STATE OF MICHIGAN

COURT OF APPEALS

BETTY SIMON and BOBBY SIMON, SR.,

Plaintiffs-Appellants,

v

KIM WIDRIG, C.R.N.A., PASTOR A. APEROCHO, JR., M.D., LIFECARE ANESTHESIOLOGISTS, P.C., AND HILLSDALE COMMUNITY HEALTH CENTER,

Defendants-Appellees.

UNPUBLISHED
July 15, 2008

No. 277070
Hillsdale Circuit Court
LC No. 06-000408-NH

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

In this medical malpractice action, the trial court granted defendants' motions for summary disposition, dismissing with prejudice plaintiffs' claims under MCR 2.116(C)(7), (8), and (10). Plaintiffs appeal as of right. Because plaintiffs never properly commenced this action, we affirm.

I. Background

On January 5, 2005, plaintiff[1] underwent surgery to remove an ovarian cyst at defendant Hillsdale Community Health Center (Health Center). Before the surgery, defendant Kim Widrig, C.R.N.A.,[2] inserted an epidural catheter into plaintiff and administered the general anesthesia. After surgery and upon waking from the anesthesia, plaintiff complained of parathesia and pain in her lower legs and feet. The following day, tests performed by a neurosurgeon showed that

[1] Plaintiffs, Betty and Bobby Simon, are wife and husband. Because any claims by Bobby Simon are derivative of his wife's claims, the term "plaintiff" in the singular refers to Betty Simon.

[2] Widrig was employed as a nurse anesthetist by defendant Lifecare Anesthesiologists, PC. Defendant Pastor Aperocho, M.D., was the president of Lifecare Anesthesiologists.

plaintiff suffered a direct neurotoxicity to the spinal cord and nerve root as a result of the Lidocaine from the epidural. Plaintiff is now unable to walk without the assistance of a walker.

Plaintiffs mailed a notice of intent to defendants on March 8, 2006. On June 28, 2006, just 112 days later, plaintiffs filed a complaint against defendants with the trial court. Defendants, except Widrig, were served with a summons and a copy of the complaint on July 19, 2006. Widrig was served on September 9, 2006. In his answer, Widrig listed the following affirmative defenses:

> 3. All claims for damages as contained in Plaintiffs' Complaint are barred by the applicable Statute of Limitations and/or applicable savings provisions.
>
> 4. Plaintiffs have failed to comply with the provisions of MCL 600.2912b.
>
> * * *
>
> 9. That any or all named Plaintiffs failed to comply with the notice provisions of MCL 600.2912b and that Plaintiffs' action is thus barred. Defendant gives notice that he will move for summary disposition.[3]

On January 12, 2007, two years and seven days after the alleged malpractice occurred, Widrig moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Widrig claimed that, because a complaint filed before the expiration of the notice period, either 182 days, MCL 600.2912b(1), or 154 days, MCL 600.2912b(8), is insufficient to commence a medical malpractice action and to toll the statute of limitations and because more than two years had passed since the date of the alleged malpractice, plaintiffs' claims were barred by the statute of limitations. The remaining defendants joined in Widrig's motion.

Plaintiffs moved to strike defendants' affirmative defenses. According to plaintiffs, because defendants chose to "set forth a boilerplate recitation of legal conclusions," rather than to provide a statement of the facts supporting the affirmative defenses, as required by MCR 2.111(F)(3), defendants had waived their affirmative defenses. The trial court denied the motion to strike, finding that defendants, by stating that plaintiffs' claims failed to comply with MCL 600.2912b and that the claims were barred by the applicable statute of limitations, placed plaintiffs on notice that they failed to comply with the time requirements of MCL 600.2912b.

Thereafter, plaintiffs responded to Widrig's motion for summary disposition. They claimed that, because a civil action is commenced upon the filing of a complaint with the trial court, they commenced the medical malpractice action when they filed the complaint and,

---

[3] The Health Center listed plaintiffs' "failure to comply with MCL 600.2912b" as an affirmative defense. Lifecare Anesthesiologists and Aperocho listed neither the statute of limitations nor plaintiffs' failure to comply with MCL 600.2912b as an affirmative defense.

therefore, the statute of limitations was tolled. In addition, because none of defendants evidenced an intent to settle the present case, plaintiffs claimed that the filing of the complaint before the notice period expired did not prejudice defendants.

The trial court, citing to *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), stated that it had no choice but to grant summary disposition to defendants. Because the limitation period had expired, the trial court dismissed plaintiffs' claims with prejudice.

II. Analysis

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). Summary disposition is proper under MCR 2.116(C)(7) if the claim is barred by the statute of limitations. *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 288; 731 NW2d 29 (2007). Generally, the statute of limitations in a medical malpractice is two years from the date the claim accrues. MCL 600.5805(6); *Braverman v Garden City Hosp*, 275 Mich App 705, 710; 740 NW2d 744 (2007), aff'd 480 Mich 1159 (2008).

Plaintiffs concedes they filed the complaint with the trial court before the notice period, MCL 600.2912b(1), (8), expired. Nonetheless, they claim the trial court erred in granting summary disposition to defendants Pastor Aperocho, M.D., and Lifecare Anesthesiologists because the two defendants failed to plead a statute of limitations defense or any defense based on plaintiffs' failure to comply with MCL 600.2912b in their answer, as required by MCR 2.111(F)(2). Similarly, plaintiffs claim the trial court erred in granting summary disposition to the Health Center because it failed to set forth in its answer any facts to support its defense that plaintiffs failed to comply with MCL 600.2912b. See MCR 2.111(F)(3). Finally, plaintiffs claim the trial court erred in granting summary disposition to Widrig because Widrig was not served with a summons and a copy of the complaint until after the notice period had expired. According to plaintiffs, the present action was not commenced against Widrig until he had been served with process.

A. Timeliness of Complaint

A medical malpractice claimant is prohibited from commencing suit against a health professional or health facility unless written notice is provided to the professional or facility before the action is commenced. MCL 600.2912b(1); *Burton, supra* at 751. MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person *shall not* commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [Emphasis added.]

Generally, the claimant must wait 182 days after providing the notice of intent to commence the medical malpractice action. MCL 600.2912b(1). However, the plaintiff may commence the action after 154 days if the health professional or health facility fails to respond to the notice of

intent. MCL 600.2912b(8). As already stated, plaintiffs concede that they filed the complaint with the trial court before the notice period expired.[4]

MCL 600.2912d(1) provides that, in a medical malpractice action, a "plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional . . . ." In *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000), the Supreme Court held that, based on the Legislature's use of the word "shall," a "mandatory and imperative" directive in MCL 600.2912d(1), the mere tendering of a complaint without the required affidavit of merit is insufficient to commence a medical malpractice action.

Relying on *Scarsella*, the Supreme Court in *Burton, supra* at 753-754, held that a complaint filed before the expiration of the notice period is insufficient to commence a medical malpractice action:

> The directive in § 2912b(1) that a person "shall not" commence a medical malpractice action until the expiration of the notice period is similar to the directive in § 2912d(1) that a plaintiff's attorney "shall file with the complaint an affidavit of merit . . . ." Each statute sets forth a prerequisite condition to the commencement of a medical malpractice lawsuit. The filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit. In each instance, the failure to comply with the statutory requirement renders the complaint insufficient to commence the action.

Thus, as plaintiffs conceded, the complaint in this case was untimely, and it failed to properly commence the malpractice action.

B. Statute of Limitation Defense

Nevertheless, plaintiffs maintain that defendants Aperocho and Lifecare Anesthesiologists should be precluded from asserting a statute of limitations defense because they failed to properly preserve it as required by MCR 2.111(F)(2). We disagree.

In *Auslander v Chernick*, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2007 (Docket No. 274079), reversed 480 Mich 910 (2007), the plaintiffs filed a medical malpractice complaint unaccompanied by an affidavit of merit. The defendants, in their answers, asserted that the plaintiffs' claims were "barred by the statute of limitations as it applies to malpractice actions" and that plaintiffs' affidavit of merit "fails to meet the requirements" of MCL 600.2912a and MCL 600.2912d. The defendants moved for summary disposition, arguing, in part, that plaintiffs failed to file an affidavit of merit with the complaint. In response, the plaintiffs argued that, because the defendants failed to set forth any factual basis for its affirmative defenses, the defense was waived pursuant to MCR 2.111(F)(2). Finding that the

[4] Plaintiffs also do not dispute that, because the statute of limitations did not expire during the notice period, the statute of limitations was not tolled by MCL 600.5856(c).

defendants waived any defenses relating to the sufficiency of the affidavit of merit for failure to plead a sufficient factual basis, the trial court denied the defendants' motion for summary disposition, and a panel of this Court affirmed. According to the Court, the asserted defense was not only devoid of facts underlying the defense, it was contrary to the facts because it indicated that an affidavit of merit had been filed. *Id.*, slip op 3.

The Supreme Court reversed "for the reasons stated in the Court of Appeals dissenting opinion," and it remanded for entry of an order granting the defendants' motion for summary disposition. *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007). The dissenting judge in *Auslander* opined:

> I fully acknowledge that a defendant must raise certain defenses in its first responsive pleading, and that a failure to do so may result in the waiver of those defenses. See MCR 2.111(F)(2); MCR 2.111(F)(3). However, I conclude that [the] defendants were never required to raise or plead their asserted defenses in the first instance because this medical malpractice action was never properly commenced.
>
> [The p]laintiffs' claims arose, at the latest, at the time of the myocardial infarction in March 2003. "[T]he mere tendering of a complaint without the required affidavit of merit is insufficient to commence [a medical malpractice] lawsuit," and therefore does not toll the two-year period of limitations. *Scarsella*[, *supra* at 549-550.] In this case, [the] plaintiffs wholly omitted to file the requisite affidavits of merit, and their complaint of September 2004 was therefore insufficient to toll the limitations period. *Id.* Regardless whether [the] defendants properly raised and preserved the statute-of-limitations and affidavit-of-merit defenses in their first responsive pleading, the period of limitations was not tolled by plaintiffs' complaint, and plaintiffs' claims were already time-barred at the time of the circuit court's ruling. *Id.* at 553. I would reverse and remand for dismissal with prejudice of [the] plaintiffs' claims. MCR 2.116(C)(7); *Scarsella*, *supra* at 551-552. [*Auslander*, *supra* at slip op 1-2 (Jansen, J., dissenting).][5]

Because they filed the complaint before the notice period expired, plaintiffs never properly commenced this medical malpractice action. *Burton*, *supra* at 752. Therefore,

---

[5] Because, from the terms of the Supreme Court's peremptory order in *Auslander* and this Court's unpublished opinion, this Court can determine the applicable facts and the reason for the Supreme Court's decision, the Supreme Court's peremptory order constitutes binding precedent. See *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 591 n 8; 546 NW2d 690 (1996), remanded on other grounds 455 Mich 863 (1997); see also *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 195-196; 650 NW2d 364 (2002) (finding as binding precedent a peremptory order from the Supreme Court when the order stated that the Supreme Court "agrees with the Court of Appeals dissent's discussion of principles" and the opinion from this Court was an unpublished opinion).

defendants were not required to plead a statute of limitations defense in their answer. Regardless whether defendants properly raised and preserved such a defense in their answers, the two-year limitation period was not tolled by the filing of plaintiffs' complaint, and plaintiffs' claims were already time-barred at the time of the trial court's ruling. *Id.* at 756.[6] Accordingly, we affirm the trial court's order granting defendants' motions for summary disposition with prejudice.[7]

C. Service of Summons

In affirming the trial court's order, we also reject plaintiffs' claim that the action against Widrig was not commenced until September 9, 2006, the day Widrig was served with process and which was more than 182 days after the notice of intent was mailed.[8] "A civil action is commenced by filing a complaint with a court." MCR 2.101(B). See also MCL 600.1901 ("A civil action is commenced by filing a complaint with the court"); MCL 600.5856(a) (the statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules"). We recognize that, because of *Burton, supra*, and *Scarsella, supra*, a medical malpractice action is not commenced upon the mere filing of a complaint with the trial court. A medical malpractice action is only commenced if the complaint is filed after the notice period has expired, *Burton, supra*, and an affidavit of merit accompanies the complaint, *Scarsella, supra*. However, nothing in *Burton* or *Scarsella* supports the proposition that a medical malpractice action is not commenced until the defendant has been served with process.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

---

[6] Although defendants may not have been prejudiced by plaintiffs' premature filing of the complaint, prejudice to defendants is not relevant to the inquiry whether, because of plaintiffs' failure to comply with MCL 600.2912b, summary disposition should be granted to defendants. *Burton, supra* at 753.

[7] In supplemental authority, plaintiffs claim that, based on *Kirkaldy v Rim*, 478 Mich 581, 585-586; 734 NW2d 201 (2007), the proper remedy for their failure to comply with the requirements of MCL 600.2912b is dismissal without prejudice. In *Kirkaldy*, the Supreme Court stated that the statute of limitations is tolled when a complaint and an affidavit of merit are filed. However, as stated by the Supreme Court, the filing of a complaint before the expiration of the notice period is the equivalent of filing a complaint *without* an affidavit of merit. *Burton, supra* at 753-754. Neither is sufficient to commence a medical malpractice action. *Id.* at 754. Accordingly, we conclude *Kirkaldy* is not applicable to the present case.

[8] We note that plaintiffs' argument on appeal is inconsistent with the position taken below, that the medical malpractice action was commenced when the complaint was filed. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994).