STATE OF MICHIGAN

COURT OF APPEALS

MARK LACEY and HEIDI LACEY,

Plaintiffs-Appellants,

v

STEVEN P. KLEGMAN, D.O., and GRAND TRAVERSE RADIOLOGISTS P.C.,

Defendants-Appelleess,

and

MUNSON MEDICAL CENTER,

Defendant.

UNPUBLISHED
June 17, 2008

No. 277774
Grand Traverse Circuit Court
LC No. 06-025153-NH

MARK LACEY and HEIDI LACEY,

Plaintiffs-Appellees,

v

STEVEN P. KLEGMAN, D.O., and GRAND TRAVERSE RADIOLOGISTS,

Defendants-Appellants,

and

MUNSON MEDICAL CENTER,

Defendant.

No. 278200
Grand Traverse Circuit Court
LC No. 06-025153-NH

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In Docket No. 277774, plaintiffs Mark and Heidi Lacey appeal as of right the trial court's order granting summary disposition to defendants. In this medical malpractice action, in Docket No. 278200, defendants Steven P. Klegman, D.O., and Grand Traverse Radiologists appeal as of right the trial court's order denying their motion for case evaluation sanctions. Because plaintiffs' affidavits of merit failed to comply with MCL 600.2912d(1), we affirm the trial court's order granting summary disposition to defendants. However, because the appropriate remedy was dismissal without prejudice, we reverse the trial court's order dismissing plaintiffs' claims with prejudice and remand for an order dismissing the claims without prejudice. In addition, because the order dismissing plaintiffs' claims without prejudice is not a "verdict" under MCR 2.403(O)(2), we affirm the trial court's order denying defendants' motion for case evaluation sanctions.

I. Background

On October 24, 2003, plaintiff Mark Lacey[1] went to Munson Medical Center for an MRI of the lumbar spine. The MRI, as read by Dr. Klegman, a licensed and practicing physician, specializing in diagnostic radiology, showed a left posterolateral annular bulge at L5-S1.

Eighteen days later, on November 11, 2003, plaintiff went to the office of Dr. Prusick, where he was seen by Paula Robey, a physician's assistant. Robey reviewed the October 24, 2003 MRI. She noted that, in addition to the posterolateral annular bulge, there was a far lateral disk herniation at L3-4. Robey prescribed plaintiff steroids and referred him to the pain clinic. Later that day, plaintiff appeared at the Munson Medical Center for intractable pain. At the request of Dr. Prusick, a radiologist looked at the October 24, 2003 MRI, and a disk herniation with displacement of the L3 nerve root was observed. Dr. Prusick recommended surgery, and a far lateral diskectomy was performed. Following surgery, plaintiff developed left L3 radiculopathy. He continues to suffer from chronic pain and numbness.

Plaintiff submitted with his complaint two affidavits of merit. In the first affidavit of merit, Stuart Mirvis, M.D., a licensed and practicing physician, specializing in diagnostic radiology, addressed the standard of care:

> 3. As to Dr. Steven P. Klegman . . . when a patient exhibiting the signs and symptoms such as those demonstrated by Mark Lacey, owed a duty to:
>
> > a. Properly perform and interpret a[n] MRI with abnormal findings, including, but not limited to, a left posterolateral annular bulge at L5-S1, as well as a lateral disk herniation at L3-L4.
>
> * * *

[1] Plaintiffs are husband and wife. Because any claims by Heidi Lacey are derivative of her husband's claims, the term "plaintiff" in the singular refers to Mark Lacey.

> 6. It is my opinion that the acts or omissions listed above constitute violations of the applicable standard of care.
>
> 7. In order to have conformed with the above-named should have done those listed in paragraph[] 3.

In the second affidavit of merit, Gary Lustgarten, M.D., a licensed and practicing physician, specializing in neurological surgery, addressed the issue of causation:

> 3. That it is my opinion that within a reasonable degree of medical certainty the violations of the standard of care by the above named Defendants, as outlined in the Affidavit of Merit of STUART MIRVIS, M.D., are the proximate cause of the damages claimed by Plaintiff Mark Lacey.
>
> 4. That within a reasonable degree of medical certainty, timely and proper compliance with the standard of care as described above would have prevented Mark Lacey, from suffering the damages alleged by the Plaintiff.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). Defendants argued the two affidavits of merit were defective because, contrary to MCL 600.2912d(1), the affidavits did not specify the manner in which the alleged breach of the standard of care was the proximate cause of plaintiff's injuries. Alleging that the statute of limitations is not tolled when a medical malpractice complaint is filed with a defective affidavit of merit, defendants argued plaintiffs' claims were barred by the statute of limitations. Defendants requested the trial court to dismiss the present action with prejudice. Defendants also claimed that Dr. Lustgarten could not support his statement regarding causation because, in his deposition, he testified that he could not state with any degree of reliability how plaintiff's injuries would have differed with a timely diagnosis. The trial court granted summary disposition to defendants, finding that, because the affidavits of merit did not set forth "how" the delay in diagnosis caused plaintiff's subsequent injuries, the affidavits failed to comply with MCL 600.2912d(1).[2]

Defendants thereafter moved for case evaluation sanctions. The trial court denied the motion, pursuant to MCR 2.403(O)(11), finding that it would be unfair to have plaintiffs pay case evaluation sanctions when defendants could have moved for summary disposition on the basis that the affidavits of merit were defective approximately nine months earlier, when the limitations period had expired.

II. Motion for Summary Disposition

[2] In its order granting summary disposition to defendants, the trial court wrote, "This order does resolve all pending claims and closes the case." The parties agree that the order dismissed plaintiffs' claims with prejudice.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). This Court also reviews de novo questions of law relating to the sufficiency of an affidavit of merit. *Vanslembrouck v Halperin*, 277 Mich App 558, 560-561; 747 NW2d 311 (2008).

To commence a medical malpractice action, a plaintiff must file a complaint and an affidavit of merit. *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). The purpose of the affidavit of merit is to deter frivolous medical malpractice claims by verifying through the opinion of a health professional that the plaintiff's claims are valid. *Barnett v Hidalgo*, 478 Mich 151, 163-164; 732 NW2d 472 (2007). Pursuant to MCL 600.2912d(1), the affidavit of merit shall contain a statement of each of the following:

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

The issue is whether the affidavit of merit signed by Dr. Lustgarten adequately detailed "[t]he manner" in which the alleged breach of the standard of care by Dr. Klegman was the proximate cause of plaintiff's injury. The mere correlation between alleged malpractice and an injury is insufficient to show proximate cause. *Craig v Oakwood Hosp*, 471 Mich 67, 93; 684 NW2d 296 (2004). Proximate cause consists of both factual and legal causation. *Id.* at 86. Factual causation requires showing that "but for" the defendant's actions, the plaintiff's injuries would not have occurred. *Id.* at 86-87. Legal causation involves examining the foreseeability of consequences and whether the defendant should be held responsible for the consequences. *Id.* at 87.

The statements in the affidavit of merit signed by Dr. Lustgarten do not adequately describe the manner in which the alleged breach of the standard of care by Dr. Klegman was the proximate cause of plaintiff's subsequent injuries, which plaintiff describes as his radiculopathy and chronic pain. While Dr. Lustgarten averred that had Dr. Klegman timely and properly interpreted the MRI as showing a disk herniation, plaintiff would not have suffered his subsequent injuries, the affidavit of merit does not describe the manner in which Dr. Klegman's failure to timely and properly interpret the MRI factually and foreseeably caused plaintiff's injuries. In other words, Dr. Lustgarten failed to specify the manner in which a proper and timely interpretation of the MRI would have averted plaintiffs' radiculopathy and chronic pain. Accordingly, the trial court properly found that plaintiff's affidavits of merit did not comply with MCL 600.2912d(1). Summary disposition was properly granted to defendants.

However, the trial court erred in dismissing plaintiffs' claims with prejudice. Although case law from our Court established that the filing of a defective affidavit of merit was the equivalent of failing to file an affidavit of merit for the purpose of tolling the statute of limitations,[3] see *Geralds v Munson Healthcare*, 259 Mich App 225, 235-240; 673 NW2d 792 (2003); *Mouradian v Goldberg*, 256 Mich App 566, 574; 664 NW2d 805 (2003), our Supreme Court has overruled *Geralds* and *Mouradian*. In *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007), the Supreme Court stated that because an affidavit of merit is presumed valid, the filing of the complaint and affidavit of merit tolls the limitations period until the validity of the affidavit is successfully challenged in subsequent judicial proceedings. "Only a successful challenge will cause the affidavit to lose its presumption of validity and cause the period of limitations to resume running." *Id.* Accordingly, when plaintiffs filed the complaint and affidavits of merit, the filing tolled the limitations period.[4] Because defendants' challenge to the validity of the affidavits of merit was successful, the proper remedy is dismissal without prejudice. *Id.* Therefore, we remand for entry of an order dismissing plaintiffs' claims without prejudice. Plaintiffs shall have whatever time remains in the limitations period to file a complaint accompanied by conforming affidavits of merit. *Id.*; *Potter v McLeary (On Remand)*, 278 Mich App 279, 283; 748 NW2d 599 (2008).[5]

We deny defendants' request to limit the Supreme Court's holding in *Kirkaldy* to prospective application. Generally, a judicial decision is to be given complete retroactive effect. *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999). Since deciding *Kirkaldy*, the Supreme Court has retroactively applied *Kirkaldy* to cases pending before it. See *Bates v Gilbert*, 479 Mich 451, 463 n 7; 736 NW2d 566 (2007); *Dube v St. John Hosp & Medical Ctr*, 480 Mich 914; 739 NW2d 867 (2007); *Bailey v Pornpichit*, 480 Mich 909; 739 NW2d 619 (2007); *Glisson v Gerrity*, 480 Mich 883; 738 NW2d 237 (2007); *Newsome v Bono*, 480 Mich 852; 737 NW2d 727 (2007); *Robertson v Ascherl*, 480 Mich 851; 737 NW2d 690 (2007). The Supreme Court's retroactive application of *Kirkaldy* convinces us that *Kirkaldy* is to be given complete retroactive effect.

III. Motion for Case Evaluation Sanctions

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[3] A medical malpractice complaint filed without an affidavit of merit is insufficient to commence the action and to toll the limitations period. *Scarsella*, *supra* at 550.

[4] We decline defendants' request to hold that a "wholly nonconforming" affidavit of merit, described by defendants as one that has a "complete absence of any meaningful description of the manner of proximate cause," is not sufficient to toll the statute of limitations. We find no support for such a holding in *Kirkaldy*.

[5] Although plaintiffs did not raise the issue whether the order of dismissal should be with or without prejudice below, we decided to address the issue because the issue presents a question of law, *Boyle v Gen Motors Corp*, 468 Mich 226, 229-230; 661 NW2d 557 (2003), and all the facts necessary for resolution of the issue have been presented. See *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002).

This Court reviews de novo a trial court's decision to award medication sanctions. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). However, a trial court's decision to deny case evaluation sanctions pursuant to the interest of justice exception, MCR 2.403(O)(11), is reviewed for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003). Because we remand for an entry of dismissal without prejudice, we must determine whether an order of dismissal without prejudice is a "verdict" under MCR 2.403(O)(2).

If a party has rejected a case evaluation, and so has the opposing party, and the action proceeds to verdict, the party must pay the opposing party's actual costs if the verdict is more favorable to the opposing party than the case evaluation. MCR 2.403(O)(1). MCR 2.403(O)(2) contains a precisely worded definition of "verdict." *Freeman v Consumers Power Co*, 437 Mich 514, 519; 473 NW2d 63 (1991). MCR 2.403(O)(2) provides:

> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

The issue is whether a dismissal without prejudice entered as a result of a ruling on a motion after rejection of the case evaluation is a "judgment." MCR 2.430(O) does not define "judgment."

The rules of statutory construction apply to the construction of court rules. *Hill v LF Transportation, Inc*, 277 Mich App 500, 507; 746 NW2d 118 (2008). An undefined term is to be given its plain and ordinary meaning, and it is appropriate to consult a dictionary for the term's definition. *Robinson v Ford Motor Co*, 277 Mich App 146, 152; 744 NW2d 363 (2007). A "judgment" is defined as "[a] court's final determination of the rights and obligations of the parties in a case." Black's Law Dictionary (7th ed).

In the present case, there was no judgment. The only determination made in the case was that plaintiffs' affidavits of merit failed to comply with MCL 600.2912d(1). Because the order for dismissal is to be without prejudice, there was no determination regarding the rights and obligations of the parties. Plaintiffs are free to refile their claims against defendants, *Kirkaldy, supra*, at which time, should plaintiffs file with the complaint conforming affidavits of merit, the rights and obligations of the parties will be determined. See *Thomas v Michigan Employment Security Comm*, 154 Mich App 736, 742; 398 NW2d 514 (1986) ("The inclusion of the term 'without prejudice' in a judgment of dismissal ordinarily indicates the absence of a decision on the merits, and leaves the parties free to litigate the matter in a subsequent action, as though the dismissed action had not been commenced") (quotations omitted). Because the order of dismissal without prejudice is not a "judgment," and thus is not a "verdict" under MCR 2.403(O)(2), defendants are not entitled to their actual costs. Accordingly, we affirm the trial court's order denying defendants' motion for case evaluation sanctions. See *Etefia v Credit*

Technologies, Inc, 245 Mich App 466, 470; 628 NW2d 577 (2001) (this Court will not reverse a trial court's order if it reached the right result for the wrong reason).

Affirmed in part, reversed in part, and remanded for entry of an order dismissing plaintiffs' claims without prejudice. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra