

STATE OF MICHIGAN
COURT OF APPEALS

ANGELINA GUERRA, as Personal
Representative of BRADLEY GUERRA,
Deceased,

UNPUBLISHED
June 11, 2002

Plaintiff-Appellant,

V

ROBERT H. MACKIE, M.D., RIVERSIDE
MEDICAL ASSOCIATION, P.C., RAYMOND
MAJKRZAK, M.D., and CHIPPEWA COUNTY
WAR MEMORIAL HOSPITAL,

No. 236268
Chippewa Circuit Court
LC No. 98-003795-NH

Defendants-Appellees.

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

HOOD, J., Dissenting

I must respectfully dissent. I believe that plaintiff correctly asserts 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, they submitted to the circuit court's jurisdiction.

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.

I would hold, however, 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 valid 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, I would find that jurisdiction was “otherwise acquired” over defendants, tolling the statutory limitations period pursuant to MCL 600.5856(b). Although dismissal of plaintiff’s complaint is appropriate because it did not comply with MCL 600.2912d(1), dismissal should be without prejudice. *Scarsella, supra* at 551-552.

Tolling provisions are intended to “protect a plaintiff’s right to bring an action and prevent a defendant from defeating a claim by absenting himself from the jurisdiction.” *Lausman v Benton Tp*, 169 Mich App 625, 629; 426 NW2d 729 (1988). In contrast, statutes of limitations are intended to promote plaintiffs’ diligence, prevent litigation of stale claims, and to establish reasonable, limited times for bringing actions. *Id.* As a general rule, exceptions to statutes of limitations are strictly construed. *Id.*

The tolling statute in question here, MCL 600.5856, has been liberally construed to “allow litigation of apparently valid claims of which [the] defendant had timely notice.” *Id.* at 630, citing *Affiliated Bank of Middleton v American Ins Co*, 77 Mich App 376, 379; 258 NW2d 232 (1977). Moreover, the fundamental question in determining whether a limitations period has been tolled in accordance with MCL 600.5856 is whether the trial court acquired personal 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); *Sanderfer v Mount Clemens General Hosp*, 105 Mich App 458, 462; 306 NW2d 322 (1981); *McNeil v Quines*, 195 Mich App 199, 203; 489 NW2d 180 (1992); *Roberts v Troy*, 170 Mich App 567, 581; 429 NW2d 206 (1988) (“The statute of limitations is tolled during the time that a court has jurisdiction over the

defendant”).¹ Sections (a) and (c) of MCL 600.5856 refer to acquiring personal jurisdiction over the defendant when the plaintiff files a valid complaint and serves it on the defendant, or files it with an officer for service. *Mair, supra*, 419 Mich at 82-83. Section (b), to the contrary, refers to ways of acquiring jurisdiction other than by service of process, such as the defendant’s consent. Tolling the statutory limitations period under these circumstances would comply with the statutory language and meet the goals of the tolling statute. MCL 600.5856; *Mair, supra*, 419 Mich at 83.

The tolling statute’s [MCL 600.5856] attention to when the defendant is notified of the action against him is consistent with the overall purpose of the statute of limitations. Tolling occurs in situations where the extension of time will not disadvantage the defendant as a result of his unawareness of the need to preserve evidence and prepare a defense. Thus, the tolling statute takes away any harshness that might occur if the plaintiff, in good faith, commenced a suit without having the merits adjudicated and later learned that because of that mistake the statute had run. At the same time, it protects the defendant from the very evils that the statute of limitations is intended to do away with.

Subsections 1 and 2 of the tolling statute allow a lawsuit to go forward notwithstanding the statute of limitations when the defendant has already received notice of the allegations against him as a result of the prior lawsuit. [*Mair, supra*, 419 Mich at 83.]

Contrary to the majority, I do not believe that this holding is contrary to the precedential decisions in *Holmes, supra* at 714 and *Scarsella, supra* at 549-552. It does not appear that this argument was raised in either *Holmes* or *Scarsella*. This Court generally addresses only those issues properly raised in an appellant’s statement of questions involved. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998); *Check Reporting Services, Inc v Michigan National Bank-Lansing*, 191 Mich App 614, 628; 478 NW2d 893 (1991). And, our Supreme Court only reviews issues raised in the appellant’s application for leave to appeal. MCR 7.302(F)(4)(a).

I would reverse.

/s/ Harold Hood

¹ These cases refer to an earlier version of MCL 600.5856, not including subsection (d). With that exception, the statutory language of the earlier version is almost identical to the current version. PA 1961, No. 236, § 5856, effective January 1, 1963.