

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DOROTHY GLENN, Personal Representative of  
the Estate of ANDREW GLENN, Deceased,

UNPUBLISHED  
June 17, 2004

Plaintiff-Appellee,

v

No. 245876  
Genesee Circuit Court  
LC No. 02-073261-NH

HAL F. MARTENS, D.O. and CONSULTANTS  
IN ARTHRITIS & ALLIED CONDITIONS,

Defendants-Appellants,

and

GENESYS REGIONAL MEDICAL CENTER and  
HEE DONG PARK, M.D.,

Defendants.

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

PER CURIAM.

Defendants appeal by leave granted the trial court's order granting plaintiff's motion for entry of default. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On April 25, 2002, plaintiff filed a complaint for medical malpractice. The complaint was accompanied by an affidavit of merit, as required by MCL 600.2912d. Pursuant to MCL 600.2912e(1), defendants had ninety-one days from April 25, 2002, or until July 25, 2002, to file an affidavit of meritorious defense. Defendants mailed an affidavit of meritorious defense to plaintiff's counsel on July 24, 2002, but did not file same with the trial court until July 26, 2002.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9)<sup>1</sup> or, in the alternative, entry of default against defendants. Plaintiff argued that defendants' failure to file an affidavit of meritorious defense in a timely manner as required by MCL 600.2912e(1) constituted a failure to plead, and that summary disposition or default was proper under the circumstances. The trial court granted plaintiff's motion for entry of default on the issues of negligence and proximate cause, remarking that if it had discretion, it would make a different decision.

This case presents a question of statutory interpretation, which is reviewed de novo, *Kowalski v Fiutowski*, 247 Mich App 156, 160; 635 NW2d 502 (2001), a case which is factually and legally on all fours with the case now before us. *Kowalski* held that the use of the word "shall" in MCL 600.2912e(1) with regard to filing an affidavit of meritorious defense within ninety-one days after the plaintiff files an affidavit of merit indicates that the requirement is mandatory. *Kowalski, supra* at 160-161. If a defendant fails to comply with the ninety-one-day requirement, it violates the statute. *Id.* However, the Court pointed out that MCL 600.2912e is silent on the subject of the appropriate remedy or sanction to be applied when a defendant violates the statute and it does not expressly permit or forbid an extension of time for filing the affidavit of meritorious defense. *Kowalski, supra.*

Applying principles of statutory construction, this Court determined that a remedy for an untimely filing of the affidavit of meritorious defense could be inferred. *Id.* at 162. It found that the Legislature's deletion of the sanction provision contained in the earlier version of the statute "indicated that it intended to leave the determination of a proper remedy to the discretion of the court," but also noted that the elimination of the time extension provision indicated an intent to require strict compliance with the time limit. *Id.* at 162-163. The *Kowalski* Court concluded that the statute "neither prohibits nor requires a default when the defendant fails to timely file its affidavit of meritorious defense." *Id.* at 163.

The Court's analysis included a discussion of whether a trial court is authorized to enter a default when a defendant fails to file a timely affidavit of meritorious defense. It concluded that an answer to a medical malpractice complaint is not complete without the affidavit of meritorious defense and under such circumstances a defendant has failed to plead. Because MCR 2.603(A) allows the court to enter a default when a defendant fails to "plead or otherwise defend," the trial court is authorized to enter a default when the affidavit of meritorious defense is untimely. *Kowalski, supra* at 163-164.

In the cases addressed in *Kowalski*, the trial courts entered defaults without recognizing that they had the discretion to determine the appropriate remedy applicable under the particular circumstances of each case, precisely the situation presented here. The *Kowalski* Court set forth some guidelines to be followed by trial courts in determining the appropriate sanction against a defendant for failing to timely file an affidavit of meritorious defense. It explained:

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<sup>1</sup> On appeal we do not address plaintiff's arguments with regard to MCR 2.116(C)(9) (failure to state a valid defense), because the trial court's order granted a default and did not reference the court rule.

[I]n each of these cases, although a default was a permissible remedy, the trial court erroneously believed that it was required by statute to enter a default and that it had no discretion to fashion any other appropriate sanction. Because the trial court did not exercise discretion in entering the default and did not consider the possibility of any other remedies, it erred in refusing to set aside the default. We reverse its orders and remand for exploration of the issues of setting aside the defaults for good cause and what remedies should be ordered. We recognize that the trial court may ultimately find a default to be appropriate, but it may reach its conclusion only after exercising its own discretion in the matter. In selecting a sanction both appropriate and effective in compelling compliance with the statute, the trial court may consider the reasons for defendants' delays, what other actions defendants took to apprise plaintiffs and the court of those reasons, any prejudice to plaintiffs resulting from the delays, and any other factors relevant to the determination. [*Id.* at 165-166.]

In this case, the trial court ruled, "Defendants missed the deadline by one day, and so the Court must grant Plaintiff some relief according to the statute, and enters default." The trial court, while seeming to recognize that it had some discretion, failed to exercise its discretion, saying, "[I]f I had discretion I would not rule this way." The trial court further commented that it knew it had discretion, but not the extent of the discretion. MCL 600.2912e(1) neither requires nor prohibits the entry of a default for a defendant's failure to file an affidavit of meritorious defense in a timely manner. The Legislature intended to leave the determination of a proper remedy to the trial court. A trial court has the discretion to determine what remedy is appropriate under the particular circumstances presented by the case. *Kowalski, supra*. An appropriate remedy could include default, summary disposition under MCR 2.116(C)(9), or a lesser sanction.

We reverse the trial court's order entering a default against defendants, and remand this matter to the trial court for the determination of a proper remedy for defendants' failure to file an affidavit of meritorious defense in a timely manner. On remand, the trial court is to consider the range of remedies available to it. In fashioning a remedy, the trial court may consider the reason for defendants' delay in filing the affidavit of meritorious defense, any prejudice to plaintiff resulting from the delay, and any other relevant factors. *Id.* at 166.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff  
/s/ Brian K. Zahra  
/s/ Christopher M. Murray