# STATE OF MICHIGAN

# COURT OF APPEALS

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| In the Matter of the Estate of BRADLEY GUERRA, Deceased. | UNPUBLISHED<br>June 11, 2002 |
| ANGELINA GUERRA, as Personal Representative of BRADLEY GUERRA, Deceased,<br><br>Plaintiff-Appellant,<br><br>v<br><br>ROBERT H. MACKIE, M.D., RIVERSIDE MEDICAL ASSOCIATION, P.C., RAYMOND MAJKRZAK, M.D., and CHIPPEWA COUNTY WAR MEMORIAL HOSPITAL,<br><br>Defendants-Appellees. | No. 236268<br>Chippewa Circuit Court<br>LC No. 98-003795-NH |

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendants summary disposition pursuant to MCR 2.116(C)(7) and (8) in this medical malpractice action. We affirm.

Bradley Guerra, plaintiff's infant son, died on July 2, 1997. On October 12, 1998, plaintiff filed a medical malpractice action against defendants, attaching to her complaint a document titled "Plaintiff's Affidavit of Merit Under MCL 600.5856(D)." The document, signed by Dr. Richard Fields, M.D., was not notarized. All defendants filed answers and responded to the allegations in plaintiff's complaint. The case continued to be litigated until, on February 12, 2001, defendant Dr. Majkrzak filed a motion for summary disposition, alleging that the statutory limitations period expired because plaintiff failed to file a valid affidavit of merit. The trial court granted summary disposition, finding that the statutory limitations period was not tolled because plaintiff's purported affidavit was not notarized, and dismissed the case with prejudice against all defendants.

Plaintiff argues that the statute of limitations was tolled pursuant to MCL 600.5856(b) when defendants appeared and filed responsive pleadings contesting the merits of the case, thereby submitting to the circuit court's jurisdiction. Although we find plaintiff's argument persuasive, we must disagree in light of Supreme Court precedent.

The applicable statutory limitations period for this claim was two years. MCL 600.5805(5). Because Bradley Guerra died on July 2, 1997, the statute of limitations expired on July 2, 1999, unless tolled. MCL 600.5856 provides, in part, that a statute of limitations is tolled at the time the complaint is filed and a copy of the summons and complaint are served on the defendant, MCL 600.5856(a), or at the time jurisdiction over the defendant is otherwise acquired, MCL 600.5856(b).

To commence a medical malpractice action, a plaintiff must file a complaint and affidavit of merit. MCL 600.2912d; *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). The affidavit of merit is mandatory and imperative. *Id*. "[T]he mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Id*. To be effective, the document filed with the complaint must be a valid affidavit. *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 711; 620 NW2d 319 (2000). "To constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Id*., citing *People v Sloan*, 450 Mich 160, 177 n 8; 538 NW2d 380 (1995). In this case, the document plaintiff attached to the complaint was not a valid affidavit of merit because it failed to meet the third requirement—there was no indication that the doctor confirmed the contents by oath before a person having the authority to administer an oath. Because plaintiff's purported affidavit failed to meet the statutory requirements, it was insufficient to toll the statutory limitations period pursuant to MCL 600.5856(a). *Holmes, supra* at 712.

Plaintiff, however, argues that the statutory limitations period was tolled by MCL 600.5856(b). The fundamental question in determining whether a limitations period has been tolled in accordance with MCL 600.5856 is whether the trial court acquired jurisdiction over the defendant through service of process, consent, or other means. *Mair v Consumers Power Co*, 419 Mich 74, 82; 348 NW2d 256 (1984); *McNeil v Quines*, 195 Mich App 199, 203; 489 NW2d 180 (1992); *Roberts v Troy*, 170 Mich App 567, 581; 429 NW2d 206 (1988). Sections (a) and (c) of MCL 600.5856 refer to acquiring personal jurisdiction over the defendant when the plaintiff files a complaint and serves it on the defendant, or files it with an officer for service. *Mair, supra* at 82-83. Section (b), to the contrary, refers to ways of acquiring jurisdiction other than by service of process, such as consent of the defendant or the defendant's voluntary appearance in the action. *Id*. at 82.

In this case, defendants all filed responsive pleadings and attacked the merits of plaintiff's claim before the statutory limitations period expired. An objection to personal jurisdiction must be raised in the first responsive pleading, or it is waived. MCR 2.111(F)(2); *In re Gordon Estate*, 222 Mich App 148, 158; 564 NW2d 497 (1997). Therefore, were we writing

on a blank slate, we would find that jurisdiction was "otherwise acquired" over defendants, tolling the statutory limitations period pursuant to MCL 600.5856(b).

However, in light of *Scarsella*, we do not believe that the distinctions between MCL 600.5856(a) and (b) make a significant difference. The Supreme Court clearly stated in *Scarsella, supra* at 552-553, that the failure to file an affidavit of merit precludes the tolling of the period of limitations. If the filing of an invalid complaint does not toll the period of limitations, then neither can the service of an invalid complaint on a defendant.

Nevertheless, we do urge plaintiff to seek leave to appeal to the Supreme Court. In our view, the Supreme Court's decision in *Scarsella* is clearly at odds with its recent decision in *Roberts v Mecosta Co General Hosp*, 466 Mich ___; ___ NW2d ___ (Nos. 116563, 116570, 116573, decided April 24, 2002). As the Court reiterated, *slip op* at 7-8, we must apply the plain meaning of a statute as written:

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. *People v Wager*, 460 Mich 118, 123 n 7; 594 NW2d 487 (1999). To do so, we begin with an examination of the language of the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).
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> Section 5856(d) clearly provides that notice must be compliant with § 2912b, not just § 2912b(2) as plaintiff contrarily contends. Had the Legislature intended only the delivery provisions of § 2912b to be applicable, we presume that the Legislature would have expressly limited compliance only to § 2912b(2). However, the Legislature did not do so. Rather, it referred to all of § 2912b.
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> Since the statute is clear and unambiguous, this Court is required to enforce § 5856(d) as written. *Stone, supra*. As a result, the tolling of the statute of limitations is available to a plaintiff only if all the requirements included in § 2912b are met.

Nowhere in MCL 600.5856 does the Legislature make any reference to whether a complaint is valid or does it provide for an exception when the affidavit of merit does not accompany the complaint. Accordingly, the courts cannot properly read into the statute such a requirement. Indeed, the fact that the Legislature did explicitly address the issue of the notice requirement of MCL 600.2912b in MCL 600.5856(d), it is even more evident that the Legislature did not intend noncompliance with MCL 600.2912d to affect the tolling provisions of § 5856.

In any event, it is for the Supreme Court, not this Court, to set aside the holding *Scarsella* and we are bound by that decision until the Supreme Court does overrule it. Accordingly, we urge plaintiff to seek review in the Supreme Court to reverse this opinion.

Affirmed.

/s/ David H. Sawyer