

STATE OF MICHIGAN
COURT OF APPEALS

LYUBOV LYSYUK,

Plaintiff-Appellee,

v

ALEXANDER A. DUTKO, D.D.S.,

Defendant-Appellant.

UNPUBLISHED

February 4, 2003

No. 232057

Macomb Circuit Court

LC No. 2000-003695-NM

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

In this medical malpractice action, defendant appeals by leave granted from an order denying his motion for summary disposition under MCR 2.116(C)(7). We reverse.

The timeline relevant to this case is as follows: Plaintiff filed a notice of intent to sue on October 21, 1999. On March 16, 2000, she filed her complaint, accompanied by an unsigned and unsworn affidavit of merit. On June 15, 2000, she filed an amended complaint, again with an unsigned and unsworn affidavit of merit. On September 15, 2000, defendant moved for summary disposition under MCR 2.116(C)(7), alleging that the applicable statute of limitations barred plaintiff's suit. On September 22, 2000, plaintiff filed a signed and sworn version of the affidavit of merit.

Defendant contended below that the statute of limitations barred plaintiff's suit because she did not submit, within the limitations period, a signed affidavit of merit with her complaint as required by MCL 600.2912d(1). He contended that the allegedly negligent dental treatment occurred in October 1997 and was discovered in January 1998. Because the statute of limitations in a medical malpractice action is two years from the act or omission that forms the basis of the claim or within six months after the plaintiff discovers or reasonably should have discovered the potential claim, see MCL 600.5805(4) and MCL 600.5838a(2), defendant argued that limitations period expired without the tendering of a signed and viable affidavit of merit. Plaintiff responded by alleging that she did not discover the potential claim until October 1999 and that she therefore had six months from that date to file properly her claim. She further alleged that the six-month period was extended by 182 days because she filed a notice of intent to sue under MCL 600.2912b. See *Morrison v Dickinson*, 217 Mich App 308, 312-313; 551 NW2d 449 (1996). Accordingly, plaintiff argued that the limitations period did not expire until October 2000 and that her complaint was valid because she filed a signed and sworn affidavit of merit on September 22, 2000.

In denying defendant's motion for summary disposition, the trial court concluded that plaintiff "substantially complied with the statute requiring a signed affidavit of merit to accompany the complaint to toll the statute of limitations" because the defective affidavit of merit was "subsequently cured by the filing of a signed affidavit." Although the court's findings with regard to the expiration of the limitations period are not entirely clear, it appears that the court accepted plaintiff's allegation that she discovered the potential claim in October 1999 and that the proper affidavit of merit was therefore filed within the limitations period and could cure the initially defective affidavit.

Upon our de novo review, see *Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 554; 550 NW2d 262 (1996), we are compelled to reverse the trial court's denial of defendant's motion for summary disposition.

We initially note that the first two affidavits of merit filed by plaintiff clearly did not meet the requirements of MCL 600.2912d(1). See *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 711-712; 620 NW2d 319 (2000). In *Holmes*, the Court ruled that a document unsworn before a person authorized to administer an oath does not constitute an appropriate affidavit for purposes of MCL 600.2912d(1). *Holmes, supra* at 711-712. Here, the documents plaintiff filed on March 16, 2000, and June 15, 2000, were unsworn and thus deficient under *Holmes*. We also conclude that the reasoning from *Holmes* applies to the *unsigned* nature of the first two documents filed by plaintiff. Accordingly, the first date on which plaintiff filed a proper affidavit of merit was September 22, 2000.

The relevant question then becomes: when did the limitations period expire? Indeed, *Holmes* makes clear that if the limitations period expires *before* the filing of a proper affidavit of merit, a plaintiff's claim cannot proceed. *Id.* at 709, 712. See also *Young v Sellers*, ___ Mich App ___; ___ NW2d ___ (Docket No. 239829, issued December 20, 2002), slip op, pp 2-4. Here, the trial court evidently concluded that the limitations period expired in October 2000 because plaintiff did not discover the claim until October 1999 and then filed a notice of intent to sue under MCL 600.2912b. However, MCR 2.116(G)(5) indicates that in evaluating a motion for summary disposition brought under MCR 2.116(C)(10), the court is to consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties." See also *Smith, supra* at 554. Under MCR 2.112(A), "pleadings" include only a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. Plaintiff's allegation that she first discovered the potential claim in October 1999 occurred in her brief filed in response to defendant's motion for summary disposition. This brief was not a "pleading." *Id.*; see also, generally, *Village of Dimondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000). Nor did plaintiff provide any affidavits or other documentary evidence in support of her allegation that she first discovered the potential claim in October 1999. Under these circumstances, plaintiff provided no support for her late-discovery argument. Indeed, as noted above, MCR 2.116(G)(5) refers to "affidavits, together with the pleadings, depositions, admissions, and documentary evidence. . . ." It does *not* indicate that the court should consider bald assertions made in motions and briefs in evaluating a motion for summary disposition under MCR 2.116(C)(7).

The only evidence of an accrual date before the court, therefore, was in the complaint, in which plaintiff alleged a treating date of October 17, 1997, and, based on certain allegations in

the complaint, a potential discovery date of February 1998.¹ Accordingly, even allowing for a 182-day extension under MCL 600.2912b, plaintiff's proper affidavit of merit was not filed within the limitations period. Therefore, under the reasoning from *Holmes*, the trial court erred in failing to grant defendant's motion for summary disposition.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter

¹ We note that defendant alleged a potential discovery date of January 1998, apparently because this was a month in which plaintiff visited a second doctor as mentioned in the complaint. However, plaintiff also mentioned in the complaint a February 1998 visit to the second doctor. We further note that we reject plaintiff's contention on appeal that defendant conceded a discovery date of October 1999.