

STATE OF MICHIGAN  
COURT OF APPEALS

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DONALD WYANT, Personal Representative of  
the Estate of DEBORAH LYNN MEADE, a/k/a  
DEBORAH LYNN WYANT,

UNPUBLISHED  
December 13, 2005

Plaintiff-Appellant/Cross-Appellee,

v

NORTON SHORES MEDI-CENTER, DR. V.  
SCOTT, DR. WILLIAM KIRCHLINE, and  
HACKLEY COMMUNITY CARE CENTER,

No. 255823  
Muskegon Circuit Court  
LC No. 98-038788-NH

Defendant-Appellee/Cross-  
Appellant.

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Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting all defendants summary disposition based on the expiration of the statute of limitations and dismissing his medical malpractice claim with prejudice. Defendant Scott cross-appeals from a previous order denying his motion for summary disposition based on the expiration of the statute of limitations. We affirm the trial court's order granting all defendants summary disposition and find it unnecessary to address defendant Scott's cross-appeal.

Plaintiff first argues that an affidavit that is not properly notarized is defective, and the proper remedy is dismissal without prejudice. We disagree.

Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is time-barred. *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999).

In *Holmes v Michigan Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000), three cases were consolidated on appeal. The plaintiff in one of the cases filed a complaint alleging malpractice on March 27, 1996, but did not attach an affidavit of merit. *Id.* at 710. On December 16, 1996, an unsworn affidavit was filed. On January 27, 1997, the plaintiff filed a second complaint and an unsworn affidavit. On August 8, 1998 the plaintiff filed a complaint with an affidavit of merit. *Id.* The statute of limitations expired on February 8, 1997. *Id.* The defendants moved for summary disposition and argued that the document filed

December 16, 1996, was not an affidavit of merit because it was not properly sworn, so the statute of limitations was not tolled.

In *Holmes*, we held that the trial court correctly determined that the unsworn document did not satisfy MCL 600.2912d(1), which requires a complaint alleging malpractice to be accompanied by an affidavit of merit. We stated that an affidavit “must be (1) a written or printed declaration of 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.” *Holmes, supra* at 711, citing *People v Sloan*, 450 Mich 160, 177, n 8; 538 NW2d 380 (1995), and *Blacks Law Dictionary* (7<sup>th</sup> ed). We held that the December 16, 1996, document did not meet the last requirement because “no evidence establishes that the affirmation was made before a person authorized to administer an oath.” *Holmes, supra* at 711. Therefore, we held that the claim was time barred because an affidavit of merit was not filed before the expiration of the limitations period. *Id.* at 712.

Similarly, in the present case the affidavit of merit was not signed in the presence of a notary public, so all of the requirements of a valid affidavit were not met. Therefore, by definition the document attached to the complaint was not an affidavit and was tantamount to not filing an affidavit at all.

Additionally, as our Supreme Court very clearly stated in *Scarsella v Pollak*, 461 Mich 547, 551-552; 607 NW2d 711 (2000) (*Scarsella II*), “a plaintiff who files a medical-malpractice complaint without the required affidavit is subject to dismissal without prejudice, and can refile properly at a later date. However, such a plaintiff must still comply with the applicable statute of limitations.” When an affidavit of merit is not attached to the complaint, the action is not properly commenced and the statute of limitations is not tolled. *Id.* at 552-553.

In the present case, plaintiff did not comply with the statute of limitations. The alleged malpractice occurred on August 8, 1996, and the decedent passed away on August 12, 1996. Letters of authority were issued on March 4, 1996. The statute of limitations for malpractice actions is two years from the date of the alleged malpractice, MCL 600.5805(6), or two years from the date the letters of authority were issued if a person dies before the limitation period has run, MCL 500.5852. Here the statute of limitations expired on March 4, 1998. A subsequent affidavit was filed; however, even if that subsequent affidavit were valid, it was not filed until 1999, long after the statute of limitations had expired. Because the statute of limitations had expired, dismissal with prejudice was appropriate. *Holmes, supra; Scarsella II, supra*.

Next, plaintiff relies on MCL 600.2301 and argues he should be allowed to amend his complaint to include an affidavit of merit and have it relate back to the date the original complaint was filed because defendants have not been prejudiced. We disagree.

In *Scarsella II*, the our Supreme Court affirmed and adopted our opinion in *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998), (*Scarsella I*). We stated:

Plaintiff contends that he should have been allowed to amend his . . . complaint by appending the untimely affidavit of merit. He reasoned that such an amendment would relate back, see MCR 2.118(D), making timely the newly completed complaint. We reject this argument for the reason that it effectively

repeals the statutory affidavit of merit requirement. Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1) . . . . [*Scarsella I, supra* at 65.]

If the court were to allow an unsworn affidavit to be amended to satisfy the requirements of MCL 600.2921d(1), the affidavit requirement would be completely nullified. Therefore, the trial court properly concluded that plaintiff could not amend his complaint to meet the statute of limitations requirement.

Having concluded that the claims against defendants are time barred by the statute of limitations, we need not address the issue presented by defendant Scott on cross-appeal.

The trial court properly dismissed plaintiff's claim with prejudice against defendants based on the expiration of the statute of limitations.

We affirm.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Jane E. Markey