STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY LEWIS, Plaintiff-Appellant,	UNPUBLISHED February 4, 2000
v MICHAEL H. EIDELMAN, M.D., and MICHAEL H. EIDELMAN, M.D., P.C., Defendants-Appellees.	No. 206804 Oakland Circuit Court LC No. 97-548176-NH

DOROTHY LEWIS, Plaintiff-Appellant,	
v MICHAEL H. EIDELMAN, M.D. and MICHAEL H. EIDELMAN, M.D., P.C., Defendants-Appellees.	No. 213503 Oakland Circuit Court LC No. 97-551127-NH

Before: O'Connell, P.J., and Meter and T. G. Hicks*, JJ.

PER CURIAM.

In Docket No. 206804, plaintiff appeals as of right from the trial court's order dismissing her medical malpractice action for failure to file an affidavit of merit. In Docket No. 213503, plaintiff also appeals as of right from the trial court's order dismissing her second malpractice action under MCR 2.116(C)(6) (another action involving same claim initiated between the parties). We affirm the first case and reverse the second. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

* Circuit judge, sitting on the Court of Appeals by assignment.

When plaintiff filed her initial medical malpractice action, she did not file an affidavit of merit with the complaint. Defendants moved to dismiss the complaint, and the trial court granted the motion without prejudice. Plaintiff filed a second complaint, accompanied by an affidavit of merit, and subsequently filed a claim of appeal from the first dismissal. Defendants moved to dismiss the second complaint under MCR 2.116(C)(6), and that motion was granted.

MCL 600.2912d; MSA 27A.2912(4) provides that a plaintiff in a medical malpractice action shall file an affidavit of merit with the complaint. This requirement does not deprive plaintiff of equal protection of law. The affidavit of merit requirement is similar to the notice provision contained in MCL 600.2912b; MSA 27A.2912(2), construed in *Neal v Oakwood Hospital Corp,* 226 Mich App 701; 575 NW2d 68 (1997). The Court found that the notice requirement did not violate state or federal guarantees of equal protection of law because the requirement was rationally related to the general purpose of addressing dissatisfaction with the medical liability system. *Id*. at 719. Similarly, the affidavit of merit requirement bears a reasonable relation to a permissible legislative objective of limiting unsupported malpractice actions.

The trial court correctly dismissed plaintiff's first action without prejudice. In *VandenBerg v VandenBerg,* 231 Mich App 497, 502; 586 NW2d 570 (1998), this Court found that the purpose of the statute was to prevent frivolous medical malpractice claims. In that case, the plaintiff did not file an affidavit of merit with the complaint, but provided the affidavit at the time the complaint was served. This Court held that dismissal was inappropriate under those circumstances where defendant was not prejudiced. *Id*. at 502-503. However, in *Dorris v Detroit Osteopathic Hospital Corp,* 460 Mich 26, 47; 594 NW2d 455 (1999), the plaintiff did not provide an affidavit of merit, and unlike the plaintiff in *VandenBerg,* did not supplement her complaint with such an affidavit. The Supreme Court held that the appropriate remedy under the circumstances was dismissal without prejudice. *Id*. at 47-48. The trial court did not err in employing the same remedy in plaintiff's first action, where plaintiff did not provide defendants with an affidavit of merit.

However, the we hold that the trial court erred in granting summary disposition in plaintiff's second action. MCR 2.116(C)(6) provides for the dismissal of an action when another action has been initiated between the same parties involving the same claim. *Darin v Haven,* 175 Mich App 144, 147; 437 NW2d 349 (1989). "The rule is designed to stop parties from endlessly litigating matters involving the same questions and claims as those presented in pending litigation[,]" *Rowry v Univ of Michigan,* 441 Mich 1, 20; 490 NW2d 305 (1992), and also to prevent litigious harassment. *Fast Air, Inc v Knight,* 235 Mich App 541, 546; 599 NW2d 489 (1999). A pending case includes a case that remains on appeal to this Court. *Darin, supra* at 151. In *Fast Air, supra,* this Court held that the purpose of MCR 2.116(C)(6) is not served by the dismissal of every case where multiple actions are pending. The court rule does not operate in every situation where other litigation was initiated but later dismissed. *Id*. at 546-547.

Under the circumstances of this case, the maintenance of the second action does not constitute litigious harassment. At the time the second action was filed, no appeal had been taken, and multiple actions were not pending. Plaintiff's malpractice claim was not litigated in the initial action, which was dismissed for failure to file an affidavit of merit. This is the first action where the merits of the claim

would be litigated. Had plaintiff waited to file a second action, the statute of limitations would have run. See *Scarsella v Pollak*, 232 Mich App 61, 64; 591 NW2d 257 (1998). Therefore, the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(6) in this case.

In Docket No. 206804, the decision is affirmed. In Docket No. 213503, the decision of the court is reversed. This matter is remanded to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Timothy G. Hicks