

STATE OF MICHIGAN
COURT OF APPEALS

MARIA MILLER and STEVE MILLER,

Plaintiffs-Appellees,

v

DR. JEFFREY A. KEZLARIAN,

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 249641

Oakland Circuit Court

LC No. 02-045543-NH

Before: Meter, P.J., and Wilder and Schuette.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion for summary disposition in this medical malpractice case. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On August 31, 2000 plaintiffs, acting *in propria persona*, filed suit alleging that defendant, a board-certified psychiatrist, committed medical malpractice when treating Maria Miller. The complaint was accompanied by an affidavit of merit signed by a psychiatrist who is not board-certified in Michigan. The trial court dismissed the case without prejudice on the ground that the affidavit did not conform to the statutory requirements, concluding that the statute of limitations had been tolled while the case was pending.

On November 20, 2002 plaintiffs, through counsel, re-filed the action. The complaint was accompanied by an affidavit of merit signed by a board-certified psychiatrist. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that the instant action was barred by the statute of limitations. The trial court denied the motion, holding that the affidavit of merit that accompanied the original complaint was not grossly nonconforming and tolled the limitations period.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The statute of limitations for a medical malpractice action is two years. MCL 600.5805(6). A medical malpractice plaintiff must file with the complaint an affidavit of merit signed by a health professional who meets or whom the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. The affidavit must contain a statement of the applicable standard of practice, the health professional's opinion that the

defendant breached the applicable standard of practice, the actions the defendant should have taken in order to have complied with the applicable standard of practice, and the manner in which the breach of the standard of practice was the proximate cause of the alleged injury. MCL 600.2912d(1). If the defendant is board-certified in a specialty, the expert witness must be board-certified in the same specialty. MCL 600.2169(1).

We reverse the trial court's order denying defendant's motion for summary disposition. An affidavit of merit that is grossly nonconforming to the statutory requirements does not support the filing of a complaint that tolls the running of the statute of limitations. *Geralds v Munson Healthcare*, 259 Mich App 225, 239-240; 673 NW2d 792 (2003); *Mouradian v Goldberg*, 256 Mich App 566, 571-575; 664 NW2d 805 (2003).¹ The instant action was filed after the two-year limitations period expired on May 5, 2001. The affidavit that accompanied the original complaint was not signed by a board-certified psychiatrist. The trial court reasoned that this fact was irrelevant because the affidavit set forth specific allegations regarding the applicable standard of practice and how defendant breached that standard. However, the fact that a witness might be competent to testify regarding a particular issue is not dispositive. *Decker v Flood*, 248 Mich App 75, 83-84; 638 NW2d 163 (2001) (specialist may not testify as to the standard of practice for a general practitioner). Plaintiffs' assertion that their belief that the physician was qualified to give expert testimony against defendant was reasonable given that he is recognized as a specialist in psychiatry in Maryland and that they were acting *in propria persona* when they filed the original complaint is without merit. Absent an inquiry into a health professional's qualifications to sign an affidavit of merit, a belief that the health professional is qualified as an expert witness is not reasonable. *Geralds, supra* at 230-234. The filing of a nonconforming affidavit of merit with the original complaint did not toll the limitations period. *Id.* at 239-240; *Mouradian, supra*. Defendant was entitled to dismissal of this action with prejudice. *Id.*

Reversed.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Bill Schuette

¹ Plaintiffs argue that *Geralds, supra*, which was decided after the trial court denied defendant's motion for summary disposition, should not be given retroactive effect. However, plaintiffs made no such argument in the trial court with respect to *Mouradian, supra*, which defendant cited in support of his motion. Plaintiffs' argument regarding retroactivity has not been properly preserved for appeal. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004).