STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY GLANCY, Personal Representative of the Estate of FRANK D. GLANCY, deceased,

Plaintiff-Appellee,

v

DAVID STEINBERG, M.D. and ASSOCIATES IN PHYSICAL MEDICINE & REHABILITATION,

Defendants-Appellants,

and

WASHTENAW HILLS MANOR, INC., d/b/a HEARTLAND HEALTH CARE CENTER - ANN ARBOR,

Defendant.

UNPUBLISHED
June 24, 2003

No. 237963
Washtenaw Circuit Court
LC No. 00-001442-NH

BEVERLY GLANCY, Personal Representative of the Estate of FRANK D. GLANCY, deceased,

Plaintiff-Appellee,

v

DAVID STEINBERG, M.D. and ASSOCIATES IN PHYSICAL MEDICINE & REHABILITATION,

Defendants,

and

WASHTENAW HILLS MANOR, INC., d/b/a HEARTLAND HEALTH CARE CENTER - ANN ARBOR,

Defendant-Appellant.

No. 237976
Washtenaw Circuit Court
LC No. 00-001442-NH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendants David Steinberg, M.D., Associates in Physical Medicine and Rehabilitation, P.C. (APMR), and Washtenaw Hills Manor, Inc., d/b/a Heartland Health Care Center - Ann Arbor (Heartland), appeal by leave granted the trial court's denial of their motion for summary disposition. We reverse.

I. Facts and Procedural History

On December 22, 2000, plaintiff filed a medical malpractice wrongful death claim arising out of the July 18, 1998 death of Frank Glancy.[1] Plaintiff filed two statutorily mandated affidavits of merit[2] with the complaint, one signed by an Illinois physician, Michael F. Gonzales, M.D., the other signed by a nurse registered by the state of Ohio, Jill B. Thomas, R.N. Both affidavits were purportedly notarized and sworn by Annette Bujarski, who worked as a secretary at plaintiff counsel's law firm.

In their affirmative defenses, filed on February 22, 2001, Steinberg and APMR asserted that Gonzales' affidavit is defective because "it was not attested to by the signator . . . in the manner prescribed by the statute and required by the applicable case law." On August 14, 2001, Steinberg and APMR filed a motion for summary disposition and alleged that plaintiff failed to file a valid affidavit of merit under MCL 600.2912d(1) because Bujarski, the notary, testified that, while she signed the jurat[3] on each affidavit acknowledging that the affidavit was subscribed and sworn before her, she did not know either affiant, Gonzales or Thomas, she did not witness their signatures, she did not verify the affiants' identities, and she did not administer an oath to either affiant. Steinberg and APMR argued that, because the affidavits were defective, the trial court should strike the complaint. Heartland joined and concurred in the motion on September 6, 2001.

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[1] Beverly Glancy was appointed personal representative of the estate of Frank Glancy on July 20, 1999.

[2] MCL 600.2912d(1).

[3] Black's Law Dictionary (7th ed) defines "jurat" as:

> A certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made. • A jurat typically says "Subscribed and sworn to before me this ___ day of [month], [year]," and the officer (usu. a notary public) thereby certifies three things: (1) that the person signing the document did so in the officer's presence, (2) that the signer appeared before the officer on the date indicated, and (3) that the officer administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document.

In response, plaintiff argued that, despite the defective notarization, she substantially complied with the affidavit of merit requirements under MCL 600.2912d(1) and that, therefore, the dismissal of her complaint would be unduly harsh. With her response, plaintiff also submitted properly notarized affidavits of merit from Gonzales and Thomas.

At oral argument on October 11, 2001, the trial court denied defendants' motion because it reasoned, under Michigan law, a case may be dismissed for a violation of MCL 600.2912d(1) only if the plaintiff completely fails to file an affidavit of merit, not where the affidavit is merely defective. The trial court entered an order denying the motion on November 6, 2001. This Court granted defendants' applications for leave to appeal the trial court's order on February 19, 2002.[4]

II. Summary of Holding

We hold that the trial court erred by denying defendants' motion for summary disposition because plaintiff failed to comply with the affidavit requirements under MCL 600.2912d(1).[5] Our decision is controlled by *Holmes v Michigan Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000), in which this Court held that, for purposes of the affidavit requirement under MCL 600.2912d(1), "where no indication exists that the doctor confirmed the document's contents by oath or affirmation before a person authorized to issue the oath or affirmation, the document does not qualify as a proper affidavit." *Id*. at 712. Here, the unrebutted evidence shows that neither affiant confirmed the contents of the affidavits by oath or affirmation before the notary and, therefore, plaintiff's complaint did not initiate an action against defendants. Moreover, defendants notified plaintiff of this defect at the outset of this case, long before the statute of limitations expired on plaintiff's claims and, thus, with sufficient warning to plaintiff's counsel who clearly could have and should have corrected this blatantly obvious defect.

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[4] Steinberg and APMR filed an application for leave to appeal in Docket No. 237963 on November 26, 2001. Heartland filed an application for leave to appeal in Docket No. 237976 on November 27, 2001. This Court granted both applications in an order dated February 19, 2002 and, in the same order, consolidated the cases for our review.

[5] Defendants filed their motion for summary disposition under MCR 2.116(C)(8) and (C)(10). Because we hold that plaintiff's complaint was null and void, we consider the appeal under subsection (C)(8), failure "to state a claim on which relief can be granted." We review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). As the *Maiden* Court further explained:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). [*Id*. at 119-120.]

Unfortunately, plaintiff's counsel took no action to remedy the fatal deficiency. Accordingly, we reverse the trial court's denial of summary disposition because plaintiff's complaint is a nullity.

III. Analysis

In a medical malpractice action, a plaintiff must comply with the statutory filing requirements under MCL 600.2912d(1), which provides that the plaintiff or his 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 . . . ." (Emphasis added.) As our Courts have repeatedly observed, "[u]se of the word 'shall' indicates that an affidavit accompanying the complaint is mandatory and imperative." *Scarsella v Pollack* (*Scarsella II*), 461 Mich 547, 549; 607 NW2d 711 (2000), quoting *Scarsella v Pollack* (*Scarsella I*), 232 Mich App 61, 63-64; 591 NW2d 257 (1998). Accordingly, our Courts have also ruled that, "the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Id*.

It is also well-settled that, "[t]o constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Holmes, supra* at 711. Further, in a medical malpractice action, absent substantiation that the affidavit was confirmed by oath and signed before "a person authorized to administer an oath," the affidavit does not constitute a valid affidavit of merit. *Id*. at 711-712.

Here, it is undisputed that the statements by Gonzales and Thomas do not constitute proper affidavits of merit because neither affidavit was "confirmed by oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Holmes, supra* at 711. Accordingly, plaintiff failed to file a valid affidavit of merit and failed to commence a medical malpractice action against defendants. *Scarsella II, supra* at 549.

In denying defendants' motion below, the trial court explained that, in *Scarsella*, the Court declined to address whether an affidavit later found to be "inadequate or defective" might suffice to initiate a medical malpractice case. *Scarsella II, supra* at 553 n 7. According to the trial court, because the affidavits were facially adequate and only the jurat was defective, the grant of summary disposition after the statute of limitations had run would be unduly harsh. Rather, the trial court opted to allow plaintiff to substitute the "corrected" affidavits and continue with the case.

We reject the trial court's analysis for several reasons. First, as the *Holmes* Court observed, there is a difference between filing a defective affidavit (by failing to include in the document some information contemplated by MCL 600.2912d(1)(a)-(d) such as the appropriate standard of care or how it was breached), and "a plaintiff who completely fail[s] to provide a document meeting the definition of an affidavit . . . ." *Holmes, supra* at 713 n 4.[6] Here, as

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[6] Though this Court recently held that an affidavit that is "grossly nonconforming" to the statutory requirements does not constitute a valid affidavit of merit to initiate a medical

(continued…)

discussed, the failure to have the Gonzales and Thomas statements "confirmed by oath or affirmation" before a notary constitutes a failure to submit an affidavit. *Id*. at 711. We further note that defendants raised this issue early in the litigation by asserting it in their affirmative defenses on February 22, 2001. Thus, plaintiff had several months to attempt to correct the impropriety before the statute of limitations expired on July 20, 2001. See *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998). Plaintiff's later attempt to submit "proper" affidavits is simply untimely. Plaintiff filed the amended affidavits on September 18, 2001, well past the statute of limitations expiration and long after the problem was brought to plaintiff counsel's attention. Therefore, the untimely "correction" does not save the action from the time bar.

Moreover, and contrary to the trial court's apparent reasoning, *Holmes* is not distinguishable because this case involves a "defective" jurat rather than a missing jurat. The statements at issue here do not merely constitute inadequate or defective affidavits; they evidence an overt attempt to deceive the trial court by falsely representing that the documents were properly signed and sworn. An affidavit with a false jurat does not amount "substantial compliance" with MCL 600.2912d(1) and we decline to treat a fraudulent jurat or intentional misrepresentation more favorably than no jurat at all.[7]

Plaintiff's complaint was null and void as a matter of law and the trial court should have granted defendants' motion for summary disposition. *Scarsella II, supra* at 549.

Reversed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

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malpractice action. *Mouradian v Goldberg*, ___ Mich App ___; ___ NW2d ___ (Issued May 20, 2003, Docket No. 239954).

[7] Furthermore, to conclude that an affidavit with a false notarization is "sufficient" under the statute or to regard it as equivalent to a properly signed and sworn affidavit would undermine and render meaningless the requirements our Legislature imposed for initiating a medical malpractice claim. Moreover, were we to credit the statements of Gonzales and Thomas as "adequate" under the statute and our case law, it would, no doubt, encourage the bar to ignore or trivialize the affidavit requirements and notarization rules.