

STATE OF MICHIGAN
COURT OF APPEALS

DUJUAN LIGONS, Personal Representative of the
Estate of EDRIS LIGONS, Deceased,

UNPUBLISHED
June 3, 2008

Plaintiff-Appellant,

v

GHIATH TAYEB,

No. 278061
Oakland Circuit Court
LC No. 2006-078500-NH

Defendant-Appellee.

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed his malpractice complaint on October 31, 2006, unaccompanied by an affidavit of merit. Plaintiff filed an ex-parte motion for an extension of time in which to file the affidavit, see MCL 600.2912d(2), which the circuit court denied by order dated October 31, 2006, the order stating "Facially defective—no authority cited and motion fails to comply with Rules of Court re: ex-parte requests; no brief filed." Plaintiff filed a supplemental ex-parte motion to extend deadline to file affidavit of merit by 28 days, which the circuit court denied. Plaintiff later filed an affidavit of merit without leave of the court, and defendant received a copy of the affidavit when he was served with process on November 21, 2006, well before the wrongful death savings provision would expire on January 22, 2007.

In *VandenBerg v VandenBerg*, 231 Mich App 497, 502-503; 586 NW2d 570 (1998), this Court concluded that dismissal was improper under similar circumstances:

The parties agree the purpose of § 2912d is to deter frivolous medical malpractice claims. Plaintiff contends the purpose of the statute was fulfilled in this case because defendants were served with the affidavit of merit at the same time they were served with the complaint. However, defendants argue the statute was intended to prevent the filing of frivolous actions, and if suits are filed without the required affidavit of merit the purpose of § 2912d would be defeated. We agree with plaintiff. The purpose of the statute was served in this case when defendants received service of the affidavit of merit along with the complaint. Defendants

did not suffer any prejudice here where they had access to the affidavit of merit from the moment they received the complaint. Accordingly, the trial court should not have imposed the harsh sanction of dismissal in this case.

In *Scarsella v Pollak*, 461 Mich 547, 549, 552-553; 607 NW2d 711 (2000), the Supreme Court held that a medical malpractice suit is not commenced until the filing of the complaint and valid affidavit of merit; and that if the limitations period has not expired, dismissal without prejudice is the appropriate remedy where a complaint is filed without an affidavit of merit.

In this case, dismissal with prejudice was improper under the circumstance that defendant was served with the affidavit of merit and complaint at the same time, well before the wrongful death savings provision would expire. We agree with plaintiff that although this suit was not properly commenced when plaintiff filed his complaint on October 31, 2006, it was timely commenced on November 21, 2006, with the filing of plaintiff's affidavit of merit. See *Wood v Bediako*, 272 Mich App 558, 564-565; 727 NW2d 654 (2006), in which this Court noted:

In *Scarsella*, *supra* at 550 n 1, our Supreme Court declined to overrule *VandenBerg*. Instead it found *VandenBerg* factually and legally distinguishable because *VandenBerg* did not involve a statute of limitations issue. Hence, while the filing of a complaint without an affidavit of merit does not toll the period of limitations, and the subsequent filing of an affidavit after the limitations period has run does not relate back to the original filing, *id.* at 549-550, *the subsequent filing of an affidavit before the limitations period has run will operate to toll the limitations period and commence the suit unless a defendant moves for dismissal or can demonstrate prejudice. Dorris [v Detroit Osteopathic Hosp Corp, 460 Mich 26, 47; 594 NW2d 455 (1999)]; VandenBerg, supra at 502. [Emphasis added.]*

In the instant case, defendant filed his motion to dismiss on February 16, 2007, well after being served, and only after the wrongful death savings provision had expired on January 22, 2007. Further, defendant did not demonstrate prejudice. We conclude that under these circumstances, dismissal with prejudice was improper and reverse. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski