STATE OF MICHIGAN

COURT OF APPEALS

BRIAN POTTER,

Plaintiff-Appellee,

v

RICHARD C. MCLEARY, M.D., GARY AUGUSTYN, M.D., ROBERT DOMEIER, D.O., EMERGENCY PHYSICIANS MEDICAL GROUP, P.C, and ST. JOSEPH MERCY HOSPITAL ANN ARBOR, d/b/a TRINITY HEALTH-MICHIGAN,

Defendants,

and

KRISTYN H. MURRY, M.D. and HURON VALLEY RADIOLOGY, P.C.,

Defendants-Appellants.

FOR PUBLICATION
February 6, 2007
9:10 a.m.

No. 262529
Washtenaw Circuit Court
LC No. 03-001226-NH

BRIAN POTTER,

Plaintiff-Appellee,

v

RICHARD C. MCLEARY, M.D., KRISTYN H. MURRY, M.D., GARY AUGUSTYN, M.D. HURON VALLEY RADIOLOGY, P.C., and ST. JOSEPH MERCY HOSPITAL ANN ARBOR, d/b/a TRINITY HEALTH-MICHIGAN,

Defendants,

and

No. 263538
Washtenaw Circuit Court
LC No. 03-001226-NH

Official Reported Version

ROBERT DOMEIER, D.O. and EMERGENCY PHYSICIANS MEDICAL GROUP, P.C.,

Defendants-Appellants.

Before: Wilder, P.J., and Zahra and Davis, JJ.

DAVIS, J. (*dissenting*).

I agree with the majority that the affidavits of merit filed in this case were defective. As counsel essentially conceded at oral argument, they did not contain any statement whatsoever on proximate cause because they did not state how the physicians' alleged failures related to plaintiff 's alleged injuries. Because no conforming affidavit was filed before December 8, 2003, when the limitations period expired, summary disposition under MCR 2.116(C)(7) was ostensibly appropriate.

However, I respectfully disagree with the majority's dismissal of the possibility of retroactive amendment of the nonconforming affidavits under MCL 600.2301, which states as follows:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

This statute, or its substantially identical predecessor, has been part of Michigan statutory law for almost a century.[1] However, I can find no published caselaw addressing it in this context. The possibility of amendment was discussed in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). However, our Supreme Court in *Scarsella* did not address the clear policy implications of MCL 600.2301, and the holding was explicitly limited to situations where *no* affidavit was filed whatsoever. *Scarsella*, *supra* at 550-553. Obviously, there is no logical way to amend a

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[1] A version of this statute, including only the first sentence, was part of the 1846 Revised Statutes, Chapter 104, § 1. The Legislature added the second sentence when it enacted 314 PA 1915, which became 1915 CL 12478, 1929 CL 14144, and 1948 CL 616. A few inconsequential changes, like using the words "shall be" instead of "is" or "are," were made when it was re-enacted by 236 PA 1961. Because I cannot view these changes as substantive, any cases interpreting or applying the 1915 version of this statute must remain applicable today.

nonexistent process, pleading, or proceeding, so MCL 600.2301 would not have applied in any event. The situation before this Court today is different.

Since *Scarsella*, this Court has concluded that a "grossly nonconforming" affidavit does not count as an affidavit of merit under the statute. *Saffian v Simmons*, 267 Mich App 297, 302-303; 704 NW2d 722 (2005). However, those cases that subsequently relied on *Scarsella* did not address the significant distinction: where an affidavit is *actually filed*, even if it is eventually ruled defective for one reason or another, it nevertheless exists as something in the record that can be "amended." Thus, whether MCL 600.2301 can be used to permit retroactive amendment of a nonconforming—though *actually filed*—affidavit of merit after the period of limitations has expired is an issue of first impression.

The general rule created by MCL 600.2301 and its predecessors is that leave to amend the pleadings "should be denied only in the face of undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). The goal of this rule is to dispose of cases on the basis of parties' substantial rights, rather than on technical errors. *Gratiot Lumber & Coal Co v Lubinski*, 309 Mich 662, 668-669; 16 NW2d 112 (1944). However, "such amendments are not allowed when prejudice would result and when the substantial rights of the parties would be affected adversely." *Phillips v Rolston*, 376 Mich 264, 268; 137 NW2d 158 (1965).

Statutes of limitations are generally considered procedural, not substantive. *People v Sinclair*, 247 Mich App 685, 689; 638 NW2d 120 (2001). However, this is only true while the limitations periods are still running; once the limitations period has completely run, the right to defeat a cause of action becomes vested. *In re Straight's Estate*, 329 Mich 319, 325; 45 NW2d 300 (1951); *Gorte v Dep't of Transportation*, 202 Mich App 161, 167; 507 NW2d 797 (1993). A trial court may therefore not "permit an amendment which states a cause of action barred by the statute of limitations." *Bockoff v Curtis*, 241 Mich 553, 558; 217 NW 750 (1928).

However, this only precludes stating a completely new cause of action. If "the transactional base of the claim [is] still . . . pleaded before the statute runs, thereby giving defendant notice within the statutory period that he must be prepared to defend against all claims for relief arising out of that transaction," then "the basic policy of the statute of limitations" is satisfied even if amendment is permitted. *LaBar v Cooper*, 376 Mich 401, 406; 137 NW2d 136 (1965). In essence, this is a longstanding policy directive that it is unfair to surprise the other party by retroactively amending a pleading to assert something against which the party had no reasonable opportunity to defend.

I see no such limitation here. None of the defendants has challenged whether plaintiff's notices of intent[2] complied with MCL 600.2912b(4)(e), which requires a statement of "the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." Under MCL 600.2912d(1)(d), the affidavit of merit must contain "[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." Logically, if the notice of intent was adequate in this regard, defendants cannot seriously contend that they would be surprised if the affidavit of merit was retroactively amended to include the same thing. In any event, it is especially hard to believe that defendants could be surprised or prejudiced after carrying on discovery and litigation for more than a year after the complaint and affidavits were filed before bringing this motion.

MCL 600.2301 and its predecessors set forth a clear policy that our jurisprudence seeks to resolve disputes on their merits, not on technicalities. It *mandates* that the courts overlook technical errors that "do not affect the substantial rights of the parties." Plaintiff actually submitted affidavits of merit that complied with the statutory requirements in all but one respect. There would be no surprise or other substantive prejudice to defendants for that technical defect to be retroactively corrected. Therefore, plaintiff should be afforded the opportunity to amend his affidavits of merit to comply with the statute.

I recognize the majority's argument that doing so would eviscerate the Legislature's remedy under MCL 600.2912d(2). See *Mouradian v Goldberg*, 256 Mich App 566, 575; 664 NW2d 805 (2003). However, I am not convinced by it. Again, the situation before us is different. This is *not* a case where plaintiff simply filed a bare complaint without an affidavit and now seeks to go back in time to insert one into the lower court record. This is a case where plaintiff *did* file an affidavit, albeit a defective one, and moreover had *previously* filed notices of intent that adequately set forth the missing information. An affidavit actually existed in the record, as did the information the affidavit should have contained.

Where correcting a technical defect would not inflict unfair prejudice on the other party, I would adhere to our legal system's longstanding and honorable goal of resolving disputes on their merits.

/s/ Alton T. Davis

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[2] I recognize, as does the majority, that defendants have raised a challenge to the sufficiency of the notices of intent. However, that challenge is limited to other grounds.