

STATE OF MICHIGAN
COURT OF APPEALS

HELEN BOGAN and JIMMIE BOGAN,

Plaintiffs-Appellants,

v

THE DETROIT MEDICAL CENTER, INC., d/b/a
SINAI HOSPITAL, and EDUARDO PHILLIPS,
M.D.

Defendants-Appellees,

and

MATTHEW BLOOM, M.D.,

Defendant.

UNPUBLISHED
February 20, 2001

No. 219865
Wayne Circuit Court
LC No. 98-830874-NH

Before: Whitbeck, P.J., and Murphy and Cooper, JJ.

PER CURIAM.

Plaintiffs in this medical malpractice action appeal as of right from an order granting summary disposition in favor of defendants Detroit Medical Center and Dr. Eduardo Phillips on the basis of plaintiffs' failure to file an affidavit of merit before the period of limitations expired.¹ We affirm.

Plaintiffs Helen Bogan and Jimmie Bogan alleged that on or around April 29, 1996, defendants incorrectly and unnecessarily performed a biopsy of suspect calcifications in Helen Bogan's breast. On March 19, 1998, plaintiff served defendants with a notice of intent to file a claim. MCL 600.2912b; MSA 27A.2912(2). This notice tolled the limitations period for 182 days. On September 23, 1998, plaintiffs filed their complaint against defendants. Defendants were served on December 16, 1998. Plaintiffs did not file an affidavit of merit with the

¹ Plaintiffs did not serve a summons or complaint on defendant Matthew Bloom, M.D. The trial court did not obtain jurisdiction over Bloom; therefore he is not a party to this appeal.

complaint, nor at any time thereafter as required by MCL 600.2912d(1); MSA 27A.2912(4)(1). The two-year period of limitations for plaintiff's medical malpractice claim expired on October 29, 1998. MCL 600.5805(4); MSA 27A.5805(4); MCL 600.5838a; MSA 27A.5838a.

Defendants moved for summary disposition on January 29, 1999, arguing that plaintiffs failed to file the required affidavit of merit, and thus failed to timely file a proper complaint within the statutory limitations period. We review de novo decisions regarding summary disposition. *Rheaume v VandenBerg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998).

The plaintiff in an action alleging medical malpractice "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness." MCL 600.2912d(1); MSA 27A.2912(4)(1). Plaintiffs here argue that this statutory requirement conflicts with the rule-making authority of the Supreme Court and contravenes MCR 2.101(B), which provides that a civil action is commenced by the filing of a complaint. We disagree.

When a plaintiff fails to timely file an affidavit of merit with a complaint alleging medical malpractice, the statutory period of limitations continues to run and will expire if the defect is not cured before the period expires. *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 711 (2000); *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 708-709; 620 NW2d 319 (2000). Though this stricter filing requirement is not consistent with MCR 2.101(B), the court rules now acknowledge the requirement that an affidavit of merit must accompany or supplement a complaint in order for a medical malpractice action to commence. MCR 2.112(L). Accordingly, MCL 600.2912d; MSA 27A.2912(4) is not an unconstitutional usurpation of the Supreme Court's rule-making authority. Const 1963, art 6, § 5.

We additionally disagree with plaintiffs' argument that the trial court abused its discretion in refusing to grant plaintiffs leave to amend their complaint to add an affidavit of merit. Not only did plaintiffs fail to file an affidavit of merit with the complaint or before the limitations period expired, they also failed, within that time, to make a formal motion under MCL 600.2912d(2); MSA 27A.2912(4)(2) requesting a twenty-eight day extension for good cause shown. To have allowed plaintiffs to rely on this legislative remedy after the limitations period had expired would have nullified the limitations period for medical malpractice actions, and would have subverted the explicit requirement that an affidavit of merit accompany the complaint. See *Scarsella, supra* at 550; *Holmes, supra* at 709.

Affirmed.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Jessica R. Cooper