

STATE OF MICHIGAN
COURT OF APPEALS

D. DENNIS DUDLEY, Personal Representative of
the Estate of ARTHUR L. GARDNER, Deceased,

UNPUBLISHED
March 16, 2004

Plaintiff-Appellee,

v

JOHN N. FLOOD, D.O.,

No. 245085
Ingham Circuit Court
LC No. 02-000460-NH

Defendant-Appellant.

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On June 24, 1999 plaintiff was appointed personal representative of decedent's estate.¹ On December 19, 2000 plaintiff filed suit alleging that defendant, a board-certified orthopedic surgeon, committed medical malpractice by negligently prescribing pain medication to decedent. The complaint was accompanied by an affidavit of merit signed by a general practitioner and emergency room physician (suit referred to as *Gardner I*). Defendant moved for summary disposition, arguing that because the complaint was not accompanied by an affidavit that met the statutory requirements, its filing did not toll the statute of limitations and the suit was time-barred. The trial court granted summary disposition in favor of defendant.

On March 28, 2002 plaintiff re-filed the medical malpractice action. The complaint was accompanied by an affidavit of merit signed by a board-certified orthopedic surgeon. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that the suit was untimely because it was filed after June 24, 2001, and was barred by the doctrine of res judicata. The trial court denied the motion, holding that the affidavit filed in *Gardner I* tolled the

¹ As personal representative of decedent's estate, plaintiff had until June 24, 2001 to file a medical malpractice action unless the statute of limitations was tolled. MCL 600.5852.

limitations period and that the dismissal of that case was without prejudice. Defendant thereafter filed an application for leave to appeal to this Court, which was granted.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). In the absence of disputed questions of fact, the issue of whether a cause of action is barred by a statute of limitations is a question of law that is reviewed de novo. *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002).

The statute of limitations for a medical malpractice action is two years. MCL 600.5805(6). A medical malpractice plaintiff must file with the complaint an affidavit of merit signed by a health professional who meets or whom the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. The affidavit must contain a statement of the applicable standard of practice, the health professional's opinion that the defendant breached the applicable standard of practice, the actions the defendant should have taken to have complied with the applicable standard of practice, and the manner in which the breach of the standard of practice was the proximate cause of the alleged injury. MCL 600.2912d(1). If the defendant is board-certified in a specialty, the expert witness must be board-certified in the same specialty. MCL 600.2169(1).

We reverse the trial court's order denying defendant's motion for summary disposition in this case. An affidavit of merit that is grossly nonconforming to the statutory requirements does not support the filing of a complaint that tolls the running of the statute of limitations. *Mouradian v Goldberg*, 256 Mich App 566, 571-575; 664 NW2d 805 (2003). The instant action was filed after the two-year limitations period expired on June 24, 2001. The affidavit that accompanied the complaint in *Gardner I* was not signed by a board-certified orthopedic surgeon. The trial court reasoned that this fact was irrelevant because any licensed physician would be competent to testify regarding the standard of practice for administering pain medication. However, the fact that a witness may in fact be competent to testify regarding a particular issue is not dispositive. *Decker v Flood*, 248 Mich App 75, 83-84; 638 NW2d 163 (2001) (specialist may not testify as to the standard of practice for a general practitioner). The filing of the complaint and a nonconforming affidavit in *Gardner I* did not toll the limitations period. *Mouradian, supra*. Defendant was entitled to dismissal of this action with prejudice. *Id.*

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to the facts or evidence in a prior action. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Defendant argues that the trial court erred in holding that the filing of the instant action was not precluded by the doctrine of res judicata. We decline to reach this issue in light of our resolution of the statute of limitations issue. *Mouradian, supra*.

Reversed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette