STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL W. GATES and DIANE GATES,

Plaintiffs-Appellants,

v

LEE BERENS, M.D., MACATAWA ANESTHESIOLOGY, P.C., and HOLLAND COMMUNITY HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
June 30, 2000

No. 219320
Ottawa Circuit Court
LC No. 98-032572-NM

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right from a trial court order granting defendants' motions for summary disposition on the ground that plaintiffs' action was time barred. We affirm.

This Court reviews de novo a trial court's grant of summary disposition. *Todorov v Alexander*, 236 Mich App 464, 467; 600 NW2d 418 (1999). In addition, whether a cause of action is barred by the statute of limitations is a question of law, which we review de novo. *Id*. This case also presents a question of statutory interpretation, which we review de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Plaintiffs contend that the trial court erred by relying on our decision in *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998) (*Scarsella I*), aff'd 461 Mich 547; 607 NW2d 711 (2000) (*Scarsella II)*, rather than our decision in *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998). In *Scarsella I*, we ruled that a medical malpractice complaint filed without an affidavit of merit is insufficient to commence an action for purposes of tolling the limitations period, and where an affidavit of merit is filed after the expiration of the limitations period the action is time barred, even though the complaint was timely filed. *Scarsella I, supra* at 64. Here, the trial court found that plaintiffs' affidavit of merit was not filed until after the statute of limitations on their claims had expired; therefore, it concluded that dismissal was mandated by *Scarsella I*.

Plaintiffs do not challenge the finding that their affidavit of merit was filed after the running of the limitations period; rather, plaintiffs contend that the trial court should have relied on *VandenBerg*. In *VandenBerg*, we held that dismissal was not required for failing to include an affidavit of merit with the complaint. *VandenBerg, supra* at 501-502. The *Scarsella I* panel, however, distinguished *VandenBerg* because *VandenBerg* did not involve a statute of limitations problem. *Scarsella I, supra* at 64 n 1. Accordingly, the *Scarsella I* panel stated that *VandenBerg* was both "factually and legally distinguishable" from the case it was addressing. *Id*. In the instant matter, the trial court was faced with a statute of limitations problem. Therefore, the trial court properly concluded that *Scarsella* was controlling authority.

Moreover, as we noted above, our Supreme Court, in a per curiam opinion filed on March 28, 2000, affirmed this Court's decision in *Scarsella I. Scarsella II, supra* at 553. Our Supreme Court specifically noted that the *Scarsella I* panel correctly distinguished *VandenBerg*. *Id.* at 552 n 4. Thus, we reject plaintiffs' argument to the extent that it suggests that the trial court should not have relied on *Scarsella I* because it was erroneously decided.

We decline to address plaintiffs' constitutional issues because they were neither decided by the trial court nor raised below. *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993). Although we recognize precedents stating that appellate review of unpreserved issues is permissible to prevent manifest injustice, e.g., *Herald Co, Inc v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998), we conclude no manifest injustice will result here in light of precedents rejecting similar constitutional arguments against similar provisions of the statute at issue here. See *McDougall v Schanz*, 461 Mich 15, 37; 597 NW2d 148 (1999); *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 720-721; 575 NW2d 68 (1997).

Finally, at oral argument counsel for plaintiff raised an argument that had not been briefed, claiming that he could not have made this argument until our Supreme Court ruled in *Scarsella II*. However, the argument was available as soon as our opinion in *Scarsella I* was handed down, long before briefs were filed in this appeal. We consider this argument, not briefed by defendant, to be abandoned. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 129-130 n 9; 602 NW2d 390 (1999).

We affirm.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck