STATE OF MICHIGAN

COURT OF APPEALS

JUSTIN FULLER, PERSONAL REPRESENTATIVE of the ESTATE OF ROBERT M. FULLER,

Plaintiff-Appellant/Cross-Appellee,

v

ALI A. ESFAHANI, MD, GENESYS REGIONAL MEDICAL CENTER, WILLIAM V. ZEMNICKAS II, DO, and SURGICAL SPECIALISTS, PC,

Defendants-Appellees/Cross-Appellants,

and

WALTER F. BARKEY, MD, and MCLAREN HEALTH CARE CORP.,

Defendants.

UNPUBLISHED
March 27, 2008

No. 271368
Genesee Circuit Court
LC No. 2001-070920-NH

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants Ali Esfahani and Genesys Regional Medical Center, and various trial court orders with respect to the trial and post-trial proceedings against defendants William Zemnickas and Surgical Specialists. Defendants Ali Esfahani and Genesys Regional Medical Center cross-appeal the trial court's entry of default against them. Defendants William Zemnickas and Surgical Specialists also cross-appeal from the trial court's entry of a default against them, the trial court's denial of their "*Apsey*"[1] motion, and the trial court's award

[1] *Apsey v Memorial Hospital*, 266 Mich App 666; 702 NW2d 870 (2005).

of additur. We affirm in part, reverse in part, and remand for a new trial as to Zemnickas and Surgical Specialists.

Facts

In 1981 plaintiff's decedent, Robert, underwent aortic valve replacement surgery with defendant Esfahani at defendant Genesys' predecessor entity. In 1993, Robert experienced drainage from his incision, so Robert returned to Esfahani. In 1996, due to continued drainage, Esfahani removed some granulated tissue sutures and a sternal wire from the area. Within a few months, the incision site began draining again. Robert last treated with Esfahani in March, 1997, when Esfahani opined that the drainage was due to a suture, which he then removed.

In April, 1998, Robert began treatment with Dr. Zemnickas. In March 1999, Dr. Zemnickas removed a suture and the drainage began once again. Zemnickas referred Robert to the University of Michigan Hospital, where decedent treated with Dr. Orringer. In November 1999, Robert underwent surgery at U of M Hospital, where massive infections were found in his sternum and his breastbone removed as a result.

In February, 2000, Robert began bleeding from his chest due to a ruptured aorta. Surgery was immediately performed at U of M Hospital to repair the rupture, and Robert survived the surgery. Unfortunately, Robert had another aortic rupture while he was being prepared for discharge and died while still at U of M Hospital. According to plaintiff, the defendants' failure to diagnose and treat Robert's infections caused his death. Plaintiff filed its complaint for malpractice against, among others, Esfahani, Genesys, Zemnickas, and Surgical Specialists, on July 19, 2001.

On plaintiff's motion, the trial court entered a default against Esfahani, Genesys, Zemnickas, and Surgical Specialists for failing to file affidavits of meritorious defense in a timely manner. The trial court declined to reconsider or set aside the default and, shortly thereafter, granted Esfahani and Genesys' previously filed motion for summary disposition based upon their statute of limitations defense.

Plaintiff's claims against Zemnickas and Surgical Specialists proceeded to a jury trial on the issue of damages only, which resulted in the entry of a judgment of no cause of action in favor of Zemnickas and Surgical Specialists. Plaintiff thereafter moved for a new trial, JNOV, or additur. The trial court granted plaintiff's motion for additur in the amount of $253,604.00. Zemnickas and Surgical Specialists moved for reconsideration of the additur order and also moved to dismiss pursuant to *Apsey v Memorial Hospital*, 266 Mich App 666; 702 NW2d 870 (2005). The trial court denied the motion to dismiss, but granted the motion for reconsideration, finding that the collateral source rule resulted in a total setoff of the additur amount such that plaintiff's economic damages award was reduced to zero. These appeals followed.

Defaults as to Esfahani, Genesys, Zemnickas, and Surgical Specialists

The first issue for resolution on appeal is whether the trial court's entry of a default against Esfahani[2] based upon his failure to timely file an affidavit of meritorious defense was appropriate. Similarly, Zemnickas[3] contends that the trial court abused its discretion in entering the default against him and in not considering lesser sanctions. The grant or denial of motion for default for failing to file an affidavit of meritorious defense is reviewed for an abuse of discretion. *Costa v Community Emergency Med Svcs,* 263 Mich App 572, 581; 689 NW2d 712 (2004).

MCL 600.2912e provides, in relevant part:

> (1) In an action alleging medical malpractice, within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d, the defendant shall file an answer to the complaint. Subject to subsection (2), the defendant or, if the defendant is represented by an attorney, the defendant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional who the defendant's attorney reasonably believes meets the requirements for an expert witness under section 2169. . .

The requirement that an affidavit of meritorious defense be filed within the specified time period is mandatory. *Wilhelm v Mustafa,* 243 Mich App 478, 482; 624 NW2d 435 (2000). We have recognized that in a medical malpractice action, an answer without the affidavit of meritorious defense "is incomplete and does not conform with the rules[.]" *Kowalski v Fiutowski*, 247 Mich App 156, 164; 635 NW2d 502 (2001). Thus, if a defendant fails to file the affidavit within the specific time period, that defendant has failed to plead. *Id.*

Notably, MCL 600.2912e does not provide a remedy for a defendant's noncompliance. According to *Kowalski, supra* at 162-163, the Legislature "intended to leave the determination of a proper remedy to the discretion of the court." Although a default is a permissible remedy, a trial court errs by believing it lacks discretion to fashion any other appropriate sanction. *Id.* 165-166.

Esfahani first argues that default was inappropriate, as it filed an affidavit of meritorious defense within the requisite time period. Esfahani contends that plaintiff twice stipulated to extensions for the filing of his answer to the complaint, and he filed his answer on September 17, 2001, within the extended time period. According to Esfahani, the affidavit of meritorious defense was thus due November 22, 2001 (91 days from the date of service of the complaint upon them, plus the 28 day extension) and he timely mailed his affidavits to the court for filing

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[2] "Esfahani" shall hereafter refer to both Dr. Esfahani and Genesys Regional Medical Center, as Genesys' liability is based upon respondeat superior.

[3] "Zemnickas" shall hereafter refer to both defendant Zemnickas and defendant Surgical Specialists, the latter's liability being premised on respondeat superior.

on November 20, 2001 (though, likely due to the Thanksgiving holiday, the affidavits were not docketed by the trial court until November 27, 2001).

However, that plaintiff agreed to extend the time in which Esfahani was required to file his answer does not necessarily extend into an agreement to allow the late filing of an affidavit of meritorious defense. More importantly, MCL 600.2912e specifically requires that an affidavit of meritorious defense be filed not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit of merit required under MCL 600. 2912d. While "upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1)" (MCL 600.2912d(2)), no such provision is extended to defendants for the late filing of an affidavit of meritorious defense. The fact that, in this case, the parties had agreed to extend the time in which to answer is irrelevant, given that "parties may not rewrite statutes by extrajudicial agreement." *Burton v Reed City Hosp Corp*, 471 Mich 745, 762; 691 NW2d 424 (2005). Plaintiff's complaint and affidavit were filed on July 19, 2001. Esfahani's affidavit of meritorious defense was due 91 days later, making his affidavits filed in November, 2001 untimely.

Esfahani next contends that even if the affidavit of meritorious defense was untimely, default would still be improper because his obligation to file an affidavit of meritorious defense would only be triggered upon plaintiff's filing of an appropriate affidavit of merit. According to Esfahani, where, as here, plaintiff's affidavit of merit does not comply with statutory requirements, his obligation to file a responsive affidavit was not prompted.

In *Saffian v Simmons*, 477 Mich 8; 727 NW2d 132 (2007), a dentist attempted a similar claim. The dentist in that case declined to respond to a compliant of malpractice against him because he believed that the affidavit of merit accompanying it was deficient. Our Supreme Court found that a default could nonetheless be entered against him because the dentist's belief concerning the affidavit of merit did not constitute "good cause" for failing to respond timely to the complaint, and, thus, was not a proper basis to challenge entry of default judgment against the dentist. Thus, here, as in *Saffian*, the defendant's unilateral belief that an affidavit of merit is nonconforming (without a court's determination that the affidavit is faulty) neither excuses a defendant from filing a response or affidavit of meritorious defense, nor does it preclude entry of a default judgment against him.

Zemnickas contends that his affidavit was timely because it was filed within 91 days of his being served with plaintiff's complaint and affidavit of merit. As previously indicated, however, MCL 600.2912e specifically requires that an affidavit of meritorious defense be filed not later than 91 days after the plaintiff or the plaintiff's attorney *files* the affidavit of merit required under MCL 600. 2912d and the statute sets forth no extension allowing for additional time in which to file the affidavit of meritorious defense.

Zemnickas attempts to skirt this requirement by promoting a definition of "file" as used in MCL 600.2619d that would equate with the phrase "serve on defendant." When asked to interpret a statute, we "begin by construing the language of the statute itself." *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). The Legislature is presumed to have intended the meaning it plainly expressed, *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003), so that if the language in the statute is clear and unambiguous, the plain meaning of the statute reflects

the legislative intent and judicial construction is not permitted. *People v Giovannini*, 271 Mich App 409, 412; 722 NW2d 237 (2006). We afford each word its plain and ordinary meaning. *People v Fennell*, 260 Mich App 261, 267; 677 NW2d 66 (2004).

"File" is defined in Black's Law Dictionary as "to deposit in the custody or among the records of a court." That the word has a meaning distinct from that of "to serve on a party opponent" is recognized by our Legislature can be found in the language of Substitute House Bill 5905. As pointed out by defendants, Substitute for House Bill 5905 (passed by the House but still otherwise pending) addresses the very issue. First introduced in May of 2004, the bill, as passed by the House would amend MCL 600.2912e to read that in an action alleging medical malpractice "within 21 days after the plaintiff has **served** an affidavit in compliance with section 2912d, the defendant shall file an answer to the complaint and that a defendant shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d **or 112 days after service on the defendant of the complaint, whichever is later**, an affidavit of meritorious defense signed by a health professional who the defendant's attorney reasonably believes meets the requirements for an expert witness under section 2169."

That the Legislature recognizes a need to amend the statute to provide for an alternative filing date for service, supports a reading of the word "file" in the statute consistent with its legal definition. If another definition was intended, doubtless the Legislature will move to pass Substitute House Bill 5905.

We are cognizant that the purpose of Substitute House Bill 5905 is to allow correction of technical errors in the filing of affidavits of merit and meritorious defense so that medical malpractice cases could proceed on their merits and would not be dismissed solely due to a technical deficiency. As it stands today, however, this is how we are directed, both through a literal reading of the statute and binding authority, to proceed. We thus decline defendants' invitation to read the word "file" as it appears in MCL 600.2169e to mean "serve on defendant(s)."

Zemnickas' last claims the trial court generally abused its discretion by denying his motion to set aside the default. The trial court stated during the hearing on plaintiff's motion (against all defendants) that it understood its options to be granting plaintiff's motion for summary disposition, granting defaults, or denying both requests and ordering other sanctions against defendants for failing to timely file affidavits of meritorious defense. The trial court further stated that there was no doubt that the filing deadline was missed. The trial court appeared to discount defendants' explanations concerning the timing issues and rejected out of hand other delay explanations offered by counsel. With respect to Zemnickas, the trial court only discussed the timing issue generally, undoubtedly because of the similarity to the discussion with counsel for Esfahani. Plaintiff's complaint and affidavit of meritorious claim was filed July 19, 2001. Zemnickas was not served until August 15, 2001. He answered timely on extensions granted on October 17, 2001, and mailed his affidavit of meritorious defense, which was filed on November 2, 2001. The affidavit of meritorious defense was filed 79 days after service of the complaint that included plaintiff's affidavit of merit. Defendant's affidavit of merit was filed 106 days after plaintiff's affidavit or 15 days late.

The trial court generally discussed with counsel his observations that plaintiffs have be encumbered with timing issues concerning nonconforming affidavits of merit and a motion for

summary disposition for dismissal after expiration of the period of limitation of actions. The trial court intimated that turnabout is fair play and that concept seemed to permeate its decision-making. The trial court did not have the benefit of the Supreme Court's decision in *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007). *Kirkaldy* ameliorates the trial court's concern for fair play. *Kirkaldy* provides for the tolling of the limitation of actions until a judicial proceeding successfully determines the nonconformity of plaintiff's affidavit of merit resulting in a dismissal without prejudice and resumption of the running of the remaining period of limitation of actions.

The trial court acknowledged that it had discretion in entering a default, *Kowalski, supra* at 162-163. But then failed in analysis concerning that discretion. The trial court stated,

> And so there has to be a [sic] sanctions, because both parties, both defendants missed the deadline. So the court in its discretion will not grant summary disposition for plaintiff because while the reasonings are not recognized in the law, in the Court's discretion I can see some reasonableness to the reasonings. And instead the Court will grant plaintiff default.

The ruling failed to consider other sanctions short of the ultimate penalty.[4] Default in the context of the instant litigation is the procedural equivalent of summary disposition because all that remained was for plaintiff to prove his nonspecific damages. The trial court considered no other sanction. Additionally, the trial court seemed to understand defendants' reason for late filing of its affidavit, but failed to consider the reason in the context of employing the court's discretion. The trial court announced that prejudice to plaintiff was not an element for consideration under the *Kowalski* standard. "In selecting a sanction both appropriate and effective in compelling compliance with the statute, the trial court may consider the reasons for defendants' delays, what other actions defendants took to apprise plaintiffs and the court of those reasons, any prejudice to plaintiffs resulting from the delays, and any other factors relevant to the determination." *Kowalski, supra*, at 165-166. At the motion for summary disposition/default plaintiff identified no prejudice that was experienced by Zemickas' 15 day late filing of his affidavit of merit. A seven-month delay in challenging the timeliness of defendants' affidavit of merit is telling in and of itself. Our review of the record fails to disclose any identifiable prejudice to plaintiff.

A trial court's decision to impose sanctions is reviewed for an abuse of discretion. *Borgess Medical Center v Resto*, 273 Mich App 558, 582; 730 NW2d 738 (2007); *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995). This Court reviews a trial court's decision to grant or deny a motion for a default judgment for an abuse of discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 89; 618 NW2d 66 (2000). Thus, the grant of a motion for default and the denial of a motion to set aside default implicate the discretion of the trial court. An abuse of discretion occurs when the trial court's decision results in an outcome

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[4] Because plaintiff's affidavit of merit was challenged by defendants, the trial court could have employed a waiver of any defect in plaintiff's affidavit as a sanction. The court could have considered costs, fees, or discovery protections as a sanction.

falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). This standard recognizes that there will be circumstances in which there will be no single correct outcome. If the trial court selects a principled outcome, there is no abuse of discretion, and the reviewing court must defer to the trial court's ruling. *Maldonado, supra*. When the trial court selects an outcome--here a sanction--that is neither reasonable nor principled, an abuse of discretion occurs. *Id*.

Here, the trial court used no discretion at all when it employed the ultimate sanction without considering counsels' reasons for the late filing of the affidavit of merit. The trial court did not consider lesser secondary sanctions and refused to consider if plaintiff suffered any prejudice as a result of the delay in filing of the affidavit. The trial court did not employ any analysis of the discretionary factors and misapplied *Kowalski*. "Because the trial court did not exercise discretion in entering the default and did not consider the possibility of any other remedies, it erred in refusing to set aside the default. . . . We recognize that the trial court may ultimately find a default to be appropriate, but it may reach its conclusion only after exercising its own discretion in the matter. In selecting a sanction both appropriate and effective in compelling compliance with the statute, the trial court may consider the reasons for defendants' delays, what other actions defendants took to apprise plaintiffs and the court of those reasons, any prejudice to plaintiffs resulting from the delays, and any other factors relevant to the determination." *Kowalski, supra*, at 166. Under these circumstances, default was neither reasonable nor principled concerning Zemnickas and we reverse and reinstate defendants' answer and affirmative defenses.[5]

Esfahani likewise argues that default was an unduly harsh and improper sanction if its affidavit of meritorious defense was untimely. While we could provide an analysis similar to that applied to Zemnickas, we decline to do so because of the following analysis of his summary disposition issue.

Summary Disposition in Esfahani and Genesys' favor

After a default had been entered against Esfahani, the trial court held a hearing on Esfahani's motion for summary disposition based upon an alleged expiration of the statute of limitations. The trial court agreed with Esfahani that plaintiff's decedent knew of an injury and discovered its possible cause in June, 1998 and/or May, 1999 and lived longer than six months and 30 days after the discovery. The trial court thus ruled that plaintiff's complaint was barred by the applicable statute of limitations and granted summary disposition in Esfahani's favor.

On appeal, plaintiff asserts that as the default against Dr. Esfahani and Genesys was still in place when these defendants argued their motion for summary disposition against plaintiff, the trial court lacked the authority to consider their motion and grant their requested relief. Plaintiff

[5] Meritorious defense has been established by the multiple affidavits of merit and the trial court's statement that the affidavits of meritorious defense are appropriate except for timeliness.

also contends that questions of fact remained as to whether plaintiff's complaint was timely filed. Esfahani counters that the default should not have been entered as he did not fail to plead or otherwise defend and has shown good cause and a meritorious defense for having the default set aside. Esfahani alternatively claims that even if entry of the default was proper, it was a simple scheduling issue that led to plaintiff's motion for default being heard before his motion for summary disposition.

We review de novo a trial court's decision on a motion for summary disposition. *Coleman v Kootsillas*, 456 Mich 615, 618; 575 NW2d 527 (1998). Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. When deciding a motion pursuant to MCR 2.116(C)(7), this Court must consider the pleadings as well as any affidavits and documentary evidence submitted by the parties. *Id.* Whether a period of limitation applies in particular circumstances constitutes a legal question that this Court also considers de novo. *Detroit v 19675 Hasse*, 258 Mich App 438, 444-445; 671 NW2d 150 (2003).

MCR 2.603(A)(3) provides:

> Once the default of party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612.

A default entered under MCR 2.603 for failure to defend operates as an admission that there are no issues of liability, but allows the defaulting party to participate in the hearing to adjudicate monetary damages or equitable relief. See A*merican Central Corp v Steven Van Lines, Inc*, 103 Mich App 507, 512-513; 303 NW2d 234 (1981). Since a party cannot proceed with his case until the default is set aside, it is improper for the court to grant judgment in his behalf. *Coleman v Barr*, 120 Mich App 264, 266; 327 NW2d 464 (1982).

As pointed out by Esfahani, however, the trial court was well aware of Esfahani's pending motion for summary disposition when it entered the default and did not intend, upon entering the default, to preclude hearing on the summary disposition motion. At the hearing, when plaintiff reminded the court that Esfahani was in default, the trial court stated "I recognize the default that you're talking about. . . .the interesting thing about this case is there were a lot of timing issues. And I elected to let you go ahead knowing that these other issues were out there… But I think that if we take these procedural matters in order of their occurrence, actually we would look at a statute of limitations issue always first. . ." The court then went on to address the merits of Esfahani's motion for summary disposition.

In denying plaintiff's motion for reconsideration of the summary disposition order, the trial court reiterated that it was aware of Esfahani's statute of limitations defense at the time it imposed default and never intended, by entry of the default, to waive any argument defendant may have had that was unrelated to liability. The court also noted that all of the motions were originally scheduled to be heard on May 13, 2002, but were adjourned due to scheduling

conflicts.[6] While it may not have been prudent on the trial court's part to hear and decide the default motion prior to the summary disposition motion, that the trial court intended to allow the summary disposition motion to proceed to hearing is abundantly clear and the fact that plaintiff's default motion was heard prior to the summary disposition motion appears to have been a simple matter of scheduling and adjournments. As indicated by the trial court, if it had heard the summary disposition motion first, the default motion would never have been heard.

Moreover, the statutes of limitations and procedures for default judgments serve different policies and purposes:

> Statutes of limitations are intended to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend; to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured; and to protect potential defendants from protracted fear of litigation. Default procedures serve to keep the dockets current, to expedite the disposal of causes, thereby preventing a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim.
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> *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974)(internal quotation marks omitted).

The trial court's desire to keep its docket current by addressing the default argument first has essentially no impact on the statute of limitations argument. No purpose would be served in encouraging a decision based upon whichever of the parties won the race to the courthouse to be heard first.

Moreover, a party that has been defaulted is not entirely precluded from taking any further steps in the action. It can, in fact, move to set aside the default. Here, although it did not specifically state as much, the trial court implicitly set aside the default to order summary disposition in favor of Esfahani.

Furthermore, in Michigan, "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982). Here, then, while entry of the default barred Esfahani from contesting the issue of his negligence or, more specifically, the issue of whether he

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[6] Esfahani originally filed a motion for summary disposition on April 4, 2002, raising two grounds for summary disposition. The trial court granted defendant's motion for summary disposition on only one of the cited grounds. When the authority the trial court relied upon for finding the one basis for summary disposition in Esfahani's favor was reversed, plaintiff moved to set aside the order granting summary disposition to Esfahani. At the June 17, 2002 hearing on plaintiff's motion, the trial court reversed its grant of summary disposition and set an October 7, 2002 hearing date for Esfahani to argue its second basis for summary disposition.

committed malpractice, Esfahani did not argue the issue of liability in his summary disposition motion. He instead argued that plaintiff's complaint was filed outside of the applicable limitation period and the fact that the complaint was untimely precluded plaintiff from bringing action in the first instance. For all intents and purposes, Esfahani could have begun his motion with a statement that all allegations in the complaint were true. But, that would not and does not change the fact that plaintiff's claims were barred prior to filing by the statute of limitation, as further explained below.

Pursuant to MCL 600.5805(6), a medical malpractice plaintiff has two years from the date the cause of action accrues in which to file suit. MCL 600.5838a(1) clarifies that a claim of medical malpractice "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim."

Here, it is undisputed that decedent last treated with Esfahani on March 31, 1997. Under MCL 600.5805, then, plaintiff's claim accrued, at the very latest, by the above date and plaintiff's complaint against these defendants must have been filed by March 31, 1999. A notice of intent to sue was not sent in this matter until November of 2000 and plaintiff's complaint was not filed until July 19, 2001—well beyond the general two-year limitation period.

But, Michigan's death savings statute, MCL 600.5852, provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

Under Michigan statutory scheme, then, additional time to file a complaint is afforded to the personal representatives of a decedent's estate.

In addition, MCL 600.5838a(2) states:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.

Decedent died in February, 2000. Plaintiff contends that decedent did not discover the existence of his claims against Esfahani for the failure to diagnose and treat a chest infection until December of 1999, when he first treated with Dr. Orringer at U of M Hospital. According to plaintiff, application of the six-month discovery period set forth in MCL 600.5838a would thus set the statute of limitations expiration date in June of 2000. As decedent died in February, 2000, plaintiff contends that the wrongful death savings provision set forth in MCL 600.5852 was triggered and allowed plaintiff to file his complaint with two years of the date a personal representative of the state was appointed. Plaintiff was appointed the estate's personal representative on March 21, 2000 and filed the complaint on July 19, 2001.

A plaintiff is held to have discovered the existence of a malpractice claim when: (1) the act or omission of the defendant becomes known and (2) the plaintiff has reason to believe that medical treatment was improper or was performed in an improper manner. *Weisburg v Lee,* 161 Mich App 443, 445; 411 NW2d 728 (1987). The discovery rule applies to discovery of an injury, not to the discovery of a later realized consequence of the injury. *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997).

It is undisputed that decedent began experiencing drainage in his chest beginning in 1993. The drainage continued off an on for several years, while decedent was treated by Esfahani. It is also undisputed that decedent last treated with Esfahani in March, 1997 and began treating with Zemnickas in April of 1998, while he was still experiencing drainage.

In support of their motion for summary disposition, defendants presented medical records concerning decedent's treatment with Zemnickas. In an April 8, 1999 letter to another doctor, Zemnickas indicated that he believed defendant to have a chronic infection in his sternal incision or even chronic osteomyelitis. Zemnickas indicates in the letter that he discussed with decedent the possibility of doing a bone scan to identify it for sure, then referring him to the Department of Infectious Disease. An April 15, 1999 bone scan did show abnormalities in the sternum indicating osteomyelitis. In an April 23, 1999 letter to another doctor, Zemnickas again stated that the bone scan revealed the possibility of osteomyelitis and related that he set decedent up for an infectious disease consult.

These letters indicate that not only was Zemnickas aware of the possibility of osteolmyelitis in decedent's sternum, he shared these observations with decedent. Decedent, then, was aware that his condition was possibly much more significant than the local infection Esfahani had diagnosed and treated. Most tellingly, in a May 5, 1999 letter, Zemnickas indicates that decedent was at the office on May 4, 1999 for the result of a Gallium scan, which showed osteomyelitis. Zemnickas indicated that decedent should be seen by a thoracic surgeon and noted, "He will not go back to Dr. Esfahani. We discussed other options and he decided to go to Ann Arbor if his insurance permits." The fact that decedent would not go back to Dr. Esfahani is significant, as is the indication that Zemnickas and decedent discussed that osteomyelitis was in fact present and that decedent would need to see a thoracic surgeon.

In short, decedent had drainage at his sternum incision site for several years. When he began seeing Zemnickas he underwent several scans, was told osteomyelitis was present, was told he needed to see a thoracic surgeon, would not return to Esfahani and was sent for a consultation with infectious disease. While lacking specific proofs of a specific claim, the documentation establishes that decedent knew of the possibility of claim as to Esfahani by at least May 4, 1999. Because the six-month discovery rule limitations period begins to run in medical malpractice cases when a plaintiff is aware of possible cause of action (*Solowy, supra)* decedent must have passed away within six months of the May 4, 1999 date decedent discovered or should have discovered the possibility of his claim in order to trigger the wrongful death savings provision of MCL 600.5852. Decedent having not passed away until February, 2000, the statute was inapplicable and plaintiff's July, 2001 complaint was untimely. Summary disposition was thus appropriate.

Motion for new trial as to Zemnickas and Surgical Specialists

Plaintiff contends that it should be granted a new trial, as the rendered verdict was both against the great weight of the evidence and a result of defense counsel's misconduct. We review for an abuse of discretion the trial court's decision to grant or deny a motion for a new trial. *Domako v Rowe,* 184 Mich App 137, 144; 457 NW2d 107 (1990).

MCR 2.611(A) provides that a new trial may be granted if, among other things, the verdict was against the great weight of the evidence or where there was misconduct by the jury or the prevailing party which materially affected substantial rights. A verdict is against the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser,* 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

In a post-trial motion, plaintiff requested relief in the form of a new trial, jnov, or additur. The trial court granted additur, awarding plaintiff the economic damages for which it had presented uncontroverted evidence. The amount of damages allowed for pain and suffering resting in the sound judgment of the trier of the facts (See, *Moore v Spangler*, 401 Mich 360, 372-373; 258 NW2d 34 (1977)) we find no abuse of the trial court's discretion in declining to grant a new trial and, instead, granting plaintiff's requested alternative relief, additur.

Plaintiff's claims of misconduct focus on defense counsel's references throughout trial of decedent's failure to mitigate his damages. An attorney's comments during trial warrant reversal where "they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Wiley v Henry Ford Cottage Hosp, 257 Mich App 488, 501-502;* 668 NW2d 402, 412 (2003).

In this matter, the trial court initially ruled that Zemnickas could argue and introduce evidence concerning the concept of mitigation of damages during trial. Essentially, defendants claimed that Zemnickas referred decedent to Dr. Orringer for treatment several months before decedent actually saw the doctor, and that decedent's failure to follow Zemnickas' referral on an earlier date was evidence that decedent did not mitigate his damages. After opening statements wherein defense counsel related evidence would be shown that decedent did not mitigate his damages, the trial court determined that the mitigation of damages argument implicated comparative fault, an issue defendants could not raise because they were in default. Plaintiff asserts that despite this ruling, defense counsel attempted to elicit testimony in support of his mitigation theory.

Plaintiff directs this court to the cross examination of the decedent's girlfriend, where defense counsel began to ask whether decedent had discussed Zemnickas' orders with her and, when an objection was lodged, indicated to the court that it "goes to mitigate her damages." Plaintiff also asserts as misconduct defense counsel's question to decedent's son about when decedent first spoke to Dr. Orringer and defense counsel's announcement that he intended to call Zemnickas to the stand to ask why he referred decedent to Dr. Orringer.

As to the first challenged statement, defense counsel should not have used the word "mitigate" after being told by the trial court that any mitigation of damages argument would be disallowed. However, even if counsel was attempting to deliberately inject improper argument into a case, "reversal is unwarranted unless the comments had the effect of diverting the jury's attention from the issue or otherwise control the verdict." *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 132-133*;* 196 NW2d 119 (1992). Where, as here, the comment was immediately cut off and defense counsel ceased his cross-examination, we cannot conclude that the statement controlled the verdict. This Court can similarly find no impropriety in defense counsel's questions/references to a referral to Dr. Orringer.

Finally, plaintiff challenges defense counsel's statement to the jury during closing arguments that they should review the first 15 pages of Zemnickas' office notes and correspondence to get a better sense of the case. According to plaintiff, those particular pages contained references to Zemnickas referring decedent to a thoracic surgeon several months before he actually treated with one, and defense counsel intended for the jury to look at the records as a failure of decedent to mitigate his damages.

While the statement was inappropriate, there is no indication that it influenced the jury verdict. First, plaintiff entered the exhibits into evidence, not defendants. Second, we cannot ignore that at the time this statement appeared, defense counsel had already, with the trial court's permission, discussed the mitigation of damages theory in his opening statement. The cat, then, was already out of the proverbial bag. If there was an impact made upon the jury verdict by virtue of defense counsel's statement, given that counsel had already been allowed to discuss the records and the evidence they contained in his opening statement it would be impossible to determine if his opening statement or his reference in closing argument were the cause.

Post-trial issues as to Zemnickas and Surgical Specialists

Zemnickas contends that the trial court's award of additur constituted an abuse of discretion and/or was clearly erroneous, as there was no error of law that would justify additur in this matter. According to Zemnickas, not only is additur generally disfavored, it is within the jury's discretion to award any amount, including nothing, in damages, that they feel appropriate and it was entirely possible that the jury found that plaintiff's decedent and the members of his estate suffered no damages whatsoever.

Plaintiff counters that while additur was appropriate, it is nevertheless entitled to a new trial because if an amount is set pursuant to additur, that amount becomes the basis for a judgment only if the defendant consents to that amount, in writing, within 14 days as set forth in MCR 2.611(E)(1). Because defendant did not consent to the additur amount, the trial court was required to order a new trial.

We review a trial court's decision on a motion for additur for an abuse of discretion. *Robertson v Blue Water Oil Co,* 268 Mich App 588, 595; 708 NW2d (2005). This Court must give deference to a trial court's decision with regard to a motion for additur because the trial court has a "superior ability to view the evidence and evaluate the credibility of the witnesses." *Weiss v Hodge,* 223 Mich App 620, 637; 567 NW2d 468 (1997).

Additur is provided for at MCR 2.611(E):

> (1) If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

Defendants are correct that a jury need not award an amount of damages, even if liability is found. *Kelly v Builders Square, Inc*, 465 Mich 29, 39-40; 632 NW2d 912 (2001). Defendants are also correct that assessing credibility and weighing testimony is the prerogative of the trier of fact. *Id.*

Here, evidence was presented at trial concerning the possible pain and suffering decedent experienced prior to his death. There was also testimony from decedent's teenage children and other family members about the loss they suffered due to decedent's death. Plaintiff presented the testimony of its expert Dr. King regarding a report he had prepared detailing the value of the loss of financial support for decedent's children. Dr. King related that he relied, in part, on decedent's judgment of divorce wherein he was required to pay child support to reach a figure of $244,291 in total economic damages. Defendants presented no witnesses and, indeed, asked very few question of the witnesses on cross-examination.

The trial court granted additur because, according to the court, plaintiff presented evidence at trial of the divorce judgment of the decedent, wherein he was obligated to pay child support. As noted by the trial court, this was a court-ordered obligation and there was no issue of credibility concerning the support or its amount. In fact, defendant stipulated to admission of this evidence. The trial court also noted that the costs associated with decedent's funeral and burial that were admitted at trial were also uncontroverted and were not placed in question through cross-examination of plaintiff's or defendants' witnesses.

There being no credibility issues with respect to the economic damages, we like the trial court, can fathom no rational basis for failing to award any damages at all. The jury has a duty to assess damages in accordance with the evidence presented. The jury was presented with legal documentation establishing decedent's responsibility for child support. The jury was also presented with a bill for funeral and burial expenses. No one challenged these documents. As indicated by the trial court, a new trial would be a waste of judicial resources as there are no issues for a jury to determine regarding liability, credibility, or the amount of damages. Given the above, we find no error in the trial court's grant of the motion for additur.[7] The trial court did, however, abuse its discretion in proceeding as if a judgment incorporating or concerning the additur amount was entered.

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[7] Zemnickas, in support of his assertion that additur was improper, relies primarily on cases addressing noneconomic damages. There is a distinction between economic and noneconomic (i.e. pain and suffering) damages and, in the present matter, the trial court awarded additur based upon economic damages only.

Again, MCR 2.611(E) provides that a trial court may deny a motion for new trial *on condition* that within 14 days the nonmoving party consent in writing to the entry of a judgment in an amount determined by the trial court. Under the clear language of this rule, additur, then, is essentially an *alternative* to a new trial. The trial court here implicitly found that a new trial was warranted based upon the inadequate damages award, but that such trial would be a waste of judicial resources as there were very limited issues for a jury to consider. However, MCR 2.611(E)(1) also explicitly provides that additur may be awarded in lieu of a new trial only where the nonmoving party (here, Zemnickas) consents, in writing, to the judgment amount found to be appropriate by the trial court. Zemnickas did not provide written consent to the additur amount. Instead, Zemnickas filed a motion for reconsideration within the requisite time period arguing that additur was inappropriate and that even if it did apply, the collateral source rule barred plaintiff's recovery of damages in the amount it did and would receive from social security.

As pointed out by plaintiff, if the nonmoving party does not consent to the additur amount, the only relief available to the moving party is for the trial court to grant the motion for new trial filed in the alternative. See *Galvan v Summers*, 375 Mich 285, 286, n 1; 134 NW2d 177 (1965) and *Chapin v Bechler*, 103 Mich App 629, 635; 303 NW2d 46 (1981). Where, as here, the trial court proceeded as if its additur decision constituted a judgment (in order to apply a setoff of collateral source benefits, there must have been an award to set off against) rather than a conditional rejection of plaintiff's motion for a new trial, and no consent to the additur award was obtained, a new trial is warranted.

Our decision concerning the above renders it unnecessary to consider most issues regarding collateral source setoff, the same having been awarded on the specific facts presented at trial. We do, however, note that in the first trial, the trial court applied collateral source set-off to funeral and burial expenses despite the fact that there was no indication these damages were paid or payable by a collateral source. On retrial, we would caution the trial court to carefully consider the evidence to determine whether any specific claimed losses and expenses were paid or are payable by a collateral source and, only if the damages are so paid or payable, to reduce that portion of the judgment as required by MCL 600.6303.

The remaining post-trial issue is based upon Zemnickas' motion filed in reliance upon *Apsey v Memorial Hospital*, 266 Mich App 666; 702 NW2d 870 (2005). In that case, it was noted that MCL 600.2912d requires that an affidavit of merit be attached to and filed with a complaint before the statute of limitations is tolled, and clarified that an affidavit notarized by an out-of-state notary must be accompanied by certification of authenticity. Zemnickas argues that plaintiff's affidavit was non-complaint and, although ordered to come into compliance by the trial court, it has yet to provide the proper certification. Zemnickas asserts that the trial court was thus required to dismiss plaintiff's claim as filed and its failure to do so constitutes an abuse of discretion.

On May 1, 2007, our Supreme Court reversed this Court's *Apsey* decision. In *Apsey v Memorial Hosp*, 477 Mich 120, 124; 730 NW2d 695 (2007), the Supreme Court stated, "The Court of Appeals. . .erroneously found that the signature of a notary public on an affidavit taken out of state must 'be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court.' MCL 600.2102(4)." The Supreme Court concluded that the URAA is an additional or alternative method of proving notarial acts and does not diminish or invalidate the recognition accorded to notarial acts by other laws of this state.

"Simply, MCL 600.2102(4) is not invalidated by the URAA. It remains an additional method of attestation of out-of-state affidavits. Because the two methods exist as alternatives, a party may use either to validate an affidavit." *Apsey, supra,* at 130. Because, under the recent *Apsey* decision, an affidavit notarized by an out-of-state notary need not be accompanied by certification of authenticity, Zemnickas' argument fails.

We affirm in part, reverse in part, and remand for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto