STATE OF MICHIGAN

COURT OF APPEALS

MARCIA DOWNS, f/k/a MARCIA DOUGLAS, as Personal Representative of the Estate of NATASHA DOUGLAS,

Plaintiff-Appellant,

v

MARILYN S. KEEBLER, f/k/a MARILYN S. MORRIS, JEFFREY W. WILDER, and DANIEL J. VERBURG, d/b/a DANIEL VERBURG, M.D., P.C., d/b/a BAY VIEW OBSTETRICS & GYNECOLOGY, a/k/a BURNS CLINIC OBSTETRICS & GYNECOLOGY,

Defendants-Appellees,

and

DEBBIE PLUIM, a/k/a DEBRA PLUIM,

Defendant.

UNPUBLISHED
October 21, 2008

No. 256422
Emmet Circuit Court
LC No. 04-008032-NI

ON REMAND

MARCIA DOWNS, f/k/a MARCIA DOUGLAS, as Personal Representative of the Estate of NATASHA DOUGLAS,

Plaintiff-Appellant,

v

NORTHERN MICHIGAN HOSPITALS, INC., d/b/a NORTHERN MICHIGAN HOSPITAL,

Defendant-Appellee.

No. 256462
Emmet Circuit Court
LC No. 04-008040-NH

ON REMAND

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

This case returns to us on remand from the Supreme Court.[1] In separate orders entered on March 7, 2008, our Supreme Court denied the applications in Docket Nos. 253611 and 255045.[2] In another order entered on March 7, 2008 in Docket Nos. 256422 and 256462, our Supreme Court stated:

> By order of April 25, 2007, the application for leave to appeal the November 28, 2006 judgment of the Court of Appeals was held in abeyance for *Mullins v St Joseph Mercy Hospital* (Docket No. 131879). On order of the Court, the case having been decided on November 28, 2007, 480 Mich 948 (2007), the application is again considered and pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of the order in *Mullins* and our decision in *Kirkaldy v Rim*, 478 Mich 581 (2007).

Thus, our Supreme Court vacated this Court's judgment in regard to Docket Nos. 256422 and 256462,[3] and has remanded the appeal to this Court for reconsideration in light of *Mullins* and *Kirkaldy*.

I. Underlying Facts and Proceedings

In February 2000, plaintiff learned that she was pregnant. The following month, plaintiff began receiving prenatal care at defendant Bay View Obstetrics & Gynecology (Bay View). Defendants Dr. Daniel Verburg and Marilyn Keebler, a nurse midwife, managed plaintiff's care.

Plaintiff entered defendant Northern Michigan Hospital (NMH) on October 23, 2000, for induction of labor. Defendants Dr. Wilder and Debra Pluim,[4] a nurse midwife, both employees of Bay View, admitted plaintiff and began the induction, respectively. Plaintiff's daughter Natasha was born at 10:54 a.m. on October 23, 2000, and died at 7:42 p.m. that same day from severe birth asphyxia.

---

[1] *Downs v Keebler*, 480 Mich 1081, 745 NW2d 101 (2008).

[2] *Downs v Northern Michigan Hospitals, Inc*, 480 Mich 1103, 745 NW2d 98 (2008); *Cryderman v Verburg*, 480 Mich 1104, 745 NW2d 100 (2008).

[3] *Downs v Keebler*, unpublished opinion per curiam of the Court of Appeals, issued November 28, 2006 (Docket Nos. 253611; 255045; 256422; 256462).

[4] Pluim was dismissed from the appeal in Docket No. 256422 pursuant to a stipulated order entered on August 28, 2008.

Plaintiff was named personal representative of Natasha's estate, and received letters of authority on August 9, 2001. Plaintiff filed a wrongful death action on April 4, 2002, naming as defendants Verburg, Wilder, Bay View, and NMH. *Cryderman*[5] *v Verburg, et al*, Emmet County Circuit Court Docket No. 02-007011-NH.[6] Accompanying the complaint were affidavits of merit signed by Dr. Berke, who is board certified in obstetrics and gynecology, and Elizabeth Hill-Carbowski, who is a nurse midwife. Defendants moved for summary disposition. On March 27, 2003, the trial court issued a written decision granting summary disposition for defendants. The court found that the affidavits of merit did not meet the requirements set out in MCL 600.2912d(1), and thus were insufficient. Plaintiff filed an application for delayed appeal, and on September 22, 2004, this Court granted the application.

On May 27, 2003, plaintiff refiled her wrongful death action. *Downs v Keebler, et al*, Emmet County Circuit Court Docket No. 03-007681-NH. Among the affirmative defenses raised by defendants was that the notices of intent mailed by plaintiff in July 2001 and July 2002 did not comply with MCL 600.2912b(4). The trial court agreed that the notices were defective. On August 5, 2003, plaintiff's counsel mailed a new notice to each defendant. Defendants sought summary disposition, and on December 11, 2003, and January 12, 2004, the trial court entered orders granting summary disposition. Plaintiff claimed an appeal from the trial court's orders granting summary disposition for defendants.

On January 6, 2004, plaintiff filed suit naming as defendants Keebler, Pluim, Verburg, Wilder, and Bay View. *Downs v Keebler, et al*, Emmet Circuit Court Docket No. 04-008032-NH. On January 16, 2004, plaintiff filed a second case, naming NMH as the sole defendant therein. *Downs v Northern Michigan Hosp*, Emmet Circuit Court Docket No. 04-008040-NH.

Thereafter, defendants in both cases moved for summary disposition pursuant to MCR 2.116(C)(7), claiming that plaintiff's cases were barred by the statute of limitations. The trial court held a hearing on the motions, and took the matter under advisement.

Shortly thereafter, our Supreme Court decided *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). In that case, our Supreme Court held that the notice tolling provision in MCL 600.5856(d)[7] did not apply to MCL 600.5852, the savings provision applicable to wrongful death actions.[8] *Waltz*, *supra* at 650-651.[9]

---

[5] Cryderman was plaintiff's name before her recent marriage. This opinion will refer to plaintiff as Downs.

[6] Subsequently, plaintiff filed an amended complaint that added Keebler and Pluim as defendants.

[7] At the time that *Waltz* was decided, MCL 600.5856(d) stated that a statute of limitations or repose was tolled if "during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b." 2004 PA 87, effective April 22, 2004, rewrote MCL 600.5856, and MCL 600.5856(d) became MCL 600.5856(c). The parties refer to the applicable statute as MCL

(continued…)

In a written decision dated April 21, 2004, the trial court granted defendants' motions for summary disposition. The trial court noted that plaintiff's claim accrued on October 23, 2000 (the date of Natasha's death); therefore, the two-year statute of limitations for a medical malpractice claim expired on October 23, 2002. MCL 600.5805(6). However, because letters of authority were issued to plaintiff on August 9, 2001, plaintiff had until August 9, 2003, to file suit. MCL 600.5852. The trial court noted that plaintiff mailed her notices of intent on August 5, 2003, and that plaintiff argued that because she did so within the two-year time period provided for in MCL 600.5852, she became entitled to an additional 182 days to file her action by virtue of MCL 600.5856(d). The trial court disagreed, noting that *Waltz* held that because MCL 600.5852 was not a limitations period, the tolling provision in MCL 600.5856(d) could not be applied to extend the time in which plaintiff could file her actions. On May 5, 2004, and May 7, 2004, the trial court entered orders granting defendants' motions for summary disposition.

II. Appellate Proceedings

Plaintiff filed claims of appeal from the orders entered on May 5, 2004, granting summary disposition in favor of NMH (Docket No. 256462), and on May 7, 2004, granting summary disposition in favor of Keebler, Pluim, Verburg, Wilder, and Bay View (Docket No. 256422). On December 15, 2004, this Court issued an order consolidating plaintiff's appeals in Docket Nos. 253611, 255045, 256422, and 256462.

In an opinion addressing the four consolidated appeals, *Downs v Keebler, Cryderman v Keebler, Downs v Keebler, Downs v Northern Michigan Hosp*, unpublished per curiam opinion of the Court of Appeals, issued November 28, 2006 (Docket Nos. 253611, 255045, 256422, 256462), this Court affirmed in part and reversed in part.[10]

(…continued)

600.5856(d).

[8] MCL 600.5852 provides that a personal representative may file a wrongful death action within two years after letters of authority are issues, even if the two-year statute of limitations applicable to wrongful death actions has expired.

[9] Our Supreme Court granted leave in *Waltz* "to consider the interplay between MCL 600.5856(d) and MCL 600.5852." *Waltz, supra* at 644. Our Supreme Court undertook to decide whether the notice tolling provision also tolled the saving provision. *Id.* Our Supreme Court acknowledged that the widespread confusion surrounding this issue stemmed in part from its statement (in dicta) in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), that MCL 600.5852 was a "limitation period", and from the resulting implication that the notice tolling provision thus applied to that "limitation period". The *Waltz* Court stated that, "[t]o the limited extent that the above-quoted portion of *Omelenchuk* might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision, it is hereby overruled." *Waltz, supra* at 655.

[10] In Docket No. 253611, this Court reversed the trial court's order granting summary disposition in favor of NMH, and affirmed the trial court's order in all other respects. Both plaintiff and NMH sought leave to appeal to our Supreme Court. In an order entered on March 7, 2008, our Supreme Court denied the applications. In Docket No. 255045, this Court affirmed the trial court's order granting summary disposition for defendants. Plaintiff sought leave to appeal to our Supreme Court. In an order entered on March 7, 2008, our Supreme Court denied the

(continued…)

In Docket Nos. 256422 and 256462, plaintiff argued that her final complaints (filed on January 6 and 16, 2004) were timely filed within the statute of limitations because she filed her first complaint on April 4, 2002, and her second complaint on May 27, 2003. This Court disagreed, noting that plaintiff's first complaint was properly dismissed because the affidavits of merit did not conform with MCL 600.2912d(1) and did not toll the statute of limitations, and that plaintiff's second complaint was in part properly dismissed because the notices of intent did not comply with MCL 600.2912b(4) and did not toll the statute of limitations. This Court concluded that the statute of limitations was not tolled under MCL 600.5856(a) because plaintiff's first complaints were not sufficient to commence the action. *Downs*, slip op at 15.

This Court rejected plaintiff's assertion that her final complaints were timely filed under MCL 600.5852, as extended by MCL 600.5856(d). This Court noted that under *Waltz*, *supra* at 646 n 6, 651, in order to toll the statute of limitations under MCL 600.5856(d), a valid notice of intent complying with MCL 600.2912b(1) must be filed prior to the expiration of the limitations period. This Court stated that because plaintiff did not file valid notices, the statute of limitations was not tolled under MCL 600.5856(d). This Court also noted that because MCL 600.5856(d) did not toll the grace period in MCL 600.5852, *Waltz*, *supra* at 648-652, plaintiff's notice to Keebler and Pluim, dated July 16, 2002, had it been valid, would have tolled the statute of limitations to January 15, 2003. Furthermore, this Court found that even though MCL 600.5852 allowed plaintiff to file suit until August 9, 2003, plaintiff did not do so. Plaintiff did not file suit until January 2004. *Downs*, *supra*, slip op at 16. Finally, this Court rejected plaintiff's arguments that: it should declare that *Waltz* did not operate retroactively, plaintiff was entitled to equitable tolling, the decision in *Waltz* denied plaintiff due process, and that *Waltz* should be reversed. *Id.*, slip op at 17-21.

Plaintiff and NMH sought leave to appeal to our Supreme Court in Docket No. 253611, and plaintiff sought leave to appeal in Docket Nos. 255045, 256422, and 256462. Our Supreme Court held the applications in abeyance pending its decision as to whether *Waltz* applied retroactively. In *Mullins*, our Supreme Court held in pertinent part that

> . . . this Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*. [480 Mich at 948.]

Omelenchuk was decided on March 28, 2000, and *Waltz* was decided on April 14, 2004. Therefore, pursuant to *Mullins*, *Waltz* does not apply to actions filed between March 28, 2000, and 182 days after April 14, 2004. As mentioned, in separate orders entered on March 7, 2008, our Supreme Court denied the applications in Docket Nos. 253611 and 255045. In an order also

---

(…continued)

application. The appeals in Docket Nos. 253611 and 255045 are not before this Court on remand. On August 15, 2008, this Court entered an order disconsolidating Docket Nos. 253611 and 255045 from Docket Nos. 256422 and 256462 to enable the remand proceedings in Docket Nos. 256422 and 256462 to move forward.

entered on March 7, 2008 our Supreme Court charged this Court with reconsidering the issues raised by plaintiff in Docket Nos. 256422 and 256462 in light of *Mullins* and *Kirkaldy*.

II. Analysis

This Court reviews a trial court's decision on a motion for summary disposition de novo. When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pled allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

The statute of limitations for an action charging medical malpractice is two years. MCL 600.5805(6). A medical malpractice claim accrues at the time of the act or omission that serves as the basis for the claim, regardless of when the plaintiff discovers or otherwise gains knowledge of the claim. MCL 600.5838a(2); *Vance v Henry Ford Health System*, 272 Mich App 426, 430 n 3; 726 NW2d 78 (2006).

The statute of limitations applicable to medical malpractice actions may be altered for various reasons, including death. If a person who would be entitled to bring a medical malpractice actions dies before the limitations period on the action has run, or within 30 days after the limitations period has run, an action may be commenced by the personal representative of the deceased person within two years after the representative receives letters of authority, even if the statute of limitations has expired by that point. An action may not be brought more than three years after the limitations period has expired. MCL 600.5852.

A person may not commence a medical malpractice action against a health professional or facility unless he has given the professional or facility written notice not less than 182 days before the action is filed. MCL 600.2912b(1). The notice must contain a statement of: the factual basis of the claim, the applicable standard of care, the basis for the claim that the applicable standard of care was breached by the health professional or facility, the action that should have been taken to comply with the applicable standard of care, the manner in which the alleged breach of the applicable standard of care proximately caused the injury claimed in the notice, and the names of all health professionals and facilities the claimant is notifying in relation to the claim. MCL 600.2912b(4).

If during the period a medical malpractice claimant is required to delay filing suit after providing the notice required by MCL 600.2912b(1) the claim would be barred by the expiration of the limitations period, the limitations period is tolled for not longer than the number of days equal to the applicable notice period after the date the notice is given. Thus, if the limitations period would otherwise bar the claim, the time period is extended for not more than 182 days. MCL 600.5856(d).

A medical malpractice action is commenced by the filing of a complaint and an affidavit of merit. *Vanslembrouck v Halperin*, 277 Mich App 558, 561; 747 NW2d 311, lv gtd 481 Mich 918 (2008). The affidavit of merit must be signed by a health professional who the plaintiff's

attorney reasonably believes meets the requirements for an expert witness.[11] The affidavit of merit must certify that the health professional has reviewed the notice and the medical records supplied to him by the claimant's attorney, and must contain a statement of: (1) the applicable standard of practice or care; (2) the health professional's opinion that the applicable standard of practice or care was breached by the health professional or facility who received the notice; (3) the actions that should have been taken or avoided by the health professional or facility who received the notice in order to have complied with the applicable standard of practice or care; and (4) the manner in which the breach of the applicable standard of practice or care proximately caused the injury alleged in the notice. MCL 600.2912d(1).

The limitations period applicable to a medical malpractice action is tolled when a complaint and affidavit of merit are filed and served on the defendant. A filed affidavit is presumed to be valid. This presumption can be rebutted only in subsequent judicial proceedings. The filing of a complaint and affidavit of merit tolls the statute of limitations until the validity of the affidavit is successfully challenged. If the affidavit is successfully challenged, the proper remedy is dismissal without prejudice. Thereafter, the plaintiff has any remaining time within the limitations period in which to refile suit supported by a conforming affidavit of merit. *Kirkaldy, supra* at 584-586.

The parties' briefs refer extensively to the complaints filed by plaintiff in 2002 and 2003. However, the trial court dismissed those cases, this Court affirmed those dismissals (Docket Nos. 253611 and 255045), and our Supreme Court denied leave to appeal in those cases. Those cases are not before this Court in this remand proceeding.[12] This proceeding concerns only the complaints filed by plaintiff in January 2004. The trial court dismissed those cases, and this Court affirmed the trial court's decisions. Our Supreme Court vacated this Court's decision in those cases and remanded them for reconsideration in light of subsequent case law, specifically *Mullins* and *Kirkaldy*.

In the decisions at issue, the trial court applied *Waltz*,[13] in which our Supreme Court held that the notice tolling provision in MCL 600.5856(d) did not apply to the saving provision in MCL 600.5852, and on that basis, dismissed plaintiff's January 2004 complaints as untimely. Our Supreme Court held that *Waltz* does not apply to a cause of action filed after *Omelenchuk* was decided (on March 28, 2000) in which the saving period provided in MCL 600.5852 expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided (on

---

[11] See MCL 600.2169(1).

[12] This Court's decision in those cases stands as the law of the case. See *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995).

[13] Defendant Wilder's assertion that the trial court did not rely on *Waltz* when granting summary disposition for defendants is simply inaccurate. In its written decision dated April 21, 2004, the trial court stated that *Waltz* held, consistent with prior authority, that MCL 600.5852 is not a statute of limitations, and thus the tolling provision in MCL 600.5856 could not be applied to further extend the filing period provided for in MCL 600.5852.

April 14, 2004). *Mullins*, *supra* at 948. Thus, the causes of action filed by plaintiff in January 2004 are not controlled by *Waltz*, but rather by *Omelenchuk*.

Plaintiff received letters of authority on August 9, 2001, and thus had until August 9, 2003, to file suit. MCL 600.5852. Plaintiff served notices of intent on defendants on August 5, 2003. Pursuant to *Omelenchuk* as it was applied at the time, the filing of the notices tolled the saving period. Thereafter, MCL 600.5856(d) required plaintiff to wait no fewer than 182 days before filing suit (or until after February 3, 2004), or 154 days if defendants did not respond to the notices. MCL 600.2912b(8). Plaintiff filed her complaint against all defendants except NMH on January 6, 2004, and filed suit against NMH on January 16, 2004. Thus, plaintiff filed suit in each case within the 182-day period. Under *Omelenchuk*, as it was applied at the time, plaintiff's suits were filed in a timely manner. The trial court erred in dismissing the suits based on *Waltz*.

Our Supreme Court's remand order instructed this Court to reconsider its decisions in these cases in light of both *Mullins* and *Kirkaldy*. As noted, the *Kirkaldy* Court held that an affidavit of merit that accompanies a complaint is presumed to be valid, and can be challenged only in subsequent proceedings. If a challenged affidavit is found to be deficient, the proper remedy is dismissal of the case without prejudice. The plaintiff has any time remaining in the limitations period in which to refile a complaint accompanied by a conforming affidavit. *Kirkaldy*, *supra* at 584-586.

The affidavits of merit that accompanied plaintiff's complaints filed in January 2004 were not those found by this Court to be deficient in Docket No. 255045. *Downs*, slip op at 5-10. In the instant cases, defendants did not seek summary disposition on the ground that the affidavits that accompanied plaintiff's January 2004 complaints were deficient. Thus, we conclude that the trial court, not this Court, may presently consider arguments regarding the affidavits that accompanied the January 2004 complaints in light of *Kirkaldy*.

Accordingly, we vacate the trial court's decisions and remand for reconsideration of the motions in light of current case law, i.e., *Mullins* and *Kirkaldy*. Because the trial court's decisions are vacated and must be remanded, we need not consider plaintiff's arguments that she is entitled to reversal of the trial court's decisions based on *Bryant* and the doctrine of judicial tolling.

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

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens