STATE OF MICHIGAN

COURT OF APPEALS

JOHN D. RENSWICK, personal representative of the estate of MARION RENSWICK, Plaintiff-Appellant, V PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan nonprofit corporation, Defendant-Appellee.	UNPUBLISHED June 3, 2004 No. 244698 Oakland Circuit Court LC No. 02-038057-NH

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendant and dismissing the case with prejudice and denying plaintiff's motion for reconsideration. We affirm.

I

On February 4, 2000, plaintiff filed a medical malpractice wrongful death action arising out of the death of his wife, Marion Renswick. The complaint alleges that on August 2, 1999, the decedent underwent a hysterectomy and related procedures to treat an existing cancerous condition. According to the complaint, no problems were detected during Mrs. Renswick's follow-up examination on September 3, 1999. Plaintiff alleges, however, that on September 13, 1999, Mrs. Renswick's primary care physician detected a mass in the area of the surgery. On September 20, 1999, a second surgery was performed to successfully remove what was revealed to be a surgical sponge. Plaintiff alleges that the presence of the sponge, and the second surgery to remove it, caused physical complications for Mrs. Renswick and the inability to proceed with cancer treatment, ultimately resulting in her death.[1]

[1] Plaintiff's complaint specifically alleges:

(continued…)

To support the allegations raised in the complaint and to comply with the requirements of MCL 600.2912d, plaintiff submitted with the complaint an affidavit of merit signed by Diane C. Sims, R.N., who was identified as "a licensed nurse specializing in surgical care . . . familiar with the standard of care as it applies under the circumstances of this case." The affidavit identified the applicable standard of care as:

> The applicable standard of practice or care of the surgical nursing staff, assisting in the operating room, is to make a proper and correct count of surgical sponges and/or instruments prior to the closure of an incision; and to notify the surgeon(s) of an improper count prior to closure to ensure that no surgical sponges and/or instruments be retained inside a patient's body prior to closure.

The affidavit described "the manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice" as:

> As a result of the above outlined failures, Claimant, Marion Renswick, had a surgical sponge retained inside her body which developed adhesions and infection, necessitating the need for extensive abdominal surgery to remove the sponge.

Defendant thereafter filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8). Defendant argued that the affidavit of merit submitted by Nurse Sims was deficient under MCL 600.2912d(1) in that the affidavit failed to assert how the alleged breach of

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(…continued)

> 24. As a result of the sponge removal surgery on September 20, 1999, plaintiff's decedent's deteriorated condition and poor health caused by the surgery, additional medical procedures, infections, loss of renal function and the other consequential damage from the retained sponge, plaintiff's decedent never received the necessary cancer treatment prescribed prior to September 20, 1999, thereby allowing the cancer to metastasize and spread to her stomach ultimately causing the plaintiff's decedent's untimely death.
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> 34. As a direct and proximate result of the above outlined breaches of the requisite standards of practice or care and duties to use ordinary and reasonable care owed by defendant . . . to plaintiff's decedent, Marion Renswick, a surgical sponge was retained inside her body which developed adhesions and infection, necessitating the need for extensive abdominal surgery to remove the sponge and parts of her small intestine, small bowel and large colon; severe conscious pain and suffering; constant diarrhea; kidney damage; physical limitations; extreme embarrassment and humiliation; inability to lead a normal life; inability to proceed with the necessary cancer treatment, which lead to the spread of cancer to her stomach and her ultimate demise; and a loss of an opportunity for plaintiff's decedent to survive.

the standard of care proximately caused any delay in Mrs. Renswick receiving cancer treatment, how the alleged delay caused Mrs. Renswick's cancer to metastasize, or how the alleged breach in the standard of care caused her death. Further, defendant contended that Sims "does not meet the expert witness criteria under MCL 600.2169 because Ms. Sims, as a nurse, does not have the requisite education, training, and knowledge of a physician to address Plaintiff's proximate cause assertions and explain the complex oncology issues." Finally, defendant argued that the allegedly defective affidavit of merit was insufficient to toll the statute of limitations and plaintiff's complaint therefore should be dismissed with prejudice.

The trial court issued a scheduling order requiring plaintiff to respond to defendant's motion. However, as plaintiff acknowledges, no response to the motion for summary disposition was ever filed. The trial court thereafter issued an order granting defendant's motion for summary disposition "for the reasons stated by Defendant," and dismissing the case with prejudice. The trial court subsequently denied plaintiff's motion for reconsideration. Plaintiff now appeals.

II

On appeal, plaintiff contends that the contents of his affidavit of merit complied with MCL 600.2912d, that his counsel reasonably believed that his affiant was qualified as an expert under MCL 600.2169, and that she was in fact so qualified, and, even assuming the existence of any deficiencies in the affidavit, the trial court erred in dismissing his medical malpractice complaint with prejudice. We disagree.

Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is time-barred. *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1991). The grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) is reviewed de novo. *Kerbersky v Northern Michigan Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998). When a motion is filed under this subsection, the court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that are filed or submitted by the parties. MCR 2.116(G)(5). The court accepts all well-pleaded allegations as true and construes them in a light most favorable to the nonmoving party. *Spikes v Banks*, 231 Mich App 341, 346; 586 NW2d 106 (1998). Additionally, this Court reviews de novo issues involving the interpretation of a statute. *Donajkowski v Alpena Power Co*, 460 Mich 243, 248; 596 NW2d 574 (1999).

Pursuant to MCL 600.2912d, the plaintiff in a medical malpractice action must 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 under [MCL 600.2169]." The affidavit must contain a statement regarding the applicable standard of practice or care, the health professional's opinion that the applicable standard of practice or care was breached by the health professional or facility, the actions which should have been taken or omitted by the health professional or facility in order to have complied with the applicable standard of practice or care, and the manner in which the breach of the standard of practice or care was the proximate cause of the alleged injury. MCL 600.2912d(1). MCL 600.2169(1) states that a person may not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional, and, if the party against whom the testimony is offered is a specialist, specializes at the time of the occurrence which is the basis for the action in the same specialty as the party against whom the testimony is offered.

Here, we conclude that summary disposition was properly granted in this case because plaintiff failed to comply with the requirements of the affidavit of merit statute. First, as previously noted, pursuant to the clear language of MCL 600.2912d, a plaintiff in a medical malpractice case is required to submit an affidavit of merit signed by a health professional whom the "plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." MCL 600.2912(d). An affidavit is sufficient if counsel reasonably, albeit mistakenly, believed that the affiant was qualified under MCL 600.2169. *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002). A plaintiff who brings a medical malpractice action against an institution only must attach to the complaint an affidavit of merit executed by a health care professional who specializes in the same specialty as the professional on whose conduct the action is based. *Nippa v Botsford General Hosp (On Remand)*, 257 Mich App 387, 397; 668 NW2d 628 (2003).

In the instant case, plaintiff does not specifically name the health care professionals whose actions allegedly render defendant vicariously liable. Rather, plaintiff, in his complaint, vaguely states that "defendant Providence Hospital and Medical Center, through its agents, servants and/or other employees, including but not limited to, the surgeons, residents, nurses and surgical technicians . . . breached their applicable standards of practice." Nonetheless, consistent with the allegations contained in plaintiff's complaint and notice of intent, it is clear that an affiant/expert must be qualified to determine if the second surgery was performed correctly, how the second surgery affected plaintiff's decedent's cancer treatment, and opine regarding the decedent's cancer prognosis if the second surgery had not taken place. The damages alleged by plaintiff, which he wholly attributed to the second surgery, extend far beyond allegations of an additional surgery.

Given plaintiff's own allegations, Diane Sims, a registered nurse and plaintiff's proffered affiant, is undisputedly without the educational and professional training to offer any opinion regarding the effect, if any, that the September 20, 1999, surgery had on plaintiff's decedent's cancer or her cancer treatment, as alleged in plaintiff's notice of intent and complaint. Moreover, a registered nurse is not qualified by education, training, or otherwise to identify and distinguish between the alleged damages attributable to the decedent's first surgery, her second surgery, or the progression of her existing cancer. A nurse would have no experience or knowledge to offer as an expert witness regarding these issues. Thus, any opinions offered by a nurse in this regard would be purely speculative and irrelevant. MCL 600.2169(2)(d).

Consequently, we conclude that plaintiff's proffered nursing expert was "without the necessary education, training, knowledge, or experience" to testify regarding the appropriate standard of care and breach of that standard where it is alleged that a retained sponge caused plaintiff's decedent's cancer to spread and subsequently caused her death. Cf. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 17-20; 651 NW2d 356 (2002) (the distinction between the standard of care for a general practitioner versus a specialist under MCL 600.2912a is immaterial to nursing malpractice actions because "nurses do not engage in the practice of medicine"); *Waati v Marquette General Hosp, Inc*, 122 Mich App 44, 48-49; 329 NW2d 526 (1982) (under MRE 702, nurse held not qualified to give expert testimony regarding the standard required of a licensed physician specializing in the practice of emergency medicine). Because plaintiff's alleged damages extend beyond allegations of an additional surgery, a nursing expert is unqualified to testify with regard to the applicable standard of care or the breach thereof. In this

case involving complex oncology issues, plaintiff's attorney could not have reasonably believed that Nurse Sims was qualified to testify as an expert witness under MCL 600.2169.[2] Consequently, the trial court did not err in granting defendant's motion for summary disposition. See *Kirkaldy v Rim*, 251 Mich App 570; 651 NW2d 80 (2002), lv pending 661 NW2d 582 (2003); *Nippa, supra*.

Moreover, the instant case involves allegations regarding a retained surgical sponge and a subsequent surgery to remove it. However, plaintiff claims that not only did the retained sponge require additional surgery for its removal, but that plaintiff's decedent's cancer treatment was then drastically affected, ultimately causing her death. Such proximate cause testimony is central to plaintiff's claim and must be attested to in the affidavit of merit signed by a proper expert (the affidavit must state "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice," MCL 600.2912d(1)(d)).

In her affidavit, Diane Sims set forth the alleged appropriate standard of care in an operating room setting for monitoring the use of surgical sponges and instruments and safeguarding against the incidence of sponge retention. However, this affidavit did not assert, as required by MCL 600.2912d, how the alleged breach in the standard of care was the cause in fact or the legal cause of the inability for plaintiff's decedent to receive cancer treatments or how the delay caused a metastasis of the cancer and her death. Despite the clear requirements of subsection (1)(d) of the affidavit of merit statute, plaintiff's affidavit merely states that plaintiff's decedent "had a surgical sponge retained inside her body which developed adhesions and infection, necessitating the need for extensive abdominal surgery to remove the sponge."[3]

Because the affidavit does not contain the requisite statements concerning proximate cause, we conclude that the affidavit does not conform to the requirements of the statute, therefore providing an additional ground for the trial court's grant of summary disposition to defendant. See *Mouradian v Goldburg*, 256 Mich App 566; 664 NW2d 805 (2003) (concluding

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[2] Indeed, in his brief on appeal, plaintiff implicitly acknowledges that Nurse Sims is not qualified to testify as to core issues of this case:

> Had this matter stayed on track, plaintiff would have listed as a witness a board certified oncologist who would have testified to the second stage of the causation issue, i.e., that the need for the second operation led to Mrs. Renswick's death. He would testify that Mrs. Renswick was a candidate for cancer therapy following the August 2, 1999, surgery and that Mrs. Renswick would more likely than not have died from some cause other than cancer if the second operation and subsequent insult to her overall health had not prevented her from receiving chemotherapy.

[3] In contrast, plaintiff's notice of intent states that the alleged breach of the standard of care was the proximate cause of the injury in that the surgery led to the "inability to proceed with the necessary cancer treatment, which led to the spread of cancer to her stomach and her ultimate demise."

that an affidavit of merit that did not contain the requisite statements of malpractice and failed to contend that the defendant physician breached any standard of care, was "grossly nonconforming" to MCL 600.2192d and warranted dismissal of the action).

III

The question remains whether the trial court erred in dismissing plaintiff's suit with prejudice. Defendant argued in its summary disposition motion, and now, on appeal, that the defective affidavit of merit was insufficient to toll the statute of limitations, and plaintiff's complaint, therefore, should be dismissed with prejudice.

In *Kirkaldy, supra,* the plaintiffs filed an affidavit from a physician who was board-certified in a specialty different from that practiced by the defendants, contrary to MCL 600.2169(1)(a). This Court held that while the timely-filed affidavit of merit was technically deficient, "the sanction of dismissal with prejudice is not required here where the less drastic sanction of dismissal without prejudice is available." *Id.* at 583. In so concluding, the *Kirkaldy* Court stated:

> Further, in deciding this issue, we note that the purpose of MCL 600.2912d is to prevent frivolous medical malpractice actions. . . . [I]t appears that the purpose of the statute was fulfilled here where plaintiffs filed an affidavit, albeit a nonconforming one, in which a medical professional clearly supported plaintiffs' claims that defendants' actions amounted to malpractice. Although in a technical sense, Dr. Klein may not have been qualified to testify regarding the defendants' standard of care or breach of that standard, it would appear that he has adequate knowledge, skill, and experience regarding the diagnosis and treatment of neurological conditions so that his proffered testimony would eliminate the possibility that plaintiffs' claim was frivolous.
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> Defendants argue that dismissal with prejudice is required because the limitation period expired. This argument presumes that the timely filing of a defective affidavit does not toll the limitation period, a position that is not supported by the existing case law. See *Scarsella II* [*Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000)], *supra* at 553. Our courts have specifically declined to decide this issue, and resolution of this case does not require that we determine whether filing an affidavit that does not comply with MCL 600.2912d tolls the limitation period. If plaintiffs proceed with their refiled action, defendants will have the opportunity to seek dismissal of that action on the ground that the limitation period has expired.
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> Plaintiffs urge this Court in their reply brief to visit the issue whether their nonconforming affidavit of merit successfully tolled the limitation period. However, this issue was neither raised in defendants' statement of questions presented nor raised by plaintiffs in their cross appeal. Therefore, we need not address this issue. [*Id*. at 583-584.]

Subsequently, in *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003), this Court did address the tolling issue and concluded that a deficient affidavit of merit

warrants dismissal with prejudice if the limitations period has expired. As in *Kirkaldy*, the affidavit of merit filed by the plaintiff in *Geralds* was found by this Court to be defective because it was not signed by a doctor who was board certified in the same specialty as the third-party defendant, and the plaintiff's attorney lacked the requisite reasonable belief that the affiant was qualified under MCL 600.2169. The *Geralds* Court rejected the plaintiff's argument that the trial court erred in dismissing his complaint with prejudice, initially noting that:

> Generally, a civil action is commenced and the period of limitations is tolled when a complaint is filed. MCR 2.101(B); MCL 600.5856. However, to commence a medical malpractice action, a plaintiff must timely file both a complaint and an affidavit of merit. MCL 600.2912d(1); *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000) (*Scarsella II*).
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> MCL 600.2912d does not provide any sanction for a plaintiff's failure to file an affidavit or a plaintiff's filing of a defective affidavit. Before 1993, MCL 600.2912d specifically provided sanctions for a plaintiff's failure to file an affidavit of merit, including dismissal of the complaint, 1986 PA 178; § 2912d(4); however, the 1993 revisions eliminated the reference to sanctions. . . .
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> In *Scarsella II*, the Supreme Court held that when a medical malpractice plaintiff wholly omits to file the affidavit required by MCL 600.2912d(1), "the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation." *Scarsella II, supra* at 553; see also *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002). However, the Supreme Court specifically stated that its "holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective," *Scarsella II, supra* at 553, and specifically reserved the issue "[w]hether a timely filed affidavit that is grossly nonconforming to the statute tolls the statute . . . ." *Id*. at 553 n 7. [*Id.* at 236-237.]

The *Geralds* Court, while acknowledging the suggestion in *Kirkaldy* that a defective affidavit possibly could still toll the period of limitations, *Kirkaldy, supra* at 584, and a similar statement in obiter dictum in *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 712 n 4; 620 NW2d 319 (2000), nonetheless concluded that the filing of the plaintiff's complaint and defective affidavit did not toll the limitation period, and defendant was entitled to dismissal of the suit with prejudice:

> In *Mouradian v Goldberg*, 256 Mich App 566, 573-574; 664 NW2d 805 (2003), a separate panel of this Court disagreed with the panel in *Holmes*, and "decline[d] to apply the *Holmes* dicta as binding precedent to this case," *Mouradian, supra* at 573 n 5, and held that a timely filed affidavit that was grossly nonconforming to the statute was insufficient to constitute an affidavit of merit within the meaning of the statute and insufficient to toll the period of limitations. This Court did not specifically define what types of defects constitute "grossly nonconforming" defects, but stated that "because the affidavit does not contain the requisite statements concerning claims of Dr. Goldberg's alleged

malpractice in the second surgery, plaintiffs' affidavit is 'grossly nonconforming' with respect to this claim." *Id*. at 574.

Semantics aside, whether the adjective used is "defective" or "grossly nonconforming" or "inadequate," in the case at bar, plaintiff's affidavit did not meet the standards contained in MCL 600.2912d(1) and failed to meet the express language of MCL 600.2169(1) because the affiant was a doctor with a different board certification than third-party defendant's board certification.

We hold that plaintiff's affidavit was defective and did not constitute an effective affidavit for the purpose of MCL 600.2912d(1) and, therefore, plaintiff filed a complaint without an affidavit of merit sufficient to commence a medical malpractice action. *Scarsella II, supra* at 553; see also *Mouradian, supra* at 574, (finding that an unsworn affidavit was not a valid affidavit within MCL 600.2912d[1]). We find that because Podgorny was not board certified in emergency medicine, there was no genuine dispute that the affidavit of merit attached to plaintiff's complaint does not comply with the requirements of MCL 600.2912d(1) and that defendant is entitled to judgment as a matter of law. [*Id*. at 239-240.]

Applying the *Geralds* decision to the instant case, where the issue regarding tolling of the statute of limitations was raised in defendant's summary disposition motion, we conclude that, because plaintiff failed to comply with the affidavit of merit statute before the expiration of the statute of limitations, this action was never properly commenced, and summary disposition with prejudice was properly granted by the trial court pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ Richard Allen Griffin
/s/ Pat M. Donofrio