STATE OF MICHIGAN

COURT OF APPEALS

FRANK GLANCY and BEVERLY GLANCY, Plaintiffs-Appellants,	UNPUBLISHED February 1, 2000
v	No. 212687 Washtenaw Circuit Court
SAINT JOSEPH MERCY HOSPITAL, Defendant-Appellee.	LC No. 97-004378 NH

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

On June 21, 1995, plaintiff Frank Glancy underwent surgery at defendant hospital and then suffered a stroke. Plaintiffs claim that the stroke was caused by a pituitary gland insufficiency that was triggered from the stress of surgery. Plaintiffs also claim that medical personnel at defendant hospital were aware of Mr. Glancy's medical history of pituitary problems, yet did nothing to prevent or diagnose the problem. Plaintiffs brought an action for medical malpractice against defendant hospital and Dr. Nancylee Stier, the internist that treated Mr. Glancy.[1]

On June 13, 1997, shortly before the expiration of the two-year statute of limitations,[2] plaintiffs filed a notice of intent to file a malpractice claim, as required by MCL 600.2912b; MSA 27A.2912(2), which provides that an action for medical malpractice may not be commenced unless the defendant has been given written notice at least 182 days before the action is commenced. However, if the defendant does not provide a written response within 154 days after receiving the notice of intent, the plaintiff may commence the action. MCL 600.2912b(8); MSA 27A.2912(2)(8). The filing of the notice of intent tolls the statute of limitations during the notice period. MCL 600.5856(d); MSA 27A.5856(d); *Morrison v Dickinson*, 217 Mich App 308, 313; 551 NW2d 449 (1996). In this case, plaintiffs filed a complaint on October 22, 1997, before the expiration of the notice period; therefore, the action was dismissed without prejudice.[3]

On December 5, 1997, after more than 154 days had expired from the time when defendant received the notice of intent, plaintiffs filed a second complaint, which was assigned a different case number from the action commenced by the first complaint.[4] On January 5, 1998, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiffs' action was barred by the statute of limitations. Defendant argued that plaintiffs failed to file an affidavit of merit with the complaint, as required by MCL 600.2912d; MSA 27A.2912(4), and that the complaint was therefore invalid. The filing of the notice of intent tolled the statute of limitations only until the expiration of the 182-day notice period, which was December 12, 1997. Defendant argued that the second complaint was ineffective to further toll the statute of limitations and that plaintiffs' claim was therefore barred because plaintiffs failed to file a complaint with an affidavit before the limitations period had expired.[5]

Plaintiffs acknowledged that an affidavit of merit was not filed with the second complaint and that this violated MCL 600.2912d; MSA 27A.2912(4). However, plaintiffs argued that the action should not be dismissed because an affidavit of merit was filed in the first action.[6] Plaintiffs argued that, because the affidavit had been filed with the court and served on defendant in the previous action, the statutory requirement was complied with. The trial court disagreed, and concluded that the requirement was not complied with, rendering the second complaint invalid and ineffective to toll the statute of limitations. Because the limitations period had by then expired, the court granted defendant's motion for summary disposition and dismissed plaintiffs' action with prejudice.[7]

We review the trial court's decision whether to grant a motion for summary disposition under MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). Additionally, whether a claim is barred by the statute of limitations is a question of law that we review de novo. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

Generally, a civil action is commenced and the statute of limitations is tolled when a complaint is filed. MCL 600.5856(a); MSA 27A.5856(a). However, in a medical malpractice action, the plaintiff must file an affidavit of merit with the complaint. MCL 600.2912d(1); MSA 27A.2912(4)(1). In essence, this affidavit "is a qualified health professional's opinion that the plaintiff has a valid malpractice claim." *Scarsella v Pollak*, 232 Mich App 61, 62-63; 591 NW2d 257 (1998). This Court has held that "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Id*. at 64. Here, because plaintiffs' complaint was filed without the required affidavit of merit, the filing of the complaint was insufficient to commence the lawsuit and toll the statute of limitations. Therefore, the trial court correctly granted defendant's motion for summary disposition because the statute of limitations barred plaintiffs' action.

Plaintiffs argue that *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998), requires a different result. In that case, the plaintiffs filed a medical malpractice claim in September 1995, but did not file an affidavit of merit until December 1995. *Id*. at 498. The defendants were served with the summons, complaint, and affidavit at the same time. *Id*. The trial court granted the defendants' motion for summary disposition because the plaintiff had failed to comply with MCL

600.2912d; MSA 27A.2912(4). This Court held that "[t]he 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." *Id.* at 502-503.[8] Therefore, this Court concluded that dismissal was inappropriate.

Here, plaintiffs argue that defendant suffered no prejudice because it had access to the previously served affidavit when served with the complaint. However, in *VandenBerg*, the defendants received the affidavit of merit at the same time they received the complaint, but in the instant case, defendant was not served with an affidavit of merit with the complaint, but in a prior action. Moreover, the panel in *Scarsella* held that *VandenBerg* was distinguishable because it did not involve a statute of limitations problem. We therefore find *VandenBerg* inapplicable to this case. The holding from *Scarsella* plainly requires us to hold that the filing of plaintiffs' complaint without the required affidavit of merit did not toll the statute of limitations. Accordingly, the trial court did not err in granting defendant's motion for summary disposition and dismissing plaintiffs' action with prejudice.[9]

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] The trial court granted Dr. Stier's motion for summary disposition, and plaintiff does not appeal this ruling.

[2] MCL 600.5805(4); MSA 27A.5805(4).

[3] Lower court number 97-004287 NH.

[4] The lower court number assigned to the second action was 97-004378 NH.

[5] Defendant also argued that claims plaintiffs asserted in an amended notice of intent were barred by the statute of limitations because the amended notice was not filed until after the expiration of the limitations period. The trial court agreed, and plaintiffs do not challenge this holding on appeal. Therefore, the instant appeal only involves the summary disposition of claims asserted in plaintiffs' original notice of intent.

[6] An affidavit of merit was filed in the first action on October 25, 1997. Although the affidavit was not filed with the first complaint, it was filed three days later. We have not been provided with the lower-court record from the first action, and we are therefore unable to discern whether the filing of the affidavit was appropriate under MCL 600.2912d(2); MSA 27A.2912(4)(2), which allows the court to grant an additional twenty-eight days in which to file the affidavit, upon good cause shown. On appeal, defendant does not dispute that an affidavit of merit was properly filed in the first action. Accordingly, we conclude, for purposes of this appeal, that an affidavit of merit was properly filed in the first action.

[7] The court also denied plaintiffs' motion for reconsideration pursuant to MCR 2.119(F).

[8] The Court held that the purpose of the requirement was to deter frivolous medical malpractice actions. *VandenBerg*, *supra* at 502.

[9] We note that our Supreme Court has held that, where an affidavit was not served with the complaint, dismissal without prejudice is an appropriate sanction. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). However, that case also did not involve any problems with the statute of limitations. Had the limitations period not expired, dismissal without prejudice might have been too harsh a sanction. However, in this case, where the faulty complaint did not toll the statute of limitations and the limitations period has expired, dismissal with prejudice was appropriate because the action was barred by the statute of limitations.