

STATE OF MICHIGAN
COURT OF APPEALS

CONNIE LYNN RANDOLPH, Individually and
as Next Friend of RACHEL LEAH RANDOLPH,
a Minor, and JOSEPH ADAM RANDOLPH, JR.,

UNPUBLISHED
August 2, 2002

Plaintiffs-Appellees,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

No. 231366
Wayne Circuit Court
LC No. 99-935563-NH

Intervening Plaintiff,

v

GARD ADAMS,

Defendant-Appellant,

and

PROFESSIONAL EMERGENCY CARE, P.C.,

Defendant,

and

OAKWOOD HEALTH CARE, INC., d/b/a
OAKWOOD HOSPITAL-ANNAPOLIS CENTER,
d/b/a OAKWOOD HEALTH CARE SYSTEM

Defendant-Appellee.

Before: Murray, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Appellant Gard Adams, M.D., appeals by leave granted the trial court's orders granting plaintiffs' combined motion to strike his pleadings and for summary disposition, and entering judgment in favor of plaintiffs. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On November 10, 1999 plaintiffs filed suit alleging that defendants committed medical malpractice during their treatment of Rachel Leah Randolph. The complaint was accompanied by an affidavit of merit as required by MCL 600.2912d. Adams answered the complaint but did not file an affidavit of meritorious defense as required by MCL 600.2912e(1). That statute provides that a defendant in a medical malpractice action must file an affidavit of meritorious defense not later than ninety-one days after the plaintiff files the affidavit required by MCL 600.2912d. Oakwood Hospital answered the complaint and filed a timely affidavit of meritorious defense. On August 25, 2000, Adams filed both his own affidavit of meritorious defense and a formal reliance on the affidavit filed by Oakwood.

On October 12, 2000, plaintiffs filed a combined motion to strike Adams' affidavit and pleadings, and for summary disposition pursuant to MCR 2.116(C)(9). The trial court granted plaintiffs' combined motion. The trial court observed that MCL 600.2912e did not allow for amendment of pleadings, and that in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), our Supreme Court held that a plaintiff's failure to file an affidavit of merit with a complaint renders the complaint insufficient and does not toll the statute of limitations. The trial court concluded that if a medical malpractice defendant did not file an affidavit within ninety-one days as required by MCL 600.2912e, that defendant could not go forward. At a subsequent hearing on plaintiffs' motion for entry of judgment the trial court stated that when it granted plaintiffs' combined motion to strike Adams' affidavit and pleadings and for summary disposition, it effectively entered a default against Adams. The trial court entered judgment against Adams, only, with damages to be determined at a later time.

We review a question of statutory interpretation de novo. *Wilhelm v Mustafa*, 243 Mich App 478, 481; 624 NW2d 435 (2000). The requirement in MCL 600.2912e that a defendant in a medical malpractice case file an affidavit of meritorious defense within the specified time period is mandatory. *Id.* at 482. MCL 600.2912e provides no remedy for a defendant's failure to file an affidavit in a timely manner, and neither requires nor prohibits a default when a defendant fails to timely file an affidavit. A defendant who fails to file an affidavit has failed to plead. Under such circumstances, a trial court is authorized by MCR 2.603(A) to enter a default against the defendant. *Kowalski v Fiutowski*, 247 Mich App 156, 162-163; 635 NW2d 502 (2001).

We reverse the trial court's orders granting plaintiffs' combined motion to strike Adams' affidavit and pleadings and for summary disposition/default and entry of judgment, and remand this matter for further proceedings consistent with this opinion. In the hearing on plaintiffs' combined motion, the trial court observed that MCL 600.2912e did not provide for amendment of pleadings, and noted that pursuant to *Scarsella, supra*, a complaint filed without the affidavit of merit required by MCL 600.2912e is a nullity. The trial court's comments indicate that the court believed that it was required to grant summary disposition or, as the court subsequently stated, enter a default, because defendant failed to file an affidavit of meritorious defense within the time specified by MCL 600.2912e. The trial court erred in so concluding. In *Kowalski* and its companion case *Castro v Cottage Health Services*, this same trial court denied the defendants' motions to set aside defaults, concluding that the defaults were required under the circumstances. This Court held that MCL 600.2912e neither prohibits nor requires a default when the defendant fails to timely file an affidavit of meritorious defense, *Kowalski, supra* at 162, and reversed the trial court's orders denying the defendants' motions to set aside the defaults on the ground that

the trial court did not exercise its discretion in entering the defaults and did not consider the possibility of other remedies. *Id.* at 165-166.

We reach a similar result in this case, and for the same reason. We remand with instructions that the trial court exercise its discretion to determine the appropriate remedy for Adams' failure to file a timely affidavit of meritorious defense. That remedy could be a default or some other sanction. The trial court should consider the reasons for Adams' delay in filing his affidavit, any actions he took to apprise plaintiffs and the court of his reasons for the delay, any prejudice to plaintiffs resulting from the delay, and any other relevant factors. *Id.* at 166.

Reversed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Brian K. Zahra