STATE OF MICHIGAN

COURT OF APPEALS

REBECCA WILLIAMS JACKSON,

Plaintiff-Appellant,

v

MECOSTA COUNTY MEDICAL CENTER, OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., MHS SURGICAL SPECIALISTS, CENTRAL MICHIGAN EMERGENCY PHYSICIANS, MECOSTA COUNTY RADIOLOGY, L.L.C., KATHRYN MEKARU, M.D., ALAN GRILLO, M.D., JERRY PEARSON, M.D., KRIS KENT, R.N., and CHRISTOPHER KUSHNER, D.O.,

Defendants-Appellees.

UNPUBLISHED
July19, 2011

No. 295219
Mecosta Circuit Court
LC No. 09-019251-NH

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's opinion and order granting defendants' motion for summary disposition and dismissing this case with prejudice based on the expiration of the statute of limitations. We affirm.

I. FACTS

Plaintiff filed this lawsuit alleging medical malpractice in connection with the care and treatment she received during an admission to defendant Mecosta County Medical Center from January 21, 2007, through January 23, 2007. She filed her complaint on July 17, 2009, but it was not accompanied by an affidavit of merit as required by MCL 600.2912d. On July 24, 2009, the trial court granted plaintiff a 28-day extension to file an affidavit of merit, but none was ever filed. On September 4, 2009, plaintiff filed a motion to waive the requirement, arguing that MCL 600.2912d was unconstitutional because it denied indigent persons access to the courts, and that it "allows for unlawful violations" of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq.* The trial court denied the motion and ultimately dismissed the complaint.

II. STANDARDS OF REVIEW

The constitutionality of a statute is a question of law reviewed de novo on appeal. *Sills v Oakland Gen Hosp*, 220 Mich App 303, 313; 559 NW2d 348 (1996). Likewise, the proper interpretation and application of statutes and court rules is also reviewed de novo on appeal. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

III. AFFIDAVIT OF MERIT

Plaintiff first argues that the requirement of an affidavit of merit violated the separation of powers doctrine. Further, she argues that it violated her constitutional rights by denying her access to the courts, and that it violated her rights to due process and equal protection.

MCL 600.2912d(1) provides that

> the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness . . . . The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice . . . .

A valid affidavit of merit must be filed with the complaint in order to commence a medical malpractice action and toll the statute of limitations. *Scarsella v Pollak*, 461 Mich 547, 552-553; 607 NW2d 711 (2000).

With regard to plaintiff's separation of powers argument, we note that in *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999), the Court indicated that Const 1963, art 6, § , endowed it with rulemaking authority over matters involving "practice and procedure" but not substantive law, and that this was consistent with the separation of powers set forth in Const 1963, art 3, § 2. The Court held that MCL 600.2169, which imposed certain requirements for the admission of expert testimony in medical malpractice cases, did not usurp the Supreme Court's rule making authority over matters of practice and procedure. The Court concluded that it was an enactment of substantive law because it reflected

> "a careful legislative balancing of policy considerations about the importance of the medical profession to the people of Michigan, the economic viability of medical specialists, the social costs of "defensive medicine," the availability and affordability of medical care and health insurance, the allocation of risks, the costs of malpractice insurance, and manifold other factors, including, no doubt, political factors—all matters well beyond the competence of the judiciary to reevaluate as justiciable issues." [461 Mich at 35, quoting *McDougall v Eliuk*, 218 Mich App 501, 518; 554 NW2d 56 (1996) (TAYLOR, P.J., dissenting).]

In requiring an affidavit of merit before a medical malpractice case can proceed, the Legislature has looked at the same policy considerations taken into account in *McDougall*. Just

as they were deemed substantive for purposes of § 2169, we conclude they are substantive with respect to § 2912d(1) for the same reasons.

Regarding the challenge to the constitutionality of § 2912d that was predicated on principles of due process and equal protection, this Court rejected such a challenge in *Bartlett v North Ottawa Community Hosp*, 244 Mich App 685, 696; 625 NW2d 470 (2001). There, the Court held that § 2912d bore a rational relationship to a legitimate government interest:

> Deterring the filing of frivolous lawsuits against any party or group is a legitimate governmental interest. Moreover, a plaintiff intending to prevail on a medical malpractice claim will eventually be required to provide evidence that a facility or professional deviated from professional norms. Thus, requiring an affidavit of merit is rationally related to achieving the result of reduced frivolous medical malpractice claims. Accordingly, we are not persuaded that § 2912d violates a medical malpractice plaintiff's equal protection rights. [244 Mich App at 695.]

With respect to due process, the plaintiff argued that § 2912d imposes "an unreasonable and arbitrary limit on a plaintiff's right to pursue a vested cause of action." *Bartlett*, 244 Mich App at 695. This Court noted that the rational basis test also applied to this argument, and stated:

> [Section] 2912d does not prohibit a plaintiff from filing a lawsuit alleging medical malpractice. Instead, § 2912d requires that a plaintiff file an affidavit of merit from a health care professional indicating that there is merit to the plaintiff's claims. As noted above, the plaintiff must eventually provide evidence of malpractice if the plaintiff intends to prevail in the action. Therefore, § 2912d bears a reasonable relation to a permissible legislative objective and is not an unconstitutional violation of due process. [*Id.* at 696.]

For the same reasons, § 2912d does not deny a plaintiff access to the courts; a plaintiff is free to pursue a court action and simply must provide evidentiary support earlier in the process. Compare *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 721; 575 NW2d 68 (1997) (ruling that "§ 2912b does not abrogate or vitiate any vested property rights plaintiff has in his cause of action or effectively divest plaintiff of access to the courts"). Plaintiff's arguments that the affidavit of merit requirement imposes special financial and other burdens on a medical malpractice plaintiff fall neatly under the due process and equal protection challenges rejected in *Bartlett*. *Bartlett* is binding on this Court. See MCR 7.215(J)(1).

Plaintiff next argues at length that *Scarsella* was wrongly decided and should be overturned. However, this Court lacks the authority to overrule our Supreme Court's precedents, or otherwise to deviate from them. See Const 1963, art 6, § 1; *Estate of Edwards v Clinton Valley Ctr*, 138 Mich App 312; 360 NW2d 606 (1984).

Plaintiff suggests that *Scarsella* is in conflict with MCR 2.002, which governs the waiver of fees. However, MCR 2.002 provides that it applies only to "filing fees" and fees for service of process or publication. It does not apply to the costs associated with an affidavit of merit such that a court must make funds available or provide the expert to satisfy the requirement. Plaintiff

provides no authority for the proposition that a civil litigant is entitled to such coaching from the court, or for the proposition that a litigant is entitled to financial assistance in preparing a civil case at taxpayer expense. See *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987) ("A party may not leave it to this Court to search for authority to sustain or reject its position.").

IV. CONFLICT WITH FEDERAL LAW

Plaintiff argues generally that the affidavit of merit requirement conflicts with HIPAA and the Health Information Technology for Economic and Clinical Health Act (HITECH), PL 111-5, Div A, Title XIII, Div B, Title IV, 123 Stat 226, 467 (approved February 17, 2009); see 42 USC 300jj *et seq.* and 42 USC 17901 *et seq*. Plaintiff fails to specify specific pairings of statutory provisions that supposedly bring such conflicts to light. "A party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim." *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). However, we note that based on 45 CFR 164.508(a)(1), promulgated under HIPAA, a covered entity may disclose protected health information if properly authorized. Moreover, a medical malpractice plaintiff necessarily is putting the subject matter of an affidavit of merit in issue, thus in public view.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens