

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN F. KAPP,

Plaintiff-Appellant,

v

LEE H. COLONY, M.D.,

Defendant-Appellee.

UNPUBLISHED

May 9, 2006

No. 259530

Ingham Circuit Court

LC No. 03-000962-NH

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

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. The trial court concluded that plaintiff's affidavit of merit did not comply with MCL 600.2912d and MCL 600.2169(1). Accordingly, because the statute of limitations had run, plaintiff's complaint was dismissed with prejudice. We affirm.

Plaintiff appeals as of right from Ingham Circuit Judge Paula J. M. Manderfield's October 4, 2004 order granting defendant's motion for summary disposition. Judge Manderfield held that plaintiff's medical malpractice claim was time barred because the affidavit of merit did not comply with MCL 600.2912d and MCL 600.2169(1), because defendant was board certified in plastic surgery and the affiant was only board certified in dermatology.

Plaintiff alleges that on August 1, 2001, she sought tattoo removal treatment from Michigan Skin Care, of which defendant was a member and director. Plaintiff testified that defendant never saw, consulted, treated, or provided follow-up care for plaintiff. Instead, plaintiff asserted she was told by an unnamed woman working at the facility that removing her chest tattoo would involve use of an "Epilight hair removal device" on three separate visits. Plaintiff testified that during the first and presumably only visit, she asked the operator to stop the Epilight device two or three times due to pain, and the operator complied with each request. Plaintiff alleged after the procedure she was "informed that she will likely suffer permanent scarring[,] . . . pain [and incur expenses because of] . . . the Epilight tattoo removal procedure."

Plaintiff then filed suit for negligence and malpractice against defendants Rick Smith, M.D., P.C., and Lee H. Colony, M.D. Plaintiff later stipulated to a dismissal of its claims against Smith, leaving Colony as the sole defendant. There is no question that defendant is board certified by the American Board of Plastic Surgery and that plaintiff's affidavit of merit was signed by a board certified dermatologist, who was not a board certified plastic surgeon.

Based on the affidavit of merit, defendant filed a motion for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing that the affidavit of merit could not toll the statute of limitations because the affiant was not board certified in the same field as defendant, as required by MCL 600.2912d and MCL 600.2169(1)(a). Plaintiff conceded that the statute of limitations had expired, but argued that the affiant met the requirements of MCL 600.2169 because plaintiff's attorney reasonably believed that the affiant was qualified and that if the affidavit of merit was defective, then the court should allow plaintiff to file a supplemental affidavit of merit. The trial court held that because the affiant did not have the same board certification as defendant, the court had no choice but to grant defendant's motion. The trial court also denied plaintiff's motion for reconsideration, concluding that the court had not been misled by any palpable error or committed any legal error.

An order granting summary disposition is reviewed by this Court de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). Defendant's motion for summary disposition was based on MCR 2.116(C)(7) and (C)(10). In reviewing a (C)(7) motion, the contents of the complaint are accepted as true unless specifically contradicted by affidavits or other appropriate documents. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). In reviewing a (C)(10) motion, all documentary evidence is considered in the light most favorable to the nonmoving party to decide whether there is any genuine issue of material fact that would warrant trial on the merits. *Wilcoxon, supra* at 357-358. Statutory interpretation is also a question of law that this Court reviews de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

A plaintiff filing a medical malpractice complaint must provide an affidavit of merit from an affiant that the plaintiff's attorney reasonably believes would meet the expert witness requirements of MCL 600.2169(1). MCL 600.2912d; *Grossman v Brown*, 470 Mich 593, 598-599; 685 NW2d 198 (2004). Plaintiff argues that the trial court erred in concluding that under the statutory scheme, his affiant needed to have the same board certification as defendant. Plaintiff asserts that defendant's board certification in plastic surgery is not relevant to the specialty at issue, which plaintiff identifies on appeal as being laser surgery. In support of this argument, defendant relies on the dissenting opinions in *Halloran v Bahn*, 470 Mich 572; 683 NW2d 129 (2004), and the concurring opinions in *Grossman*. It is axiomatic that neither dissenting nor concurring opinions are binding on this Court. *Salinas v Genesys Health System*, 263 Mich App 315, 319 n 3; 688 NW2d 112 (2004).

Moreover, plaintiff misconstrues the majority holding in *Halloran* in two ways. First, *Halloran* did not involve a defective affidavit of merit. Rather, *Halloran* addressed the issue of whether the trial court erred in striking a proposed expert witness. *Halloran, supra* at 575-576. At the affidavit-of-merit stage, however, the focus is not on whether the affiant would be qualified to actually testify at trial. *Sturgis Bank & Trust Co v Hillsdale Community Health Center*, 268 Mich App 484, 490-491; 708 NW2d 453 (2005).

Second, plaintiff misconstrues the meaning of footnote 5 of the majority opinion in *Halloran*. Footnote 5 reads as follows:

Contrary to the dissent's contention, we are not concluding that board certificates that are not relevant to the alleged malpractice have to match. There

is simply no need to address that issue in this case because it is uncontested that the defendant physician was practicing internal medicine, not anesthesiology, when he allegedly committed malpractice. Thus, the defendant physician's internal medicine board certification is a "relevant" board certificate. [*Id.* at 577-578 n 5.]

Plaintiff argues that footnote 5 evidences an agreement on the part of the *Halloran* majority that an affiant need not match a board certification held by a defendant that is irrelevant to the alleged malpractice. However, the cited footnote clearly states that the *Halloran* majority had chosen not to address the question of whether "board certificates that are not relevant to the alleged malpractice have to match." The *Halloran* majority concluded that this question of law was not in issue because of its conclusion that the defendant's board certification was relevant to the alleged malpractice. *Id.*

More importantly, however, is that plaintiff's argument fails to recognize the two-step medical malpractice procedure set forth in MCL 600.2912d(1) and MCL 600.2169. This procedure was explicitly outlined by *Grossman*:

Under Michigan's statutory medical malpractice procedure, plaintiff must obtain a medical expert at two different stages of the litigation—at the time the complaint is filed and at the time of trial. With regard to the first stage, under MCL 600.2912d(1), a plaintiff is required to file with the complaint an affidavit of merit signed by an expert who the plaintiff's attorney reasonably believes meets the requirements of MCL 600.2169. With regard to the second stage, the trial, MCL 600.2169(1) states that "a person *shall* not give expert testimony . . . unless the person" meets enumerated qualifications (emphasis added). Thus, while at the affidavit-of-merit stage a plaintiff's attorney need only "reasonably believe" the expert is qualified, at trial the standard is more demanding because the statute states that a witness "shall not give expert testimony" unless the expert "meets the [listed] criteria" in MCL 600.2169(1). [*Grossman, supra* at 598-599.]

This case involves the first step—the affidavit-of-merit stage—of the procedure. Thus, there is no need to determine whether plaintiff's affiant would have been able to testify as an expert witness under step two of the procedure. *Sturgis, supra* at 495-496.

Because the affidavit-of-merit stage of the procedure occurs before discovery begins, the relevant question is whether plaintiff's attorney reasonably believed, "given the information available to plaintiff's attorney when he was preparing the affidavit of merit," that the affiant is properly qualified. *Grossman, supra* at 599-600. The complaint alleged, correctly, that defendant was board certified in plastic surgery. The expert providing plaintiff's affidavit of merit was board certified in dermatology, not plastic surgery, and was thus not board certified in the same specialty as defendant at the time of the alleged malpractice. The record clearly indicates that plaintiff's attorney was aware of this discrepancy.

Indeed, plaintiff asserts that her attorney discussed the underlying case with a board-certified plastic surgeon who agreed with the conclusion later reached by the affiant, but suggested that plaintiff's attorney find an affiant more familiar with laser surgery. Assuming

that this undocumented assertion is true, plaintiff's affidavit of merit was nonetheless defective. Plaintiff's complaint expressly identified the relevant specialty as plastic surgery, and then chose to file the affidavit of merit with a board certified dermatologist. Accordingly, plaintiff's affiant was not board certified in the specialty that plaintiff identified as being relevant to the alleged malpractice.

In sum, irrespective of whether under the statutory scheme the specialties or board-certified specialties of the expert affiant and the defendant must match regardless of the alleged malpractice and relevant standard of care, plaintiff's attorney here could not have reasonably believed that plaintiff's affiant satisfied the requirements of MCL 600.2169 given the attorney's knowledge of defendant's certifications and given the allegations set forth in the complaint.

Next, plaintiff argues that defendant misled the trial court when it claimed that the Epilight was not a laser. However, defendant also qualified this statement by saying, "I'm not sure." Regardless, the nature of the Epilight is irrelevant to the central issue on appeal, i.e., whether plaintiff's affidavit of merit satisfied the statutory scheme. See *Wilcoxon, supra* at 357-358.

Finally, an affidavit of merit that does not comply with MCL 600.2912d is insufficient to toll the statute of limitations, and if the statute of limitations has lapsed, the complaint must be dismissed with prejudice. *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003). Such a deficiency cannot be cured by a subsequently filed affidavit of merit that complies with the statute. *Id.* at 235-236. Because plaintiff concedes that the statute of limitations had passed before summary disposition was granted, the trial court did not err in dismissing plaintiff's claims with prejudice.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder