STATE OF MICHIGAN

COURT OF APPEALS

AMY FRASER,

Plaintiff-Appellant/Cross-Appellee,

v

LINDA DUBAY, M.D.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 24, 2004

No. 248065
Oakland Circuit Court
LC No. 2001-036239-NH

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff Amy Fraser appeals as of right the trial court's order granting summary disposition in favor of defendant Linda Dubay, M.D., and dismissing plaintiff's complaint without prejudice. Defendant cross appeals the same order, contending that plaintiff's complaint should have been dismissed with prejudice. We affirm in part, reverse in part, and remand for entry of an order of dismissal with prejudice.

This is a medical malpractice cause of action in which plaintiff alleges that defendant, a general surgeon, failed to timely diagnose appendicitis and performed an unnecessary cholecystectomy. Defendant first saw plaintiff on June 28, 2000, arising from her complaints of right upper quadrant pain and performed the laparoscopic cholecystectomy on July 25, 2000. On August 6, 2000, plaintiff went to the hospital with acute abdominal pain. An ultrasound of the pelvis revealed acute appendicitis, and plaintiff underwent an appendectomy performed by another physician on August 7, 2000.

Plaintiff filed her medical malpractice complaint on November 16, 2001. Pursuant to MCL 600.2912d(1), plaintiff attached to the complaint an affidavit of merit executed by Michael Blank, M.D., who averred that he is a board-certified general surgeon.

Defendant thereafter filed a motion for summary disposition, pursuant to MCR 2.116(C)(7),(8), and (10). Defendant argued that, according to previous testimony given by Dr. Blank, at the time of the events giving rise to plaintiff's claims, and for at least the year preceding, Dr. Blank was not engaged in the active practice of general surgery. He was not, therefore, qualified under MCL 600.2169 to sign an affidavit of merit. MCL 600.2912d. Defendant moved to dismiss plaintiff's complaint with prejudice because the applicable statute of limitations had expired.

The trial court granted defendant's motion but dismissed plaintiff's complaint without prejudice. In so doing, the trial court acknowledged that Dr. Blank has been a board-certified general surgeon since 1975. However, the trial court ruled that, at the time of the incident, Dr. Blank was not actively engaged in the practice of general surgery as is contemplated by the statute, and, as such, the affidavit of merit did not meet all the statutory requirements because, during the year immediately preceding the date of the occurrence, Dr. Blank did not devote the majority of his professional time to the active clinical practice of general surgery. On this basis, the trial court held that Dr. Blank's affidavit of merit did not comply with the provisions of MCL 600.2912d and MCL 600.2169. The trial court concluded, however, that, although the affidavit was deficient, it was not grossly nonconforming under the statute. The trial court further noted that Dr. Blank was not the testifying expert in this case; rather, another physician had been deposed, and there had not been any challenge to the sufficiency of that doctor's testimony which supported a prima facie case of medical malpractice. The trial court therefore dismissed plaintiff's complaint without prejudice.

Plaintiff now appeals, contending that summary disposition was not warranted because a genuine issue of material fact exists as to whether plaintiff's counsel "reasonably believed" that Dr. Blank was qualified under MCL 600.2169 to execute the affidavit of merit. See MCL 600.2912d. Defendant cross appeals, arguing that plaintiff's complaint should have been dismissed with prejudice.

On appeal, the trial court's decision on a motion for summary disposition is reviewed de novo. *DiPonio Construction Co v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is time-barred. *McKinney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(7), this Court accepts as true all of the plaintiff's well pled factual allegations, affidavits, and other documentary evidence and construes them in a light most favorable to the plaintiff. *Terrace Land Development Corp v Seeligson & Jordan*, 250 Mich App 42, 455; 647 NW2d 524 (2002). If there are no factual disputes and reasonable minds cannot differ concerning the legal application of the facts, whether the plaintiff's claim is barred by the statute of limitations is a question of law subject to de novo review. *Id*.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Id.* The moving party is entitled to judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact. *Id.*; MCR 2.116(C)(10), (G)(4). In presenting a (C)(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Id*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 363.

MCL 600.2912d provides in relevant part:

> (1) * * *[T]he 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.* [Emphasis added.]

The health professional signing the affidavit of merit must qualify as an expert witness under the provisions of MCL 600.2169, which states:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), *during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:*
>
> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, *the active clinical practice of that specialty.*
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty. [Emphasis added.]

As previously noted, another physician, not Dr. Blank, was deposed as the testifying expert in the instant case; consequently, Dr. Blank was not deposed concerning the present malpractice claim. However, in support of her motion for summary disposition, defendant attached the transcript of Dr. Blank's discovery deposition taken on October 9, 2000, in an unrelated medical malpractice case (*Bandy v Silapaswan, M.D.*, Oakland Circuit Court Docket No. 99-013984 NH), in which Dr. Blank was offered as an expert witness on behalf of the plaintiff. At that time, Dr. Blank testified that, although he was licensed to practice in Missouri, he was no longer actively practicing medicine or performing full-time surgery because he had been on a medical leave of absence since January 1998 due to cardiac problems. Although he engaged in "a little bit of general practice on some of my old patients," Dr. Blank testified that since 1998, he had no active staff privileges at any hospitals in Jefferson County, Missouri, where his medical practice was located.

Plaintiff contends that Dr. Blank's deposition testimony taken in yet another case, *Zuniga v Memorial Health Care Center*, Shiawassee Circuit Court Case Docket No. 01-7226-NH, clearly establishes sufficient facts for plaintiff's counsel to have reasonably believed that Dr. Blank would qualify as an expert witness pursuant to MCL 600.2169, and, as such, the affidavit of merit complied with MCL 600.2912d(1). In *Zuniga*, where the plaintiff's counsel was the same attorney who represents the instant plaintiff, Dr. Blank testified that he was licensed to practice in Missouri and was board certified in general surgery since 1975. However, he explained that "I'm on sick leave basically so I'm very limited part-time at this point, I guess, until I get clearance from my doctors." Dr. Blank testified that his work hours depended on his health, and, since the spring of 1998, he worked "two days [a week] maybe, sometimes two and a half." Dr. Blank testified that as of 1999, although he "might have had a consulting position" at two local hospitals, he no longer had surgical privileges at any hospital, and instead "did some office surgery but not in the hospital." Since the spring of 1998, his practice consisted of

> basically doing a little general practice mostly on patients that have been mine prior to that. A lot of them were surgical patients, and even though I attempted to transfer them to other doctors, some of them, especially the older ones, just wouldn't go basically. So I pretty much try to take care of some of my older patients who refuse to go anywhere else.

Plaintiff now argues that although the above testimony shows that Dr. Blank did not practice full time by working forty hours per week in 1999-2000, nevertheless, during the 2-2½ days per week that he spent in a professional capacity, he spent nearly one hundred percent of his time working as a board-certified surgeon by seeing patients and doing surgeries in his office. Plaintiff maintains that Dr. Blank's part-time, in-office treatment of patients was enough to qualify Dr. Blank as an expert because, here, it is the decision to perform surgery, not the surgery itself, that is the focus of the malpractice claim. Moreover, plaintiff notes that her law firm has used Dr. Blank as an expert witness on numerous other occasions, and Dr. Blank has qualified as an expert witness. Thus, plaintiff contends it was reasonable for plaintiff's counsel to believe that Dr. Blank met the requirements of an expert witness pursuant to MCL 600.2169.

This Court has held that "an affidavit [of merit] is sufficient if counsel reasonably, albeit mistakenly, believed that the affiant was qualified under MCL 600.2169." *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002). However, according to the clear and unambiguous terms of MCL 600.2169, for the year immediately preceding the alleged malpractice, the expert must have devoted a majority of his professional time to the *active* clinical practice of the specialty that is the basis for the alleged claim. In this case, the record evidence simply does not support plaintiff's contention that a genuine issue of material fact exists regarding whether plaintiff's counsel could have reasonably or even mistakenly believed that Dr. Blank was qualified under MCL 600.2169. Dr. Blank's deposition testimony in both the *Zuniga* and *Bandy* cases unequivocally makes clear that during the year immediately preceding the date of the malpractice alleged here, i.e., defendant's purported failure to diagnose plaintiff's appendicitis in July and August 2000, Dr. Blank did not devote a majority of his professional time to the active clinical practice or instruction in general surgery. In fact, according to Dr. Blank's own admissions, he did not practice surgery at all. He had been on a medical leave of absence since January 1998 and had not since that time had active staff privileges. In light of this evidence clearly showing that Dr. Blank was not eligible to provide expert witness

testimony, combined with the fact that plaintiff's counsel also represented the plaintiff in the *Zuniga* case, it is disingenuous for plaintiff to argue that counsel reasonably believed that Dr. Blank's affidavit of merit complied with the requirements of MCL 600.2912d and MCL 600.2169. Because, in the year immediately preceding the malpractice alleged herein, Dr. Blank did not devote the majority of his professional time to either the active clinical practice of general surgery or the instruction of students in that specialty, the trial court properly concluded that plaintiff's affidavit did not meet the standards contained in MCL 600.2169(1) and that dismissal of plaintiff's complaint was therefore warranted.

However, we conclude that the trial court erred in dismissing plaintiff's complaint *without* prejudice. As defendant argues in her cross appeal, the proper sanction under the circumstances is dismissal with prejudice. An affidavit of merit that does not conform to the statutory requirements is not an affidavit of merit which satisfies the statutory filing requirements and, thus, does not support the filing of a complaint that tolls the running of the statute of limitations. *Geralds v Munson Healthcare*, 259 Mich App 225, 235-240; 673 NW2d 792 (2003); *Mouradian v Goldberg*, 256 Mich App 566, 573-574; 664 NW2d 805 (2003). The filing of plaintiff's complaint and affidavit did not toll the applicable limitations period (see MCL 600.5838a(1); MCL 600505(4)), which has now expired, and defendant was therefore entitled to dismissal of the suit with prejudice. *Geralds, supra; Mouradian, supra.* Thus, we reverse that part of the trial court's order dismissing plaintiff's claims without prejudice.

We affirm the trial court's order granting summary disposition to defendant, reverse the trial court's order dismissing plaintiff's complaint without prejudice, and remand for entry of an order dismissing plaintiff's complaint with prejudice. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood