STATE OF MICHIGAN

COURT OF APPEALS

HOLLIS POOLE and JANET POOLE,

Plaintiffs-Appellants,

v

DR. FERNANDO, DR. GASSAN BACHUWA, and HURLEY MEDICAL CENTER,

Defendants-Appellees.

UNPUBLISHED
December 18, 2001

No. 226457
Genesee Circuit Court
LC No. 99-066572-NH

Before: White, P.J., and Talbot and E.R. Post*, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was treated by defendants in June 1997 and discovered his cause of action in July 1997. He served defendants with notice of an intent to sue on June 1, 1999 and filed suit on November 2, 1999. The complaint was not accompanied by the requisite affidavit of merit, which was filed, apparently without leave of the court, in mid-January 2000. Defendants Fernando and Hurley moved for judgment, asserting that plaintiff's claim was barred by the statute of limitations. The trial court agreed.

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997).

> When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is

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

[1] Because this claim arises out of defendants' allegedly negligent treatment of Hollis Poole and Janet Poole's claim is solely a derivative one for loss of consortium, we shall refer to Hollis Poole as plaintiff.

> a genuine issue of material fact. If no facts are in dispute, and reasonable minds could not differ regarding the legal effect of those facts, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. [*Baker v DEC Int'l*, 218 Mich App 248, 252-253; 553 NW2d 667 (1996), aff'd in part, rev'd in part on other grounds 458 Mich 247 (1998) (citations omitted).]

The limitations period for a malpractice claim is two years from the time the claim accrues. MCL 600.5805(1), (5). A medical malpractice claim accrues at the time of the act or omission that gave rise to the claim "regardless of the time the plaintiff discovers or otherwise has legal knowledge of the claim." MCL 600.5838a(1). A medical malpractice claim may be filed within the two-year period or within six months after the plaintiff discovers or should have discovered the claim, whichever is later. MCL 600.5838a(2). According to the complaint, defendants treated plaintiff in June 1997 and he discovered the alleged malpractice in July 1997. Therefore, he had two years from the time defendants treated him in which to file this action. Assuming defendants last treated plaintiff on June 30, 1997, that meant he had until June 30, 1999 in which to file his complaint.[2]

As noted above, it is assumed that plaintiff had until June 30, 1999 to file suit. Unlike other claims, a medical malpractice complaint cannot be filed at any time during the limitations period. Pursuant to statute, the plaintiff "shall not" file a medical malpractice complaint unless he has first given the defendant "written notice . . . not less than 182 days before the action is commenced." MCL 600.2912b(1). Plaintiff served defendants with the requisite notice of intent on June 1, 1999. Because the limitations period would have expired during the time plaintiff was precluded from filing suit, the limitations period was tolled. MCL 600.5856(d); *Omelenchuk v City of Warren*, 461 Mich 567, 574; 609 NW2d 177 (2000). When plaintiff filed suit on November 2, 1999, after the 154-day "no suit" period, MCL 600.2912b(8), twenty-nine days remained in the limitations period.

Normally, a lawsuit is commenced upon the filing of a complaint, MCR 2.101(B), and a complaint filed at any time before the limitations period expires is timely. *Buscaino v Rhodes*, 385 Mich 474, 481, 484; 189 NW2d 202 (1971), overruled in part on other grounds by *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). In a medical malpractice action, however, the filing of a complaint without the requisite affidavit of merit is insufficient to commence the lawsuit and thus the filing of a complaint without the affidavit does not toll the limitations period, which continues to run. *Scarsella v Pollak*, 461 Mich 547, 549-550, 553; 607 NW2d 711 (2000). Because plaintiff wholly omitted to file the affidavit with his complaint, the limitations period continued to run and expired on December 1, 1999. *Id*.; *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 709; 620 NW2d 319 (2000). Although plaintiff could have

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[2] Although plaintiff contends that his cause of action accrued on July 2, 1997, the complaint alleged that Fernando's alleged negligence occurred in June 1997 and plaintiff never sought leave to amend his complaint to allege otherwise. However, the addition of an extra two days to any of the relevant dates would not affect the outcome of the case.

obtained a twenty-eight-day extension of time in which to file the affidavit, he never sought or was granted that extension of time. Even if such an extension had been granted, plaintiff should have filed the affidavit no later than December 29, 1999 (twenty-eight days from the day the limitations period expired). *Id*. at 707-708.

Plaintiff contends that because he had timely obtained the requisite affidavit of merit but simply forgot to file it with the complaint due to clerical error, that mistake should not warrant dismissal. First, this argument overlooks the fact that the filing of a complaint without the affidavit was insufficient to commence the lawsuit and thus the action was time-barred by the time plaintiff filed the missing affidavit. *Scarsella, supra* at 549-550. Plaintiff has not explained how, nor cited any authority to show that, an expired cause of action can be revived after the fact and thus has failed to preserve the issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Second, amendment of the complaint to supply the missing affidavit does not relate back and make the new complaint timely. *Scarsella, supra* at 550, 552. Accordingly, we find that the trial court did not err in granting defendants' motion.

Affirmed.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Edward R. Post