STATE OF MICHIGAN

COURT OF APPEALS

DENNIS KNOBLOCH, Personal Representative of the Estate of DAVID KNOBLOCH,

Plaintiff-Appellant,

V

DAVID LANGHOLZ, M.D, REED CITY HOSPITAL, and SPECTRUM HEALTH – REED CITY CAMPUS,

Defendants-Appellees.

UNPUBLISHED
June 21, 2002

No. 231070
Osceola Circuit Court
LC No. 00-8582-NH

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7).[1] We affirm.

I. Facts and Procedural History

This case involves a medical negligence wrongful death claim arising out of the September 11, 1996 death of David Knobloch. Plaintiff was named personal representative of Knobloch's estate on September 22, 1997. On September 16, 1999, plaintiff sent defendants the required notices of intent to pursue a claim, properly tolling the two year statute of limitations for asserting wrongful death claims arising out of alleged medical negligence. See MCL 600.5805(5)[2] and MCL 600.5852.[3] On February 22, 2000, plaintiff filed the complaint in the

[1]While the trial court's order did not specify the subrule under which it granted summary disposition, because the trial court found the complaint was time-barred by the statute of limitations, MCR 2.116(C)(7) was theapplicable subrule.

[2] MCL 600.5805(5) provides:

> Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

(continued…)

instant case against defendants. Attached to the complaint was a document titled "Plaintiff's Affidavit of Merit Under MCL 600.2912(D)[sic]," signed by Steven G. Meister, M.D., but not notarized. Dr. Meister asserted in the document that defendants breached the duty of care in treating Knobloch, and that this breach of duty was the proximate cause of Knobloch's death.

In July 2000, Defendants moved for summary disposition under MCR 2.116(C)(7). Defendants first asserted that because the document signed by Dr. Meister was not notarized, it was not an affidavit within the meaning and requirements of 600.2912d(1)[4]. Next, defendant argued that since the document signed by Dr. Meister was not an affidavit, plaintiff's complaint was required to be dismissed without prejudice for failure to file an affidavit of merit with the complaint as required under section 2912d(1). Finally, defendant contended that the filing of the complaint and purported affidavit failed to toll the statute of limitations on plaintiff's claim, and that the statute of limitations had since run and the time for filing plaintiff's claim had elapsed.

Plaintiff opposed the motion, arguing that because the affidavit of merit is intended to prevent frivolous claims and not to preclude legitimate claims from being pursued, the failure to file a notarized affidavit should be treated as a clerical error that does not result in dismissal of plaintiff's case. Plaintiff further argued that the affidavit of merit should be treated like a pleading, with the opportunity to amend being freely granted, and that he should be permitted to amend his pleadings by filing a notarized affidavit of merit.

The trial court granted defendants' motion, finding that because the document signed by Dr. Meister was not notarized, it was a statement rather that an affidavit of merit meeting the statutory requirements, and that accordingly, the case was required to be dismissed because the statute of limitations had expired prior to the filing of a valid complaint. Plaintiff filed a motion

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At the time plaintiff's lawsuit was commenced, MCL 600.5805(5) was enumerated as MCL 600.5805(4), and the language of the former subsection (4) and current subsection (5) are identical.

[3] MCL 600.5852 provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

[4] MCL 600.2912d(1) provides, in part:

> Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

for reconsideration on October 11, 2000, which the trial court denied on October 31, 2000. This appeal now ensues.

II. Standard of Review

Whether a cause of action is barred by a period of limitations is a question of law that we review de novo. *Todorov v Alexander*, 236 Mich App 464, 467; 600 NW2d 418 (1999). If a cause of action is time-barred, then summary disposition is appropriate under MCR 2.116(C)(7). See *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). We also review de novo a trial court's decision to grant or deny summary disposition pursuant to MCR 2.116(C)(7). *Id*. at 200-201, citing *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). In reviewing whether summary disposition is appropriate under MCR 2.116(C)(7), we consider all the documentary evidence submitted by the parties and accept the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true. Uncontradicted allegations are viewed in favor of the plaintiff. *Novak*, *supra* at 681-682, citing *Iovino v Michigan*, 228 Mich App 125, 131; 577 NW2d 193 (1998) and *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994).

III. Analysis

Plaintiff first argues that the trial court erred by concluding that the document signed by Dr. Meister did not constitute an affidavit of merit. We disagree.

As the trial court correctly noted in its order denying plaintiff's motion for reconsideration, this Court's decision in *Holmes v Michigan Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000), is directly on point. In reversing the trial court's decision, this Court stated in *Holmes*, *supra* at 711-714, that:

> We first observe that the trial court correctly determined that plaintiff's December 1996 statement did not satisfy MCL 600.2912d(1) because it did not constitute a proper affidavit of merit. The unambiguous statutory language demands that plaintiff or his attorney "shall file with the complaint an *affidavit* of merit signed by a health professional." MCL 600.2912d(1) (emphasis added). 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. *People v Sloan*, 450 Mich 160, 177, n 8; 538 NW2d 380 (1995); Black's Law Dictionary (7th ed). *While plaintiff's document met the first two requirements, no indication exists that the information was provided under oath. Even if we assumed that the person who signed the statement affirmed its contents, no evidence establishes that the affirmation was made before a person authorized to administer an oath.*
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> *In this case, however, the December 1996 document completely lacks a jurat. Because no indication exists that the doctor confirmed the document's*

> *contents by oath or affirmation before a person authorized to issue the oath or affirmation, the document does not qualify as a proper affidavit.*[3] *Sloan, supra*.
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> Accordingly, plaintiff failed to file an affidavit of merit before the limitation period expired on February 5, 1997, and failed to seek an extension of the period for filing the affidavit, which MCL 600.2912d(2) provides.
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> Plaintiff's December 1996 "affidavit" did not comply with MCL 600.2912d and failed to toll the limitation period. Consequently, plaintiff's instant action was time-barred. *Scarsella* [*v Pollack*, 232 Mich App 61, 64; 591 NW2d 237 (1998)]. We conclude that the trial court erred in denying defendants summary disposition according to MCR 2.116(C)(7).
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> [3] Thus, even assuming that plaintiff filed the second unsworn document together with his second complaint in January 1997, the unsworn document likewise did not represent a valid affidavit of merit. [Parallel citations omitted; emphasis added.]
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Plaintiff further contends that regardless of *Holmes*, Dr. Meister's statement complied with the requirements of MCR 2.113(A) as an affirmation rather than a statement under oath, because the document states that he is "duly sworn" and that "I would be so willing to testify." Thus, plaintiff would have us distinguish *Holmes*, and find that the document meets the requirements of an affidavit. We decline the invitation. We note that the Blacks Law Dictionary definition of affidavit adopted in *Holmes* recognizes that an affirmation, as well as an oath, must be "taken before a person having authority to administer such oath or affirmation." Id. at 711, 620 NW 2d 319, quoting Blacks Law Dictionary (6^{th} ed), p 58. In this case, as in *Holmes*, the document at issue lacks a jurat and plaintiff provides no other evidence that Dr. Meister's statement was made before a person duly authorized to administer an oath. The absence of a jurat or other evidence of verification requires a finding that the document fails to constitute an affidavit. *Merrifield v Village of Paw Paw*, 274 Mich 550 (1936). See also *Kelley v City of Flint*, 251 Mich 691, 695-696; 232 NW2d 407, (1930) *Clarke v Wayne Circuit Judge*, 193 Mich 33; 159 NW 387 (1916) (syllabus) ("A purported affidavit, on which perjury could not be assigned if it was wilfully false, would not, in law, be an affidavit at all.").

Since an affidavit of merit was not filed with the complaint, the complaint is properly dismissed without prejudice. *Scarsella v Pollak*, 461 Mich 547, 552; 607 NW2d 711 (2000). In addition, because the statute of limitations was not tolled and expired well before defendant's motion for summary disposition was filed and heard, the trial court correctly found that the complaint is now time-barred. *Id*. At 550-553.

IV. Conclusion

Because plaintiff failed to file an affidavit of merit with his complaint before the statute of limitations period elapsed, the trial court correctly ruled that plaintiff did not comply with MCL 600.2912d(1) and that summary disposition pursuant to MCR 2.116(C)(7) was properly granted in favor of defendants.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder