

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY SMITH,

Plaintiff-Appellant,

v

WALTER L. EVERETT, M.D., and RIVERVIEW
HOSPITAL,

Defendants-Appellees.

UNPUBLISHED

March 1, 2002

No. 229068

Wayne Circuit Court

LC No. 99-929425-NH

Before: Bandstra, P.J., and Murphy and Murray, JJ.

MURPHY, J. (*concurring*).

I concur with the decision to affirm because plaintiff failed to file an affidavit of merit with the complaint and we are bound by the statutory language and previous decision in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). It is distressing, nevertheless, that neither the statutory scheme nor court rules provide the possibility of a sanction less harsh in a case such as this where plaintiff claims the affidavit of merit was either inadvertently not filed, or was lost by the court clerk. The trial court should be empowered with some discretion to act under appropriate circumstances in order to avoid injustice. I would encourage the Legislature and the Supreme Court to reconsider this matter.

/s/ William B. Murphy