STATE OF MICHIGAN

COURT OF APPEALS

RODNEY HANNA, Plaintiff-Appellee,	UNPUBLISHED December 14, 2010
v	No. 289513 Wayne Circuit Court
DARIO MERLOS, D.D.S., Defendant-Appellant.	LC No. 07-732805-NH

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

After this Court initially denied defendant's application for leave to appeal,[1] our Supreme Court remanded the case to this Court for consideration as on leave granted.[2] After having given plenary consideration to defendant's arguments, we now affirm the trial court's orders denying his motions for summary disposition.

I

Plaintiff sought dental care from defendant between July and September 2006. Plaintiff filed this action for dental malpractice alleging that defendant had installed the wrong sized crown on one tooth and had failed to perform root canals on that tooth and another tooth. In November 2006, plaintiff sent a letter to defendant, which plaintiff later explained he intended to serve as a notice of intent to sue (NOI) under MCL 600.2912b. Plaintiff's counsel then sent defendant a formal NOI in October 2007. Plaintiff ultimately filed suit in December 2007. Although plaintiff had obtained an affidavit of merit (AOM), he neglected to file it with the complaint as required by MCL 600.2912d. Before the statute of limitations expired, defendant filed a motion for summary disposition on the ground that plaintiff had failed to comply with both § 2912b and § 2912d. That motion was denied. After the limitations period expired,

[1] *Hanna v Merlos*, unpublished order of the Court of Appeals, entered March 16, 2009 (Docket No. 289513).

[2] *Hanna v Merlos*, 483 Mich 1070 (2009).

defendant renewed his claims in two additional motions for summary disposition. The trial court denied both additional motions as well.

II

We review de novo the trial court's ruling on a motion for summary disposition. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). In addition, whether an AOM or an NOI is sufficient to comply with the statutory requirements is a question of law that we review de novo. See *Jackson v Detroit Med Ctr*, 278 Mich App 532, 545; 753 NW2d 635 (2008).

III

Defendant argues that the trial court erred by failing to dismiss plaintiff's claims on the ground that a proper AOM was never filed. We disagree.

The limitations period for a malpractice claim is two years from the time the claim accrues. MCL 600.5805(1) and (6). A medical malpractice claim accrues at the time of the act or omission that gives rise to the claim "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). There appears to be no dispute that plaintiff's claim accrued no later than September 19, 2006, his last day of treatment with defendant. Therefore, plaintiff had until September 19, 2008, to file his complaint. Plaintiff filed the complaint on December 13, 2007, well within the limitations period.

However, plaintiff was statutorily required to "file with the complaint an affidavit of merit signed by a health professional . . . ." MCL 600.2912d(1). As explained previously, although plaintiff had obtained an AOM and referenced it in the complaint, he failed to actually file the AOM with the complaint in December 2007. Instead, the record shows that he did not formally submit a copy of the AOM to the trial court until February 28, 2008, when he attached it as an exhibit to his answer to one of defendant's motions for summary disposition. Among other things, defendant argues that this belated filing of the AOM in February 2008 was insufficient to comply with the requirements of § 2912d(1).

In *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000), our Supreme Court held that the filing of a malpractice complaint without the requisite affidavit of merit "'is insufficient to commence the lawsuit'" and requires dismissal. If the limitations period has not expired, the case should be dismissed without prejudice and the plaintiff may refile the complaint. However, if the limitations period has expired and a conforming AOM has not been filed, the case must be dismissed with prejudice. *Id.* at 549-553.

As an initial matter, we note that the record belies plaintiff's assertion that he filed the AOM contemporaneously with the complaint in December 2007. The original complaint, which is contained in the lower court file, has no AOM attached to it. Nor does the trial court's register of actions indicate that an AOM was filed contemporaneously with the complaint. Plaintiff contends that the AOM must have become unattached from the copy of the complaint contained in the lower court file and that the court must have failed to record his December 2007 filing of the AOM in the register of actions due to a "mechanical or clerical error." But without proof, such as an affidavit from plaintiff's counsel averring that the AOM was indeed attached to the

complaint at the time of filing,[3] this contention is nothing more than an unsupported, conclusory assertion that is entitled to no evidentiary weight. Indeed, a presumption arises that, had the AOM been filed contemporaneously with the complaint in December 2007, the clerk would have inserted it into the lower court file and would have made an appropriate corresponding entry in the register of actions. See *People v Alexander*, 234 Mich App 665, 673; 599 NW2d 749 (1999); see also *Burgess v Lasby*, 91 Mont 482, 491; 9 P2d 164 (1932). The unsupported assertions of plaintiff's counsel are insufficient to overcome this presumption. See *Capman v Harper-Grace Hosp*, 96 Mich App 510, 515; 294 NW2d 205 (1980). Despite plaintiff's protestations to the contrary, the mere fact that the complaint references the AOM does not somehow prove that the AOM was actually attached to the complaint at the time of filing in December 2007.

Plaintiff also asserts that he refiled the AOM on January 14, 2008, after discovering "that the affidavit may have come unattached [from the original complaint]." But the record belies this assertion as well. The trial court's register of actions does not indicate that any AOM was filed in January 2008. As noted earlier, we presume that, had the AOM been filed, the clerk would have made the proper entry in the register of actions. See *Alexander*, 234 Mich App at 673; see also *Burgess*, 91 Mont at 491. It is true that plaintiff has produced a copy of the AOM bearing a Wayne County Clerk's time stamp with the date of January 14, 2008. However, unlike the time stamps appearing on the other pleadings, papers, and documents filed in this case, the time stamp on the affidavit of January 14, 2008, contains the word "RECEIVED" rather than the word "FILED." In other words, although it appears that plaintiff or his counsel took a copy of the affidavit to the office of the Wayne County Clerk and had it time stamped on January 14, 2008, there is still no evidence that the affidavit was *actually filed* in the lower court file on that date.

Nevertheless, we conclude that plaintiff did comply with § 2912d(1) when he later submitted a copy of the AOM as an exhibit to his answer to one of defendant's motions for summary disposition on February 28, 2008. As noted earlier, the period of limitations in this case did not expire until September 19, 2008. Accordingly, it is beyond dispute that the belated copy of the AOM submitted on February 28, 2008, was filed before the expiration of the limitations period. The question remains whether this belatedly submitted copy of the AOM otherwise qualified as "file[d] with the complaint" within the meaning of § 2912d(1). We conclude that it did.

In *Wood v Bediako*, 272 Mich App 558, 561-562; 727 NW2d 654 (2006), the plaintiff attached a defective AOM to her complaint, and the defendants thereafter moved for summary disposition. At the hearing on the defendants' motion for summary disposition, the plaintiff noted that she had subsequently and "serendipitous[ly]" submitted a conforming copy of the AOM to the trial court before the expiration of the limitations period. She argued that this later-filed, conforming AOM "'serendipitously' cured the defect and tolled the [limitations] period." *Id*. at 561. This Court agreed with the plaintiff, observing that "a trial court is required to

[3] We note that neither plaintiff nor his attorneys have sought to present such an affidavit or moved to expand the record with such an affidavit here.

consider all admissible evidence then filed in the action when deciding a summary disposition motion . . . ." *Id*. at 565. Because the plaintiff's later-filed, "serendipitous" AOM was submitted before the expiration of the period of limitations and was contained in the lower court file, this Court ruled that "the court erred in failing to consider the subsequently filed . . . affidavit when it granted [the] defendants summary disposition[.]" *Id*.

As in *Wood*, plaintiff in the present case "serendipitous[ly]" filed a belated-but-conforming copy of his AOM when he submitted it as an exhibit to his answer to defendant's motion for summary disposition on February 28, 2008. This conforming copy of the AOM was filed before the expiration of the period of limitations and was contained in the lower court file at the time of the trial court's decisions on defendant's motions for summary disposition. As explained in *Wood*, the trial court was "required to consider all admissible evidence then filed in the action" when deciding defendant's motions for summary disposition in this case. *Id*. at 565. Under the reasoning of *Wood*, we conclude that plaintiff's belated-but-conforming AOM, filed as an exhibit to his answer to defendant's motion for summary disposition in February 2008, was sufficient to comply with the requirements of § 2912d. *Wood*, 272 Mich App at 565.

IV

Defendant also argues that the trial court erred by failing to dismiss plaintiff's claims on the ground that he did not wait until 182 days after the filing of the NOI to file his complaint. Specifically, defendant asserts that plaintiff's letter of November 2006 was insufficient to constitute an NOI under the provisions of § 2912b. Again, we disagree.

Under § 2912b(1), a plaintiff asserting a medical malpractice claim must serve the defendant with an NOI and wait 182 days before filing suit. "The unambiguous language of MCL 600.2912b(4) requires a medical malpractice plaintiff to include in her notice of intent a statement of (1) the factual basis for the claim, (2) the applicable standard of practice or care alleged by the claimant, (3) the manner in which it is claimed that the applicable standard of practice or care was breached, (4) the alleged action that should have been taken to comply with the alleged standard, (5) the manner in which it is claimed that the breach was the proximate cause of the injury claimed in the notice, and (6) the names of all professionals and facilities the claimant is notifying." *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 682; 684 NW2d 711 (2004). Even if an NOI is sufficient to apprise the defendant "of the nature and gravamen of [the] plaintiff's allegations, this is not the statutory standard"; instead, the NOI must contain all the information required under § 2912b(4). *Boodt v Borgess Medical Ctr*, 481 Mich 558, 560-561, 563; 751 NW2d 44 (2008).

We have carefully reviewed plaintiff's letter dated November 8, 2006, and we conclude that it did, indeed, qualify as a conforming NOI. Plaintiff's letter reviews in detail "[defendant's] lack of x-ray diagnosis, and proper treatment of my two teeth, #3 and #18," and alleges that defendant diagnosed "tooth #3 as good without taking an x-ray," when in fact "tooth #3 [was] abscessed and the only way the gum area [could] be healthy again [was] to have a root canal." The 7-page letter describes each visit by plaintiff to defendant's office and details the alleged errors committed by defendant during each visit. For example, with respect to plaintiff's visit of July 11, 2006, the letter explains that defendant "said tooth #3 is a good tooth without taking an x-ray," and that defendant misdiagnosed the condition of tooth #18. Concerning plaintiff's visit of August 1, 2006, the letter alleges that defendant "gave me more painful antibiotic

shots . . . even though tooth #3 was abscessed and that is the reason why my gum was swollen and painful," and that notwithstanding the fact that plaintiff's "gum in this area was now infected, swollen and painful," defendant "still decided to put in a permanent crown." With regard to plaintiff's visit of September 5, 2006, the letter alleges that defendant "found a gap between tooth #17 and #18 because the new permanent crown [defendant] put in on Tuesday, August 1 was not large enough to cover this gap," that "[defendant] said that [he] believe[d] the materials [he] used caused the gum infection," and that instead of repairing the problem, defendant merely "put what [he] described as a 'sealant' on tooth #18 . . . ." Plaintiff's letter went on to detail the pain caused by the allegedly misdiagnosed dental conditions between September 15 2006, and September 19, 2006, alleging that plaintiff visited defendant twice more during that time period but that defendant only "injected more antibiotic shots . . . into my gum area," "told me I would be okay," and finally "put more medicine and cement on the crown and put it back in place." The letter specifically references the opinions and diagnoses of a second dentist, who allegedly stated that "Dr. Merlos had misdiagnosed both teeth," that "[t]ooth #3 was abscessed and that was why the gum in that area had swollen and that this tooth needed a root canal done now," and that "tooth #18 needed a root canal and a new crown because the one Dr. Merlos had put in was too small—since there was a gap between tooth #17 and #18." According to the letter, this second dentist also "confirmed that the gum area by tooth #18 was very infected." Lastly, the letter explains that plaintiff consulted a third dentist, who concurred with the opinions and diagnoses of the second dentist and agreed that defendant had misdiagnosed and negligently treated plaintiff's dental conditions. This third dentist ultimately performed the necessary root canals on tooth #3 and tooth #18.

This letter of November 8, 2006, certainly satisfies § 2912b(4)(a) and § 2912b(4)(f) by setting forth "the factual basis for the claim" and "the names of all professionals and facilities the claimant is notifying." See *Roberts*, 470 Mich at 682. This much is beyond dispute. We further conclude that plaintiff's letter satisfies § 2912b(4)(b) and § 2912b(4)(d). This Court has repeatedly observed that an NOI is sufficient to satisfy the requirements of § 2912b(4)(b) and (d) as long as it provides notice of what the standard of care would have required in a particular case. For instance, in *Esselman v Garden City Hosp*, 284 Mich App 209, 213-220; 772 NW2d 438 (2009), this Court held that the NOI complied with § 2912b(4)(b) where it alleged that the standard of care required the defendants to timely diagnose and treat gallbladder disease, to perform timely tests, to obtain x-rays, to not delay surgery, and to timely identify and treat the signs and symptoms of sepsis. Similarly, in *Potter v McLeary (On Remand)*, 278 Mich App 279, 284-285; 748 NW2d 599 (2008), rev'd on other grounds 484 Mich 397 (2009), this Court observed that the NOI complied with § 2912b(4)(b) and (d) where it alleged merely that the defendant was required to "correctly read, interpret, and report the results [of an MRI test.]" Indeed, we specifically noted in that case that an NOI will generally comply with § 2912b(4)(d) so long as "no guesswork is necessary to determine what action was required of [the defendant] to comply with the standard of care." *Id*. at 285.

We also conclude that plaintiff's letter of November 8, 2006, was sufficient to satisfy § 2912b(4)(c). Plaintiff's letter makes clear that defendant (1) failed to do an x-ray prior to ruling out the need for root canals, (2) otherwise continued to misdiagnose both teeth, even after they became infected, (3) failed to perform necessary root canals on both teeth, and (5) placed an inadequate crown on tooth #18. On the basis of plaintiff's detailed allegations, we conclude that "[a] reader of the document is not left to guess" concerning the manner in which the applicable

standard of care was breached. See *Ligons v Crittenton Hosp*, 285 Mich App 337, 345; 776 NW2d 361 (2009).

We do note that plaintiff's letter did not precisely identify "[t]he manner in which . . . the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice" as required by § 2912b(4)(e). As our Supreme Court has noted, "it is not sufficient . . . to merely state that [a defendant's] alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury." *Roberts*, 470 at 699-700 n 16 (emphasis in original). Although plaintiff's letter contained the detailed statements described above, it did not specifically and separately address the issue of proximate causation.

However, we find that plaintiff's failure to precisely address the issue of proximate cause in conformance with § 2912b(4)(e) should be disregarded, and does not prevent the letter of November 8, 2006, from qualifying as a conforming NOI. In *Bush v Shabahang*, 484 Mich 156, 178-181; 772 NW2d 272 (2009), our Supreme Court held that when a plaintiff makes a good-faith attempt to comply with the requirements of § 2912b(4), minor defects may be disregarded or cured by amendment under MCL 600.2301. In the present case, it is beyond dispute that plaintiff made a good-faith attempt to comply with the requirements of § 2912b(4). As discussed above, his letter is at least minimally sufficient with respect to most of the requirements of § 2912b(4), and only omits a proper discussion of the "[t]he manner in which . . . the breach of the standard of practice or care was the proximate cause of the injury" under § 2912b(4)(e). In light of plaintiff's good-faith attempt to comply with § 2912b(4), and given that the only deficiency we have identified was later cured by the formal NOI sent by plaintiff's counsel in October 2007, we find that any deficiencies in the letter of November 8, 2006, should be disregarded in the interests of justice. MCL 600.2301; *Bush*, 484 Mich at 180-181; see also *Swanson v Port Huron Hosp*, ___ Mich App ___; ___ NW2d ___ (2010).

We have concluded that plaintiff's letter of November 8, 2006, satisfied the provisions of § 2912b(4)(a), (b), (c), (d), and (f). See *Roberts*, 470 Mich at 682. We have also concluded that plaintiff's failure to precisely satisfy the requirement set forth in § 2912b(4)(e) must be overlooked in the interests of justice. MCL 600.2301; *Bush*, 484 Mich at 180-181. Accordingly, we must reject defendant's argument that plaintiff did not wait until 182 days after the filing of the NOI to file his complaint. The complaint in this case, which was filed on December 13, 2007, was certainly filed more than 182 days after November 8, 2006. See MCL 600.2912b(1).

V

In light of our resolution of the issues, we need not consider the remaining arguments raised by the parties on appeal.

Affirmed. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio