STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL OHANNESIAN and NANCY OHANNESIAN,

Plaintiffs-Appellants/Cross-Appellees,

v

BUTTERWORTH HOSPITAL,

Defendant-Appellee/Cross-Appellant,

and

DR. LYNN S. HEDEMAN and LYNN S. HEDEMAN, M.D., P.C.,

Defendants.

UNPUBLISHED
November 16, 2004

No. 245933
Kent Circuit Court
LC No. 98-006190-NH

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the final order in this case, entering judgment in favor of plaintiffs in accordance with the case evaluation award against defendants Dr. Lynn S. Hedeman and Lynn S. Hedeman, M.D., P.C. (collectively referred to as Hedeman). On appeal, plaintiffs contest the trial court's rulings in favor of Butterworth Hospital (defendant) on its various motions for summary disposition, arguing that the trial court was required to review Hedeman's peer review and privileges file to determine whether there was evidence that was not protected by the peer review privilege, and that the trial court erred in granting defendant's motions for summary disposition because they have stated a valid claim for ordinary negligence, or alternatively for medical malpractice. Defendant has filed a cross-appeal in this matter, contending that the trial court erred in denying its initial motion for summary disposition because plaintiffs' claim against it was for medical malpractice, and that the statute of limitations operated to bar plaintiffs' claim because they did not to file a timely affidavit of merit with respect to the claim brought against defendant. We affirm.

I. Material Facts and Proceedings

On June 20, 1996, Dr. Hedeman performed lower back surgery (lumbar laminectomy) on Michael Ohannesian at defendant hospital. According to Michael, Dr. Hedeman subsequently informed him that he had operated at the wrong level, and Michael discovered that he still had a bulging or herniated disc. Dr. Hedeman apparently operated at the L2-3 level instead of the L3-4 level, and Michael required a second surgery to correct the error.

On June 16, 1998, plaintiffs filed a complaint against Hedeman and defendant. In addition to claims of medical malpractice brought against Hedeman, plaintiffs also alleged one count of "Negligence or Malpractice of Defendant Butterworth Hospital."[1] In response to plaintiffs' complaint, defendant brought a motion for summary disposition, arguing that dismissal was proper because plaintiffs failed to file an affidavit of merit with respect to the medical malpractice claim brought against it. Defendant contended that although plaintiffs filed an affidavit of merit with their complaint, it did not pertain to the standard of care for the claim brought against defendant. Plaintiffs responded that their claim against defendant sounded in ordinary negligence and not medical malpractice.

Following oral argument on defendant's motion, the trial court determined, "This is a malpractice case, and where required an affidavit [sic] has not been filed in support of that malpractice. Having reviewed all four corners of the pleadings, I don't think I have any choice but to dismiss and grant Summary pursuant to the request of Butterworth Hospital." The trial court then concluded that plaintiffs failed to demonstrate good cause to permit them an additional twenty-eight days to file a second affidavit of merit. Regardless of the trial court's determination, however, plaintiffs were given an additional twenty-eight days to file an affidavit.[2] On November 24, 1998, the trial court entered an order denying defendant's motion for summary disposition, and further ordered that plaintiffs had until November 10, 1998, to file an affidavit of merit in accordance with MCL 600.2912d.

Defendant then brought a second motion for summary disposition, contending that plaintiffs' claim against it should be dismissed because their failure to file the affidavit of merit with the complaint rendered the complaint null since it was not filed until after the statute of limitations had run. Plaintiffs responded that defendant previously raised the same issues, and reconsideration of the court's prior order was unnecessary. Plaintiffs maintained that the claim against defendant was for negligence, and that it was not subject to the medical malpractice statute of limitations. Plaintiffs later contended in a supplemental response that the statute did not require multiple affidavits of merit, and their initial affidavit of merit was sufficient because the claim against defendant was derivative of the medical malpractice claim brought against Hedeman.

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[1] Contrary to the representations by plaintiffs' counsel during oral argument, the initial complaint contained the heading "Negligence or Malpractice" against defendant.

[2] Plaintiffs thereafter submitted William L. Nellis's affidavit to the trial court within the twenty-eight day extension.

The trial court denied defendant's second motion for summary disposition. The court first indicated that if plaintiffs correctly identified their action against defendant as one for negligence, the statute of limitations did not apply. The court stated that it was not sure whether the statutory requirements could be met regarding claims brought against a medical facility because there was no certification requirement for hospital administrators, but concluded that regardless of whether plaintiffs' claim sounded in malpractice or in negligence, plaintiffs could not get an affidavit because there was no licensed specialist in Michigan that met the criteria of MCL 600.2169.

Defendant subsequently brought three separate motions for partial summary disposition, all of which the trial court granted. The trial court first determined that plaintiffs' claim against defendant sounded in medical malpractice and not ordinary negligence. The court next found that plaintiff failed to raise a genuine issue of material fact regarding defendant's appointment or reappointment, or supervision of Hedeman, and also that plaintiffs failed to establish a causal connection between the amount of Hedeman's insurance coverage and any damage to plaintiffs. Finally, regarding the issue of informed consent, the court determined that there was no evidence that Hedeman failed to obtain informed consent or that any verification by defendant of properly obtained informed consent would have led Michael to decide not to have the surgery.

II. Medical Malpractice or Ordinary Negligence

We first address the issue regarding the nature of plaintiffs' claim against defendant (i.e., does plaintiffs' claim sound in medical malpractice or ordinary negligence). This Court utilizes the de novo standard in determining whether the nature of a claim is ordinary negligence or medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). We find that plaintiffs' claim against defendant sounds in medical malpractice and not ordinary negligence.

In determining whether a claim sounds in ordinary negligence or in medical malpractice, the Michigan Supreme Court explained that a court must ask two fundamental questions: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. *Bryant*, *supra* at 422. If both these questions are answered affirmatively, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. *Id*.; see also *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (1999). "A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff." *Bryant*, *supra* at 422-423, citing *Dyer v Trachtman*, 470 Mich 45; 679 NW2d 311 (2004); *Delahunt v Finton*, 244 Mich 226, 230; 221 NW 168 (1928) ("Malpractice, in its ordinary sense, is the negligent performance by a physician or surgeon of the duties devolved and incumbent upon him on account of his contractual relations with his patient."); see also *Oja v Kin*, 229 Mich App 184, 187; 581 NW2d 739 (1998); *Hill v Kokosky*, 186 Mich App 300, 302-303; 463 NW2d 265 (1990); *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652; 438 NW2d 276 (1989). If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence; however, if the

reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, the claim sounds in medical malpractice. *Bryant*, *supra* at 423.

Based upon our Supreme Court's thorough analysis of the law surrounding this issue, along with an independent review of each of plaintiffs' specific allegations, we find that plaintiffs' claim against defendant sounds in medical malpractice rather than ordinary negligence. As stated in *Bronson*, a case cited in both *Dorris* and *Bryant*, claims of negligent selection, retention, and supervision of staff physicians sound in medical malpractice:

> The providing of professional medical care and treatment by a hospital includes supervision of staff physicians and decisions regarding selection and retention of medical staff. [*Bronson*, *supra* at 652-653.]

Additionally, the reasoning of *Bronson* is in accordance with *Bryant*. First, there was a professional relationship between Michael and defendant hospital, as Michael's surgery was performed by Hedeman in defendant hospital. Second, the alleged acts of negligence, with respect to the selection, retention, and supervision of Hedeman, do not raise issues that are within the common knowledge and experience of the jury. The requirements necessary to obtain or retain staff privileges, and the procedures and judgment involved in determining whether a physician is sufficiently competent to perform medical procedures involve medical judgment and are not within the common knowledge or understanding of the average person.

Further, the issue of the amount of liability insurance a physician should carry is similarly not within that common knowledge. Indeed, plaintiffs' argument that a neurosurgeon should carry a higher amount of liability insurance than other types of physicians supports this conclusion, as does plaintiffs' evidence that the minimum amount required by local hospitals varies. Accordingly, plaintiffs' allegation regarding the issue of liability insurance coverage sounds in medical malpractice.

Finally, plaintiffs' claim that defendant permitted Hedeman to retain his staff privileges after they had notice that he refused to use proper surgical techniques in order to insure that the surgery was done competently also sounds in medical malpractice. Again, this allegation focuses on the retention of staff privileges, an issue discussed in *Bronson*. Further, in *Bryant*, the Court addressed the plaintiff's claim that the defendant "[n]egligently and recklessly fail[ed] to take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 [1997] entangled between the bed rails and the mattresses." *Bryant*, *supra* at 430. The Court determined that the claim sounded in ordinary negligence because "[n]o expert testimony is necessary to determine whether defendant's employees should have taken *some* sort of corrective action to prevent future harm after learning of the hazard." *Id*. at 430-431 (emphasis in original). This case is easily distinguished from *Bryant* because expert testimony is necessary to determine whether Hedeman utilized proper surgical techniques in performing the surgery. Such

information is not within the common knowledge of a lay juror. Accordingly, plaintiffs' claim against defendant sounds in medical malpractice.[3]

III. Statute of Limitations and the Affidavit of Merit

Based on our determination that plaintiffs' claim against defendant sounds in medical malpractice, we must next ascertain whether plaintiffs were required to file an affidavit of merit with respect to their claim against defendant and whether the claim was barred by the applicable statute of limitations. We hold that an affidavit of merit was required by the statute, and that the trial court erred in denying defendant's motion for summary disposition because plaintiffs' claim was barred by the applicable statute of limitations.

This Court reviews questions of law and issues of whether a claim is barred because of the statute of limitations de novo. *Bryant*, *supra* at 419; *Ligouri v Wyandotte Hosp & Med Ctr*, 253 Mich App 372, 375; 655 NW2d 592 (2002).

Defendant argues that the trial court erred in denying its initial motion for summary disposition because plaintiffs filed their complaint without the required affidavit of merit, and that plaintiffs' claim against it should be dismissed because plaintiffs did not file the required affidavit until after the statute of limitations had expired. Plaintiffs argue that the trial court properly dismissed defendant's motion because their claim against defendant sounds in ordinary negligence, and expert testimony was unnecessary to support their claim.

Michigan courts have previously held that MCL 600.2912d(1) requires plaintiffs to file an affidavit of merit with their complaint. MCL 600.2912d; *Scarsella v Pollak*, 461 Mich 547, 548-549; 607 NW2d 711 (2000). The statute directs that a plaintiff or the plaintiff's attorney "*shall* file with the complaint *an* affidavit of merit . . . ." See *Id*. at 549 (use of the word "shall" imposes a mandatory duty). It is thus clear from the statutory language that an affidavit of merit is required when filing a medical malpractice claim.

While the statute requires a plaintiff to file only one affidavit, a plaintiff may choose to file more than one when there are more than one medical professionals or facilities being sued. However, if the party determines that only one affidavit is necessary, the affidavit should address each of the distinct and separate claims of medical malpractice. The statute contains very specific instructions regarding the contents of an affidavit of merit, which is to include the standard of care, the health care provider's opinion that the standard of care has been breached by the health care professional or the health care facility, the appropriate actions the health care professional or facility should have taken to comply with the standard of care, and the manner in

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[3] Plaintiffs reliance on *Ferguson v Gonyaw*, 64 Mich App 685, 697; 236 NW2d 543 (1975), for the proposition that the claims against defendant are based on ordinary negligence rather than medical malpractice is misplaced. The *Ferguson* Court did not directly address the issue now before this Court (i.e., whether plaintiffs' claim sounds in ordinary negligence or medical malpractice), and did not utilize the appropriate standard set forth by our Supreme Court in *Bryant*.

which the breach proximately caused the alleged injury. MCL 600.2912d(1). Where a plaintiff's claims are separate and distinct, and each has a different standard of care, facts leading to the breach of that standard, and courses of proper actions that should have been taken, the affidavit of merit should contain that information in relation to each of the claims brought by the plaintiff.

In the instant case, plaintiffs' claims against defendant and Hedeman, while interrelated, are based on different standards of care, and different actions were alleged to support a breach of those standards. However, because plaintiffs did not address the claim against defendant in the affidavit of merit filed along with their complaint, an additional affidavit of merit was necessary to support plaintiffs' claim against defendant. As stated in *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 394; 668 NW2d 628 (2003), "the purpose of MCL 600.2912d[1] and 600.2169 is to ensure trustworthy medical expert testimony and to discourage frivolous lawsuits." Thus, the statutory requirements were not satisfied by filing the one affidavit in this case, where the affidavit contained no medical expert testimony against defendant as is required to pursue the medical malpractice claim against defendant. The fact that a plaintiff need only file one affidavit of merit does not mean that the affidavit does not need to contain the required information for each of the medical malpractice claims contained in a complaint, such as the one in the case at bar, which alleges a distinct but related claim of medical malpractice against both the physician and the institution. Accordingly, because the affidavit of merit filed with the complaint did not contain the statutorily required information regarding the claim against defendant, plaintiffs did not comply with the statutory requirement that an affidavit of merit be filed in a case alleging medical malpractice.[4]

Although, as indicated by the trial court, it may be difficult for plaintiffs to meet the requirements of MCL 600.2169 with respect to medical malpractice claims brought against hospital administration, nothing in the statute exempts medical malpractice plaintiffs from the statutory requirement of filing an affidavit of merit along with the complaint in cases brought against an institutional defendant. In fact, MCL 600.2912d specifically includes the term "health facility" in addressing the information required to be contained in the affidavit of merit, thus indicating that an affidavit of merit must be filed in connection with medical malpractice claims brought against a health facility, such as defendant hospital.

We next turn to the issue of whether plaintiffs' claim against defendant was time-barred under the applicable statute of limitations. We find that it was.

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[4] Plaintiffs cite to *Nippa*, *supra*, for the proposition that they complied with the requirements of MCL 600.2912d because they timely filed with their complaint the affidavit of merit of a neurosurgeon, who specialized in the same medical specialty as Hedeman. See also, *Cox v Flint Bd of Hosp Managers*, 467 Mich 1; 651 NW2d 356 (2002). However, *Nippa* did not address the precise issue before this Court. Here, plaintiffs brought claims against a hospital and a physician that were distinct. *Nippa* and *Cox* both relate to medical malpractice claims against a hospital under a theory of vicarious liability and not standard medical malpractice. Plaintiffs did not bring a claim of vicarious liability against defendant; accordingly, the reasoning of *Cox* and *Nippa* are inapplicable to the instant case.

In *Scarsella*, *supra*, our Supreme Court adopted the general rule that although the period of limitations is tolled when a complaint is filed, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence a medical malpractice lawsuit. *Id*. at 549. Thus, if a medical malpractice complaint is not accompanied by the required affidavit of merit, the statute of limitations is not tolled. *Id*. at 549-550. In order for a medical malpractice plaintiff to toll the period of limitation, the plaintiff filing a complaint without an affidavit of merit must move for the twenty-eight-day extension provided for in MCL 600.2912d(2). *Id*. at 550. In cases where a medical malpractice plaintiff wholly omits to file the required affidavit of merit, the filing of the complaint is ineffective, and does not permit tolling of the applicable period of limitation, as permitting such a tolling would undo the Legislature's clear mandate that an affidavit of merit "shall" be filed with the complaint. *Id*. at 552-553.

In the instant case, the applicable two-year medical malpractice statute of limitations was set to expire on June 20, 1998. On June 16, 1998, plaintiffs filed their complaint against Hedeman and defendant. MCL 600.5805(6). On July 28, 1998, in response to plaintiffs' complaint, defendant filed its first motion for summary disposition based on plaintiffs' failure to file a proper affidavit of merit.[5] At oral argument, however, which was held on October 2, 1998, the trial court granted plaintiffs an additional twenty-eight days to file an affidavit of merit, apparently utilizing the "good cause" exception to the rule. On October 30, 1998, plaintiffs filed Nellis's affidavit. Upon filing their complaint, plaintiffs did not file an affidavit of merit with respect to the claim brought against defendant. Nor did plaintiffs at that time, or prior to the expiration of the statute of limitations, file a motion for good cause shown to extend the time by twenty-eight days. It was not until oral argument at the October 2, 1998, hearing that plaintiffs requested the trial court to permit them an additional twenty-eight days under the statute to file the affidavit of merit.

We find that the trial court erred in denying defendant's motion for summary disposition. Because an affidavit of merit did not accompany the complaint with respect to the claim against defendant, the complaint was insufficient to commence a medical malpractice action. *Scarsella*, *supra* at 550. A complaint filed without the proper affidavit of merit does not toll the statute of limitations. *Scarsella*, *supra* at 551-552. Thus, dismissal of plaintiffs' claim against defendant with prejudice was appropriate remedy where the statute of limitations ran on June 20, 1998, and plaintiffs failed to file an affidavit of merit with their complaint prior to the expiration of the statute of limitations. *Id*.

Further, plaintiffs' attempt to remedy their failure to file the affidavit of merit pursuant to MCL 600.2912d(2) was ineffective. In order to toll the statute of limitations under MCL 600.2912d(2), which provides an additional twenty-eight days to file an affidavit for good cause shown, the mere filing of a motion to extend the time for filing an affidavit of merit is insufficient to toll the statute of limitations. Rather, it is the granting of a motion for additional

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[5] Thus, and again contrary to the representations by plaintiffs' counsel during oral argument, the propriety of the trial court's decision on defendant's initial motion for summary disposition is at issue in this appeal.

time under subsection 2912d(2) that tolls the period of limitation. *Barlett v North Ottawa Community Hosp*, 244 Mich App 685, 691-692; 625 NW2d 470 (2001). Further, a motion to extend time only provides an additional twenty-eight days following the date the statute of limitations expires. See generally *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 705-706; 620 NW2d 319 (2000). Here, the statute of limitations ran before plaintiffs filed an effective complaint with respect to their claim against defendant, and before they even brought a motion to extend the time for filing the affidavit of merit. Naturally, plaintiffs' motion was not granted prior to the date the statute of limitations expired; therefore, plaintiffs' untimely motion to extend the time for filing the affidavit of merit was equally ineffective. That the trial court granted plaintiffs' motion to extend time for filing the affidavit is irrelevant because the granting of the motion after the statute of limitations expired did not revive plaintiffs' claim. Accordingly, plaintiffs' claim against defendant was time-barred, and the trial court erred in denying defendant's motion for summary disposition.[6]

Because the trial court erred in denying defendant's motion for summary disposition and plaintiffs' claim against defendant should have been dismissed, it is unnecessary for us to address plaintiffs' remaining issues. The issue raised in defendant's cross-appeal is dispositive of this case, and plaintiffs' claim against defendant should not have proceeded as far as it did.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

[6] In rendering our decision, we do not run into the situation contemplated by *Bryant* where the plaintiff labeled her claim as ordinary negligence rather than medical malpractice. Here, plaintiffs were aware of the potential problems associated with their claim, and attempted to avoid such problems by labeling their claim against defendant as "Negligence or Malpractice," and by attempting to file their claim within the two-year medical malpractice limitation period. Thus, our determination that plaintiffs' claim against defendant was time-barred was due to plaintiffs' failure to meet the medical malpractice statutory requirements in connection with the affidavit of merit, and not on plaintiffs' "understandable confusion" regarding the legal nature of their claim.