

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY D. VAN SICKLE and DENNIS VAN
SICKLE,

Plaintiff-Appellees,

v

WILLIS B. ANDERSON, JR., D.O.,

Defendant-Appellant,

and

MCPHERSON HOSPITAL, d/b/a TRINITY
HEALTH MICHIGAN, and ST. JOSEPH MERCY
HEALTH SYSTEM, d/b/a TRINITY HEALTH
MICHIGAN,

Defendants.

UNPUBLISHED
January 13, 2005

No. 248351
Livingston Circuit Court
LC No. 02-019152-NH

SHIRLEY D. VAN SICKLE and DENNIS VAN
SICKLE,

Plaintiffs-Appellees,

v

MCPHERSON HOSPITAL, d/b/a TRINITY
HEALTH MICHIGAN,

Defendant-Appellant,

and

WILLIS B. ANDERSON, JR., D.O., and ST.
JOSEPH MERCY HEALTH SYSTEM, d/b/a
TRINITY HEALTH MICHIGAN,

Defendants.

No. 248447
Livingston Circuit Court
LC No. 02-019152-NH

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendants appeal by leave granted from the trial court's denial of their motions for summary disposition regarding plaintiffs' medical malpractice claim. Because at the notice of intent stage of this medical malpractice claim, defendant physician unequivocally disclosed his board specialty, an affidavit of merit signed by plaintiffs' nonconforming specialty medical expert does not toll the statute of limitations. We reverse the trial court's holding and remand these cases to the trial court with instructions to enter orders of dismissal.

Plaintiffs filed their complaint alleging, among other claims, that defendants committed medical malpractice on plaintiff Shirley VanSickle by failing to remove her right ovary during a hysterectomy. After filing their complaint, plaintiffs requested and received an extension of twenty-eight days to file the appropriate affidavit of merit as required by MCL 600.2912d(1). Plaintiffs filed an affidavit signed by a board-certified gynecologist. Defendant Anderson is a board-certified general surgeon and had notified plaintiffs of this in his answer to plaintiffs' notice of intent to file a claim.

Defendants argue that the affidavit of merit filed in support of plaintiffs' complaint was insufficient to toll the statute of limitations in this case because it did not satisfy the requirements of MCL 600.2912d(1) and MCL 600.2169, and therefore, the trial court erred in denying summary disposition of plaintiffs' medical malpractice claim. We agree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

MCL 600.2912d(1) requires a plaintiff to file an affidavit of merit, signed by an expert who plaintiff's counsel reasonably believes qualifies as an expert allowed to testify against defendant pursuant to MCL 600.2169, with a complaint alleging medical malpractice. MCL 600.2169, in turn, requires that, where a defendant is board-certified, the proposed expert must also be board-certified in the same specialty.

Our Supreme Court has found that a plaintiff fails to commence a medical malpractice suit when she fails to file the required affidavit of merit with her complaint. *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Generally, no person may bring an action charging malpractice unless she commences the action within two years of when the claim accrued. MCL 600.5805(5). Therefore, the filing of a medical malpractice complaint without the affidavit of merit does not toll the applicable two-year statute of limitations. MCL 600.5805(5); *Id.*, 549-550. Furthermore, this Court, in *Mouradian v Goldberg*, 256 Mich App 566, 574; 664 NW2d 805 (2003), found that the limitations period is not tolled against a medical malpractice action by the filing of a complaint with an affidavit which is grossly nonconforming to the statutory requirements. However, this Court has noted that an affidavit of merit is sufficient "if counsel reasonably, albeit mistakenly, believed that the affiant was qualified under MCL 600.2169." *Geralds v Munson Healthcare*, 259 Mich App 225, 232; 673 NW2d 792 (2003), quoting *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002).

Recent opinions of our Supreme Court affect the outcome of this case. In *Halloran v Bhan*, 470 Mich 572, 574-576; 683 NW2d 129 (2004), our Supreme Court considered whether an expert must truly have the same board certification as a defendant where, while not sharing such certification, they shared a subspecialty which the defendant was practicing at the time of the alleged malpractice. Pursuant to the plain language of the statute, our Supreme Court unequivocally found that “the proposed expert witness must have the same board certification as the party against whom or on whose behalf the testimony is offered.” *Id*, 574. However, in *Grossman v Brown*, 470 Mich 593, 599-600; 685 NW2d 198 (2004), decided the same day, our Supreme Court found that an otherwise defective affidavit was sufficient to toll the statute of limitations where the plaintiff’s counsel, based on information available to him when preparing the affidavit of merit, had a reasonable belief that the defendant and the proposed expert shared board certification.

Applying the above case law to this case, we hold that the trial court erred in denying defendants’ motions for summary disposition. Plaintiffs argue that they reasonably believed that their expert, Dr. Roth, a board-certified gynecologist, qualified as an appropriate expert where defendant Anderson, a board-certified general surgeon, misled them about his certification through his Yellow Pages ad. However, this argument fails to explain how plaintiffs’ counsel could reasonably believe this to be the case when defendant Anderson specifically told plaintiffs that the applicable standard of care was that of a board-certified general surgeon in his answer to their notice of intent to file and when the affidavit of merit itself identifies the standard of care as that of a board-certified general surgeon. Based on this information, this Court concludes that plaintiffs’ belief that Dr. Roth was qualified to testify against defendant Anderson was not reasonable. Hence, the affidavit of merit filed with the complaint was not sufficient to toll the statute of limitations, and plaintiffs’ claim is time-barred.

The trial court’s order is reversed and we remand these cases to the trial court with instructions to enter orders granting defendants’ motions for summary disposition and dismiss

the cases.¹

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

¹ It appears that the trial court found dismissal of plaintiffs' case based on the defective affidavit of merit to be a harsh result because the statute of limitations has run and plaintiffs would then not be allowed to re-file. Our Supreme Court, in *Halloran, supra*, 579, addressed such a concern as follows:

There is no exception to the requirements of the statute and neither the Court of Appeals nor this Court has any authority to impose one. As we have invariably stated, the argument that enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decide, not this Court.