

In this case, even assuming that MCR 2.101(B) and MCL 600.2912d are in direct conflict, the statute is not an unconstitutional infringement on the Supreme Court's rule-making authority because MCL 600.2912d is substantive rather than procedural. In *McDougall*, *supra*, the Supreme Court held that a statutory evidentiary rule restricting the admissibility of expert opinions in certain medical malpractice cases did not impermissibly infringe on the Supreme Court's constitutional rule-making authority over practice and procedure, even though the statute directly conflicted with a court rule of evidence. *Id*. The Court concluded that the statute was an enactment of substantive law, reflecting "wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists." *Id*. at 35. Therefore, the statute, not the court rule, governed. Likewise, MCL 600.2912d, in the instant case, involves substantive policy considerations regarding the avoidance of medical malpractice claims lacking merit. The clear legislative intent behind the requirement that an affidavit of merit signed by a health professional accompany the complaint was designed to further this legislative policy goal. Thus, MCL 600.2912d reflects a substantive policy choice by the Legislature and, even if directly conflicting with MCR 2.101(B), does not infringe on the Supreme Court's procedural rule-making authority.

Therefore, as explained above, given that plaintiffs failed to timely file their affidavit of merit within the period of limitation, we find that the trial court erred in failing to grant defendants summary disposition under MCR 2.116(C)(7).

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

/s/ Jane E. Markey
/s/ Gary R. MacDonald
/s/ Kirsten Frank Kelly