STATE OF MICHIGAN

COURT OF APPEALS

RONALD WARD, Plaintiff-Appellant, v SHARON ROONEY-GANDY, D.O., Defendant-Appellee.	FOR PUBLICATION March 22, 2005 9:20 a.m. No. 250174 Jackson Circuit Court LC No. 03-001492-NH Official Reported Version

Before: Markey, P.J., and Murphy and O'Connell, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. Plaintiff filed the wrong affidavit of merit with his complaint. Therefore, the affidavit utterly failed to conform to the law. Because a grossly nonconforming affidavit does not toll the period of limitations, and the limitations period elapsed before the filing of a correct affidavit, plaintiff 's claim is time barred. Therefore, I am required to follow Supreme Court precedent and must dissent from the majority's noble, but misguided, attempt to salvage this case.[1]

The trial court in this case originally denied defendant's motion for summary disposition, but after we issued *Mouradian v Goldberg*, 256 Mich App 566; 664 NW2d 805 (2003), the trial court reconsidered its decision on its own motion and granted summary disposition. While plaintiff argued that *Mouradian* did not apply, he did not raise any issue regarding estoppel, waiver, or any other equitable doctrine that might conceivably excuse his failure to file the appropriate affidavit of merit with his complaint. Neither did plaintiff mention the issue of equitable tolling in his statement of appellate issues. The majority has researched, considered, accepted, and applied this legal theory without any assistance from plaintiff and without providing defendant with any opportunity to rebut it.

Putting aside these procedural irregularities, the current state of the law does not justify application of the majority's equitable doctrine. In general, "a civil case is commenced and the

[1] It is clear from this record that the defendant's attorney waited (sandbagged) until the period of limitations had run before he notified plaintiff that the wrong affidavit had been filed.

period of limitation is tolled when a complaint is filed." *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). However, in actions alleging medical malpractice, a plaintiff must file an affidavit of merit with the complaint for the complaint to initiate the lawsuit. *Id.*; MCL 600.2912d(1). Filing a complaint without an affidavit of merit is insufficient to commence the lawsuit, so it will not toll the period of limitations. *Scarsella*, *supra* at 553; see also *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005). In *Scarsella*, *supra* at 551-553, our Supreme Court upheld the trial court's dismissal of a claim as time barred because the plaintiff failed to commence the suit with an affidavit within the limitations period.

In *Mouradian*, *supra* at 574, we determined that an affidavit of merit that is "grossly nonconforming" with MCL 600.2912d(1) does not toll the period of limitations any more than a complaint that is unaccompanied by any affidavit. Additionally, in *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003), we held that an affidavit that did not meet the statutory standards contained in MCL 600.2912d(1) was defective and did not toll the period of limitations. In *Young v Sellers*, 254 Mich App 447, 451-453; 657 NW2d 555 (2002), we acknowledged that the rule in *Scarsella* was harsh and unforgiving, even when the mistake was caused by nothing more than a clerical oversight, but we applied it as law. Recently, our Supreme Court considered a similar situation that stemmed from an attorney's oversight combined with sharp practice on a defendant's part. *Burton*, *supra* 748-749. Nevertheless, it held that the proper remedy was dismissal without prejudice and without regard to the fact that the limitations period had already expired. *Id*. at 753-754.

Having presented the current state of the law, I must add that I disagree with any rule of law that encourages conniving, unethical practice on the part of attorneys. The public's disdain for such behavior prompted the legislation under review. Neither the Legislature, nor our courts, should try to equalize injustices, but should strive to erase them altogether. We will never obtain fairness by allowing the disadvantaged and exploited to cheat. Therefore, while I would apply the rule of law in this case, I would also note that the Michigan Court Rules could prevent this type of gamesmanship if they required a defendant to raise with particularity any objections to the validity of an affidavit of merit in the defendant's first responsive pleading. Failure to object would result in the defendant waiving any later objection to the efficacy of the affidavit. Objecting would put the plaintiff immediately on notice of the affidavit's infirmities and would inject a much-needed dose of integrity into the current system. I would encourage the Supreme Court to amend the Michigan Court Rules accordingly.

Rather than directly approach this difficult issue, the majority equitably excuses plaintiff 's failure to file the affidavit on the basis of a doctrine it discovers in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004). However, that case specifically applied the doctrine of equitable tolling because "[p]laintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a *negligent failure to preserve her rights*." *Id*. at 432 (emphasis added). In the case at bar, plaintiff 's mistake was undoubtedly "the product" of a "negligent failure" rather than an "understandable confusion," so equitable tolling does not apply.

The affidavit of merit filed by plaintiff in this case failed to meet the requirements of MCL 600.2912d(1) because it was an affidavit regarding the wrong patient. The affidavit failed to state that defendant breached the standard of care, failed to state what actions defendant

should have taken to comply with the standard of care, and failed to state the way defendant's breach of the standard of care caused plaintiff's injuries. MCL 600.2912d(1). As such, it was grossly nonconforming because it did not deal with any specifics about this plaintiff or this defendant. Under *Mouradian* and *Geralds*, the filing of the defective affidavit did not toll the period of limitations and the trial court did not err in granting summary disposition. Therefore, lacking the suggested amendment to the Court Rules, I would affirm.

/s/ Peter D. O'Connell