

STATE OF MICHIGAN
COURT OF APPEALS

JAMES GREGORY,

Plaintiff-Appellant,

v

KNOLLWOOD DENTAL CARE, P.C., a
Michigan professional corporation, and STEPHEN
SOEHREN, D.D.S.,

Defendants-Appellees.

UNPUBLISHED
September 18, 2003

No. 240918
Macomb Circuit Court
LC No. 2001-000546-NM

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Plaintiff James Gregory appeals as of right an order of the circuit court granting summary disposition in favor of defendants Knollwood Dental Care, P.C., and Stephen Soehren, D.D.S., pursuant to MCR 2.116(C)(7) and (10). We affirm.

In denying plaintiff's motion for rehearing and reconsideration, The Honorable Pat M. Donofrio explained his ruling as follows:

Plaintiff filed his complaint on February 6, 2001. Plaintiff has alleged that defendant, a periodontist, committed malpractice on January 6, 1999. In support of his complaint, plaintiff attached an affidavit of meritorious claim from Dr. Benjamin Czerniawski, a specialist in prosthodontics.

* * *

MCL 600.2912d requires a plaintiff in a medical malpractice action to 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 under MCL 600.2169. Where defendant physician is board certified in several specialties, MCL 600.2169 requires an expert witness to possess the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice. *Tate* [*v Detroit Receiving Hosp*, 249 Mich App 212; 642 NW2d 346 (2002)]. An expert witness who is a specialist may not testify on the standard of practice of a general practitioner. *Decker v Flood*, 248 Mich App 75; 638 NW2d 163 (2001). The mere tendering of a complaint without the required

affidavit of merit is insufficient to commence the lawsuit and therefore toll the period of limitations. *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). MCL 600.2912d does not mandate dismissal of a claim for medical malpractice for failure to file an affidavit of merit at the time of the filing of the complaint, if the affidavit of merit is *served* at the same time as the complaint and there is not a statute of limitations problem. See *Scarsella*, at 550-552, and *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998).

In the case at hand, defendant is a periodontist. Plaintiff's signatory to the affidavit of merit attached to plaintiff's complaint is a prosthodontist. Hence, the specialty of plaintiff's expert witness does not match the specialty of defendant. *Tate* requires plaintiff's expert witness to match specialties with defendant. *Tate* also requires plaintiff's expert witness to possess the same specialty as that engaged in by defendant during the course of the alleged malpractice. It is plaintiff's contention that this rule should allow his expert to testify since he alleges defendant was practicing outside the specialty of a periodontist and in the area of a prosthodontist when the alleged malpractice occurred. However, the rules in *Tate* must be read in conjunction, and *Tate* requires plaintiff's expert witness to match defendant's area of specialty.

* * *

. . . Since plaintiff's expert is precluded from testifying regarding defendant's standard of practice, there is no genuine dispute that the affidavit of merit attached to plaintiff's complaint does not comply with the requirements of MCL 600.2912d(1), and defendant is entitled to judgment as a matter of law. See *Decker* at 167, and *Scarsella*. [Footnote omitted.]

We agree with the ruling of Circuit Judge (now Court of Appeals Judge) Pat M. Donofrio and hereby adopt his opinion as our own. Furthermore, plaintiff's additional arguments that summary disposition should not have been granted due to considerations of equitable estoppel, harshness of remedy, and counsel's subjective belief that the statute was not violated are policy considerations more appropriately addressed to the Legislature, not the judiciary. *Rheaume v Vandenberg*, 232 Mich App 417, 423-424 ; 591 NW2d 331 (1998).

Affirmed.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette