STATE OF MICHIGAN

COURT OF APPEALS

The Estate of PATRICIA HUBKA, Deceased, by GAYLE WAGNER, Personal Representative,

Plaintiff-Appellant,

v

KEITH DEFEVER, M.D., KEITH DEFEVER, M.D., P.C., HARRY J. ARETAKIS, M.D., JEFFREY ALAN HOLLADAY, M.D., TRINITY HEALTH-MICHIGAN, d/b/a ST. JOSEPH MERCY MACOMB, SHARON KHAN-LEPAK, D.O., ST. JOHN RIVER DISTRICT HOSPITAL, RIVER DISTRICT MEDICAL GROUP, P.C., BEERAVOLU RAMESH REDDY, M.D., and CARDIOLOGY ASSOCIATES OF PORT HURON, P.C.,

Defendants-Appellees,

and

VRAJMOHAN C. PARIKH, M.D.,

Defendant.

UNPUBLISHED
February 14, 2008

No. 274857
Macomb Circuit Court
LC No. 2005-004034-NH

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

In this wrongful death medical malpractice case, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants Keith Defever, M.D., Keith Defever, M.D., P.C., Harry J. Aretakis, M.D., Jeffrey A. Holladay, M.D., Trinity Health-Michigan, d/b/a St. Joseph Mercy Macomb ("St. Joseph Mercy"), Sharon Khan-Lepak, D.O., St. John River District Hospital ("St. John"), River District Medical Group, P.C. ("River Medical Group"), Beeravolu R. Reddy, M.D., and Cardiology Associates of Port Huron, P.C. ("Cardiology Associates"), under MCR 2.116(C)(7), for failure to file a properly certified affidavit of merit with the complaint before the expiration of the statute of limitations. We affirm in part, reverse in part, and remand for further proceedings.

This action arises from care provided to the decedent, Patricia Hubka, between April 11, 2003, and April 14, 2003, when she died from a pulmonary embolism. Plaintiff filed this action against several medical professionals who allegedly treated Hubka during this period, including: (1) Dr. Defever, Hubka's family physician; (2) Drs. Holladay and Aretakis, emergency room physicians at St. Joseph Mercy; (3) Dr. Khan-Lepak, a family practitioner; and (4) Drs. Reddy and Vrajmohan C. Parikh, cardiologists who allegedly saw Hubka on the day she died.

With the original complaint, plaintiff filed three affidavits of merit from out-of-state medical professionals. One was from Dr. Dennis Levin, a board-certified family physician, another was from Dr. Albert Weihl, a board-certified emergency room physician, and one was from Dr. Alan Brown, who is board certified in cardiology and internal medicine. It is undisputed that the only affidavit that addresses the issue of proximate cause is Dr. Brown's affidavit. However, Dr. Levin's and Dr. Weihl's affidavits were certified under MCL 600.2102(4) of the Revised Judicature Act ("RJA"), MCL 600.101 *et seq.*, while Dr. Brown's was not. Instead, Dr. Brown's affidavit complied with the requirements of the Uniform Recognition of Acknowledgements Act ("URAA"), MCL 565.261 *et seq.*

Relying on this Court's decision in *Apsey v Mem Hosp (On Reconsideration)*, 266 Mich App 666; 702 NW2d 870 (2005), rev'd 477 Mich 120 (2007), the trial court determined that Dr. Brown's affidavit of merit was defective because it did not contain the required RJA certification, that the filing of the defective affidavit did not toll the statute of limitations, and that dismissal of plaintiff's claim against the cardiologist, Dr. Reddy, was therefore required.[1] With respect to the remaining defendants, the trial court determined that plaintiff intended to satisfy the proximate cause pleading requirement with regard to all defendants by relying on Dr. Brown's affidavit, and that because Dr. Brown's affidavit was defective, dismissal was also required in regard to all remaining defendants.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. The *Maiden* Court observed:

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless

[1] The trial court had earlier dismissed plaintiff's claim against the other cardiologist, Dr. Parikh, after determining that she was not involved in Hubka's care before the standard of care allegedly was breached. Plaintiff does not challenge that decision on appeal.

> contradicted by documentation submitted by the movant. [*Maiden, supra* at 119 (citation omitted).]

Plaintiff first argues that the trial court erred in determining that Dr. Brown's affidavit of merit was defective because it did not comply with the RJA-certification requirement. We agree.

On May 1, 2007, our Supreme Court reversed this Court's decision in *Apsey* and held that an out-of-state affidavit is acceptable if it is either certified under the RJA or complies with the requirements of the URAA. See *Apsey v Mem Hosp*, 477 Mich 120, 124, 130; 730 NW2d 695 (2007). In the present case, Dr. Brown's original affidavit of merit, signed by a notary and stamped with an ordinary notary seal, meets the requirements of the URAA. See MCL 565.262(a); see also *Apsey*, *supra*, 477 Mich at 124, 134. Therefore, Dr. Brown's affidavit of merit was not defective for lack of proper certification. Furthermore, Dr. Brown's affidavit of merit is sufficient to meet the statutory requirements concerning the one cardiologist remaining in this case, Dr. Reddy. See MCL 600.2912d(1). Accordingly, the trial court's dismissal of plaintiff's claim against Dr. Reddy, and her derivative claim against Cardiology Associates, is reversed.

However, it is undisputed that none of the other affidavits of merit filed with plaintiff's complaint address the issue of proximate cause. Accordingly, the remaining defendants argue that even if Dr. Brown's affidavit is not defective, it cannot be used to satisfy the statutory proximate cause requirements with respect to the non-cardiologist defendants, Drs. Defever and Khan-Lepak (family physicians), and Drs. Holladay and Aretakis (emergency room physicians). Even were we to assume that Dr. Brown would be permitted under MCL 600.2912d and MCL 600.2169 to address the causation element relative to the non-cardiologist defendants and that plaintiff could look to Dr. Brown's affidavit in an effort to comply with MCL 600.2912d(1)(d), Dr. Brown's affidavit is insufficient to meet the requirements of MCL 600.2912d(1)(d) in regard to the non-cardiologist defendants.[2]

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[2] Although we do not reach this ruling today, if the statutes are indeed to be read as not allowing a separate affidavit of merit to satisfy the causation requirement because that affiant does not practice the same specialty or have the same board certification as the defendant, we would implore the Legislature to revisit the issue. It has become patently clear that there are often situations in which an expert affiant, who proffers an affidavit of merit and practices the same specialty or has the same board certification as a defendant, lacks the expertise and ability to speak to the issue of causation, while being more than capable to address the standard of care, breach of the standard of care, and the actions that should have been taken or omitted. Causation issues can implicate the need to rely on medical knowledge or expertise that goes beyond the scope of an expert who would otherwise be qualified to submit an affidavit of merit. This is because the breach of a standard of medical practice or care can result in injury or harm to the body in a highly particularized manner, demanding explanation from a physician in the relevant specialized field. Being qualified to address what medical steps should or should not be taken, and even knowing the potential results if a step is taken or omitted, does not necessarily mean that the affiant is also sufficiently qualified to state the physiological mechanism or manner by which the action or inaction leads to the result. This case provides an excellent example of the

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MCL 600.2912d(1)(d) requires the affidavit of merit to contain a statement regarding "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." Dr. Brown's affidavit contains a statement on proximate cause, and the statement references the previously expressed breaches of the standard of care and then proceeds to explain how those particular breaches caused Hubka's death. The problem that arises in using this causation statement for purposes of the non-cardiologist defendants is that each of the averments concerning the breach of the standard of care relate specifically and expressly to cardiologists. Dr. Brown averred, "It is my opinion that the standard of care for a cardiologist was breached by the consulting cardiologists in this case in the following ways." To satisfy the causation element for the non-cardiologist defendants, the affidavit needed to set forth the manner in which the breach of the standard of care *relative to family and emergency room physicians* was the proximate cause of the alleged injury. Without this language in Dr. Brown's affidavit and no statement on causation in the other two affidavits, there is simply no statement averring that the negligent acts of the non-cardiologist defendants caused Hubka's death. Accordingly, dismissal as to these defendants was proper.

We agree with plaintiff, however, that the claims should have been dismissed without prejudice.

In *Scarsella v Pollak*, 461 Mich 547, 553; 607 NW2d 711 (2000), our Supreme Court held that filing a medical malpractice complaint *without* an affidavit of merit was insufficient to toll the statute of limitations. But the Court declined to decide the issue whether a *defective* affidavit of merit tolls the statute of limitations. *Id*. at 553 n 7.

More recently, in *Kirkaldy v Rim*, 478 Mich 581, 584-586; 734 NW2d 201 (2007), the Court held that filing a defective or nonconforming affidavit of merit is *not* the functional equivalent of failing to file an affidavit of merit. Rather, an affidavit of merit is presumed valid, thereby tolling the statute of limitations, until that presumption is rebutted in subsequent judicial

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dilemma faced by practitioners. Although a family or emergency room physician may have the knowledge to state that a patient presenting with certain symptoms should be treated in a certain manner in order to avoid the potential danger of harm from a pulmonary embolism, the knowledge to genuinely state that the failure to follow a course of treatment actually resulted in or caused the harm or death from a pulmonary embolism, and then to explain the manner in which this occurred, would rest with a cardiologist, not a family or emergency room doctor. The failure of the Legislature to recognize this glaring problem when enacting MCL 600.2912d not only creates difficulties for plaintiffs pursuing legitimate medical malpractice actions, but can result in potentially frivolous actions moving forward, contrary to the Legislature's intent, where an affidavit of merit is signed in compliance with the statutes, but the expert affiant is truly not qualified to address causation. See *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 489; 708 NW2d 453 (2005)("We hold that the affidavits executed by the nurse and the nurse practitioner [relative to the nurse defendants] were sufficient for purposes of MCL 600.2912d(1) and the relevant subsection of MCL 600.2169 *even if the nurse and the nurse practitioner did not have the expertise or qualifications necessary to establish proximate cause.*" (Emphasis added.)). After first ordering oral argument on the issue whether the application for leave should be granted in *Sturgis Bank*, 477 Mich 874 (2006), our Supreme Court ultimately declined to grant leave, 479 Mich 854 (2007).

proceedings. *Id*. at 586; see also *Saffian v Simmons*, 477 Mich 8, 13; 727 NW2d 132 (2007). The Court stated:

> Therefore, *a complaint and affidavit of merit toll the period of limitations until the validity of the affidavit is successfully challenged* in subsequent judicial proceedings. Only a successful challenge will cause the affidavit to loose its presumption of validity and cause the period of limitations to resume running.
>
> Thus, if the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If that challenge is successful, the proper remedy *is dismissal without prejudice*. The plaintiff would then have whatever time remains in the period of limitations within which to file a complaint accompanied by a conforming affidavit of merit. [*Kirkaldy, supra* at 586 (emphasis added; internal quotations and citations omitted).]

Thus, the *Kirkaldy* Court overruled *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003), and *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003), cases in which this Court held that a nonconforming affidavit of merit does not toll the statute of limitations. See *Kirkaldy, supra* at 583.

In light of *Kirkaldy*, plaintiff's claims against Drs. Defever, Khan-Lepak, Holladay, and Aretakis, and the derivative claims against Defever, P.C., St. Joseph Mercy, River Medical Group, and St. John, should have been dismissed without prejudice.

Accordingly, we reverse the trial court's dismissal of plaintiff's claims against Dr. Reddy and Cardiology Associates, but affirm the dismissal of the remaining defendants; however, the dismissal is without prejudice.

In light of our decision, it is unnecessary to address the parties' remaining issues.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello