

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES F. ZIMMERMANN and SUSAN
ZIMMERMANN,

UNPUBLISHED
November 26, 2002

Plaintiffs-Appellants,

v

No. 235032
Wayne Circuit Court
LC No. 01-108357-NH

GARDEN CITY OSTEOPATHIC HOSPITAL,

Defendant-Appellee.

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

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

This is a medical malpractice action. Plaintiff Charles Zimmermann fell off a ladder while working outside his house on October 10, 1998, and fractured his left tibia. On October 12, 1998, he underwent surgery at defendant hospital to repair the fracture. During the next twelve hours, he developed a condition called "compartment syndrome" in his left lower leg. This is a condition in which pressure builds up, here in the left lower leg, to the extent that blood cannot properly flow into the affected area. The muscles and other tissues become necrotic because of the loss of blood flow. Mr. Zimmermann's condition was detected on October 13, 1998, unfortunately, he had suffered irreversible damage and the left leg had to be amputated at the knee on October 17, 1998.

Plaintiffs filed their notice of intent to sue on October 6, 2000, and defendant received the notice on October 9, 2000. See MCL 600.2912b. Because the notice of intent was filed before the two-year statute of limitations (MCL 600.5805(5)) expired, plaintiffs had an additional 182 days after October 13, 2000 to file their complaint. See MCL 600.5856(d). Plaintiffs filed their complaint on March 12, 2001. Plaintiffs attached two accompanying affidavits of merit that were both signed, but were unsworn.

On April 23, 2001, defendant filed its answer to the complaint and moved for summary disposition under MCR 2.116(C)(7), (8), and (10) arguing that the statute of limitations expired and barred plaintiffs' action because the complaint did not have attached to it proper affidavits of merit. On May 7, 2001, plaintiffs filed an amended complaint that included two signed and

sworn affidavits. Both affidavits were signed and sworn on May 4, 2001. However, as both parties note, the statute of limitations period expired on April 13, 2001.

The hearing on defendant's motion for summary disposition was held on May 18, 2001. Defendant argued below, as it does on appeal, that plaintiffs' complaint was untimely because the affidavits filed with the complaint on March 12, 2001, were unsworn and, therefore, because the complaint was not filed with a proper affidavit of merit, the case was not filed within the statutory time period. The trial court felt compelled under existing case law to grant the motion and its final order dismissing the case with prejudice was entered on June 1, 2001.

MCL 600.2912d(1) requires that a plaintiff in a medical malpractice action "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." If the plaintiff fails to file an affidavit of merit with the complaint, the filing of the complaint is ineffective and does not toll the applicable period of limitation. *Scarsella v Pollack*, 461 Mich 547, 553; 607 NW2d 711 (2000). However, the Court cautioned that "[t]his holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective." *Id.*

Subsequently, in *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 711; 620 NW2d 319 (2000), this Court held that an unsworn statement does not constitute a proper affidavit of merit because an affidavit, by its very definition, must be confirmed by an oath or affirmation of the party making the statement and taken before a person having authority to administer an oath or affirmation. Consequently, pursuant to *Holmes*, we are constrained to conclude that the unsworn statements attached to plaintiffs' complaint are not proper affidavits and plaintiffs failed to file an affidavit of merit to the complaint when the complaint was first filed on March 12, 2001. See *id.* at 712. The statute of limitations had expired by the time the complaint was filed on May 7, 2001, with proper affidavits of merit.

"[A] plaintiff who files a medical-malpractice complaint without the required affidavit is subject to a dismissal without prejudice, and can refile properly at a later date. However, such a plaintiff still must comply with the applicable period of limitation." *Scarsella, supra* at 551-552. Here, proper affidavits of merit were not filed with the complaint until May 7, 2001; however, the limitations period expired on April 13, 2001. Therefore, the medical-malpractice complaint was not timely filed in the present case and the trial court did not err in granting summary disposition in favor of defendant and in dismissing the case with prejudice.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.