

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KEVIN M. DUVALL, Personal Representative of  
the Estate of DONNA DUVALL,

Plaintiff-Appellant,

v

BRONSON METHODIST HOSPITAL,  
SOUTHWESTERN MICHIGAN EMERGENCY  
SERVICES, P.C., MARK D. KERSCHNER,  
M.D., and SIMON C. WATSON, M.D.,

Defendants-Appellees.

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UNPUBLISHED  
October 28, 2008

No. 277767  
Kalamazoo Circuit Court  
LC No. 06-000133-NH

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's March 23, 2007 order granting defendants' motion for summary disposition and its April 23, 2007 opinion and order denying plaintiff's motion for reconsideration. We reverse.

**I. FACTS**

This medical malpractice case arises from the death of Donna DuVall. Donna DuVall died on February 19, 2004, while in defendants' care, of acute myocardial infarction. On March 25, 2004, plaintiff, Kevin Duvall, was appointed the personal representative of the Estate of Donna DuVall. On August 2, 2005, plaintiff filed a medical malpractice suit against Bronson Methodist Hospital, Mark D. Kerschner, M.D., Simon C. Watson M.D., and T&EC Physicians, claiming that defendants were negligent in their diagnosis and treatment of Donna DuVall. Along with his complaint, plaintiff filed an affidavit of merit signed by Dr. Timothy Haydock and dated May 18, 2005. On December 29, 2005, the trial court dismissed plaintiff's claims without prejudice by stipulation and order because of defects in plaintiff's notice of intent.

Plaintiff filed a second complaint on March 9, 2006, against Southwestern Michigan Emergency Services, P.C., Bronson Methodist Hospital, Kerschner, and Watson. In June 2006, defendants were served with copy of plaintiff's complaint, jury demand, and affidavit of merit. In October 2006, defense counsel for Kerschner and Watson died and new counsel discovered that the affidavit of merit was absent from the court file.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that they were entitled to dismissal for the following reasons: the notice of intent failed to comply with the provisions of MCL 600.2912b; plaintiff failed to file an affidavit of merit under MCL 600.2912d; and the statute of limitations had expired.

In response to defendants' motion, plaintiff filed the affidavit of Mary Emmitt, the legal secretary who prepared the pleadings for plaintiff. Emmitt averred that on March 8, 2006, she presented the process server with the original and copies of the following documents: summons and complaint for each defendant, complaint, certification of notary signature for the affidavit of merit, affidavit of merit, and jury demand.

On March 5, 2007, the trial court held oral arguments. The trial court only addressed the affidavit of merit issue, i.e., whether plaintiff failed to file the affidavit of merit with the complaint before the expiration of the statute of limitations. Defendants argued that there was no affidavit of merit in the file. Defendants further argued that there was an absence of notations referring to the affidavit of merit in the docket entries and that Emmitt's affidavit was inconsistent with the record, because Emmitt swore she presented the process server with the summons and complaint and jury demand on March 8, 2006. Yet the record indicated that the complaint was filed on March 9, 2006, while the jury demand was filed on March 14, 2006. Plaintiff argued that, although he did not have firsthand knowledge of the local filing procedures, he had followed the procedures. Therefore, the affidavit must have been misplaced after filing. Plaintiff also argued that defense counsel had indisputably received copies of the affidavit of merit, and counsel provided the trial court with what he asserted was a true copy of the complaint, jury demand, and affidavit of merit returned to plaintiff when plaintiff filed the complaint.<sup>1</sup>

The trial court granted defendants' motion for summary disposition. An order dismissing plaintiff's claims with prejudice was entered on March 23, 2007.

On March 27, 2007, plaintiff moved for reconsideration. The trial court denied the motion because it found that there was no affidavit of merit in the court's file and no mention of the affidavit of merit in the court's computer system to indicate that the plaintiff had filed it under MCL 600.2912d. The trial court acknowledged that an affidavit is presumed valid when filed, but concluded that Emmitt never stated that the affidavit of merit was filed with the court. Instead, Emmitt stated that she submitted the complaint and affidavit of merit to the process server to be hand filed in Kalamazoo Circuit Court, and she received true copies from the process server. The trial court also concluded that Emmitt's affidavit was inconsistent with the record for the reason defense counsel asserted: the complaint was filed on March 9, 2006, while the jury demand was filed five days later, on March 14, 2006. The trial court explained that,

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<sup>1</sup> Defendants did not dispute that they were served with a copy of the affidavit of merit. Plaintiff did not dispute that the affidavit of merit was not in the court's file. Defendants also noted that the copy of the affidavit of merit they received from plaintiff was identical to the affidavit of merit filed in the first suit.

under *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003), overruled by *Kirkaldy v Rim*, 478 Mich 581 (2007), it did not matter if plaintiff served defendants with both a complaint and affidavit of merit, but whether plaintiff ever commenced the case. Plaintiff now appeals.

## II. STANDARD OF REVIEW

A trial court's grant of summary disposition based on the expiration of the limitations period is reviewed de novo. *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 5; 704 NW2d 69 (2005).<sup>2</sup>

## III. ANALYSIS

Plaintiff argues the trial court erred in granting defendants' motion for summary disposition and dismissing his claims with prejudice. We agree.

Generally, a civil action is commenced and the limitations period is tolled upon the filing of a complaint. MCL 600.5856(a). However, in a medical malpractice case, the plaintiff must file an affidavit of merit with the complaint in order to commence the action and toll the statute of limitations. MCL 600.2912d(1)<sup>3</sup>; *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 711 (2000) (*Scarsella II*), adopting *Scarsella v Pollak*, 232 Mich App 61, 63-64; 591 NW2d 257 (1998) (*Scarsella I*); *Young v Sellers*, 254 Mich App 447, 451; 657 NW2d 555 (2002). Indeed, our Supreme Court has held that "the mere tendering of a complaint without the required affidavit of merit is insufficient to commence [a medical malpractice] lawsuit." *Scarsella II*, *supra* at 549. Here, plaintiff's second complaint was filed without an affidavit of merit. However, we conclude that because its purpose was satisfied when it was both filed with the earlier suit and served on defendants in the instant action, the trial court erred in granting defendants' motion for summary disposition.

While we acknowledge our Supreme Court's holding in *Scarsella II*, that the filing of a medical malpractice complaint without the required affidavit of merit does not toll the statute of limitations, we find that *Scarsella II* is distinguishable from the instant action. In *Scarsella II*, *supra* at 553, our Supreme Court limited its decision to "situation[s] in which a medical malpractice plaintiff wholly omits to file the affidavit required by MCL 600.2912d(1)." Here, plaintiff filed an affidavit of merit in the earlier suit. So plaintiff did not "wholly omit" filing an affidavit of merit.

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<sup>2</sup> While defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), the trial court's order does not specify the ground upon which summary disposition was entered. However, the trial court concluded that plaintiff's claims were time-barred by the statute of limitations because plaintiff failed to timely file an affidavit of merit under MCL 600.2912d. Therefore, we treat the trial court's grant of summary disposition as on entered under MCR 2.116(C)(7). See *Young v Sellers*, 254 Mich App 447, 449; 657 NW2d 555 (2002).

<sup>3</sup> MCL 600.2912d(1) provides that the plaintiff in a medical malpractice action "shall file with the complaint an affidavit of merit . . . ."

Further, the purpose of the affidavit requirement is to deter frivolous medical malpractice claims. And this Court has held that such purpose is fulfilled, and dismissal is improper, where the defendants are served with the affidavit along with the complaint. *VandenBerg v VandenBerg*, 231 Mich App 497, 502-503; 586 NW2d 570 (1998). In *VandenBerg*, the plaintiff failed to file an affidavit of merit with the complaint, but served defendant with the complaint and affidavit before the limitation period expired. *Id.* at 498. This Court held that dismissal was not an appropriate remedy for the plaintiff's failure to file the affidavit of merit when the defendants had not been prejudiced and the purpose of the statute was served. *Id.* at 502-503. Here, like in *VandenBerg*, defendants were served with the affidavit of merit simultaneously with the second complaint, even though the affidavit was not filed with the court. Therefore, the purpose of the affidavit requirement was served and defendants were not prejudiced. To dismiss plaintiff's claim under these circumstances would be to elevate form over substance, and we decline to do so.

Accordingly, we conclude that the trial court erred in granting defendants' motion for summary disposition and in dismissing plaintiff's claims with prejudice.<sup>4</sup>

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Michael J. Talbot  
/s/ Bill Schuette

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<sup>4</sup> In light of our conclusion, we need not reach the remaining arguments raised by plaintiff on appeal.