STATE OF MICHIGAN

COURT OF APPEALS

SHARON M. KURZ,

Plaintiff-Appellant/Cross-Appellee,

v

DETROIT OSTEOPATHIC HOSPITAL CORPORATION, d/b/a BI-COUNTY COMMUNITY HOSPITAL, and JOHN P. LINDENMUTH, D.O.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
September 26, 2006

No. 261441
Macomb Circuit Court
LC No. 2003-005306-NH

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals by leave granted, and defendants cross-appeal, from the trial court's order granting summary disposition to defendants and dismissing plaintiff's action without prejudice. We reverse the trial court's grant of summary disposition to defendants and remand this case for further proceedings.

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition and dismissing her action. Defendants argue that the trial court correctly granted summary disposition but should have dismissed the action with prejudice as a matter of law because the underlying limitations period had expired. The pertinent issue on appeal is whether the trial court erred by granting defendants' motion for summary disposition and dismissing the action without prejudice based on plaintiff's alleged failure to file an affidavit that satisfies MCL 600.2912d(1).[1]

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[1] Plaintiff originally filed an affidavit of merit based on the erroneous assumption that the allegedly negligent health care professional, defendant Dr. John Lindenmuth, was a specialist in internal medicine. Plaintiff later filed an amended affidavit of merit correctly indicating Dr. Lindenmuth's specialty as emergency medicine. The trial court found the original affidavit of merit nonconforming and dismissed plaintiff's action, without prejudice, on that basis.

The trial court did not state the court rule on which it relied on in granting defendants' motion. Defendants filed their motion under MCR 2.116(C)(7) and MCR 2.116(C)(8). Because defendants' primary contention was that plaintiff's failure to file a sufficient affidavit of merit caused her to fail to commence her action within the limitations period, review is proper under MCR 2.116(C)(7), which allows for summary disposition, among other reasons, because "[t]he claim is barred because of . . . [a] statute of limitations . . . ."

A trial court's grant or denial of summary disposition is a question of law that we review de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, the contents of the complaint are accepted as true unless contradicted by documentation submitted by the moving party. *Id.*; *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Judgment under MCR 2.116(C)(7) is appropriate "[i]f the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if affidavits or other documentary evidence show that there is no genuine issue of material fact . . . ." *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992). Absent a contested issue of fact, this Court decides whether a cause of action is barred by a statute of limitations de novo, as a question of law. *City of Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002). Issues of statutory interpretation are also questions of law calling for de novo review. *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

MCL 600.2912d(1) provides, in relevant part, that

> the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's 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 under [MCL 600.2169]. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice . . . .

The phrase of import in MCL 600.2912d(1) is that the necessary affidavit of merit in a medical malpractice case shall be signed "by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169.]"

MCL 600.2169 contains three requirements for an expert witness: (1) if the allegedly negligent professional is a specialist, the expert witness must specialize in the same specialty on the date of the alleged malpractice, and if the allegedly negligent professional is a specialist who is board certified, the expert witness must also be board certified in the same specialty, MCL 600.2169(1)(a); (2) the expert witness, in the year preceding the date of the alleged malpractice, must have devoted a majority of his or her professional time to either or both (a) the active clinical practice of the same health profession or specialty practiced by the allegedly negligent professional or (b) the instruction of students in the same health profession or specialty practiced by the allegedly negligent professional, MCL 600.2169(1)(b); and (3) if the allegedly negligent professional is a general practitioner, the expert witness must have devoted a majority of his or her professional time in the year preceding the date of the alleged malpractice to active clinical practice as a general practitioner or the instruction of students in the same health profession in

which the allegedly negligent professional is licensed, MCL 600.2169(1)(c). In sum, the qualifications of the expert witness must "match" the qualifications of the allegedly negligent health professional. *Decker v Flood*, 248 Mich App 75, 85; 638 NW2d 163 (2001).

It appears that using Dr. James Matthews, who signed plaintiff's affidavit of merit, as an expert witness in this case would be appropriate under MCL 600.2169. Indeed, defendant Dr. John Lindenmuth is board certified in emergency medicine and Dr. Matthews is board certified in emergency medicine. Dr. Matthews and Dr. Lindenmuth, therefore, have "matching" specialties.

Defendants, however, focus on the fact that Dr. Matthews did not indicate his emergency medicine specialty in the original affidavit of merit. Under defendants' argument, even if a signatory to an affidavit of merit satisfies MCL 600.2169 in fact, if the signatory fails to correctly indicate the appropriate specialized knowledge in the affidavit of merit, MCL 600.2912d(1) is not satisfied. Under the circumstances of this case, this argument fails.

A court will not read into a clear statute that which is not within the manifest intention of the Legislature as derived from the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). The plain language of MCL 600.2912d(1) and MCL 600.2169, taken together, require that the plaintiff file an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes has a specialty matching that of the defendant. There is no legal basis for finding that a plaintiff's failure to correctly indicate the matching specialty in the affidavit of merit renders the affidavit nonconforming. The only reason that Dr. Matthews did not tailor his affidavit of merit toward a specialist in emergency medicine, even though he was qualified to do so, was because plaintiff's attorney reasonably believed that Dr. Lindenmuth was a specialist in internal medicine. This fact was sufficient to satisfy MCL 600.2912d(1). Because the affidavit of merit must be filed before discovery has commenced, under MCL 600.2912d(1), the plaintiff's attorney must only reasonably believe that the affiant is qualified to sign the affidavit of merit. *Grossman, supra* at 599. Whether an attorney's belief is reasonable depends on "the circumstances." *Geralds v Munson Healthcare*, 259 Mich App 225, 233; 673 NW2d 792 (2003); *Watts v Canady*, 253 Mich App 468, 471; 655 NW2d 784 (2002). Relevant circumstances include the information available to and the investigation conducted by the plaintiff's attorney. See *Grossman, supra* at 599-600; *Geralds, supra* at 233. When filing suit, a medical malpractice plaintiff may rely on "available publicly accessible resources" to establish a reasonable belief concerning whether an expert satisfies the statutory requirements for an affidavit of merit. *Grossman, supra* at 599.

Based on the circumstances here, we conclude that it was reasonable for plaintiff's attorney to believe that Dr. Matthews should complete the affidavit of merit as though Dr. Lindenmuth was a specialist in internal medicine. Primarily, plaintiff's erroneous belief that Dr. Lindenmuth was a specialist in internal medicine was based on information provided to plaintiff's counsel's office by defendant Bi-County Community Hospital, where Dr. Lindenmuth worked.

Furthermore, plaintiff's error might have been avoided had defendant complied with MCL 600.2912b(7). MCL 600.2912b(7) provides that the recipient of a notice of intent shall furnish a written response within 154 days after receipt and that the response shall indicate, among other things, "the standard of practice or care that the health professional or health facility

claims to be applicable to the action. . . ." MCL 600.2912b(7)(b).[2] MCL 600.2912b(8) provides that if no response is received by the claimant, he may commence a medical malpractice action upon the expiration of the 154-day period rather than waiting out the full 182-day period otherwise contemplated by MCL 600.2912b(1).

Defendants argue that they were not required to furnish a written response because MCL 600.2912b(8) renders the written response requirement of MCL 600.2912b(7) optional. However, MCL 600.2912b(7) states that ". . . the health professional or health facility against who the claim is made *shall* furnish to the claimant . . . a written response . . . ." (Emphasis added.) "'Shall' is a mandatory term, not a permissive one." *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006), citing *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005). Although MCL 600.2912b(8) allows a claimant to take accelerated action in the event that a potential defendant does not file a written response, MCL 600.2912b(8) does not alter the mandatory language of MCL 600.2912b(7).

We are aware of no statutory authority that relieves a plaintiff of satisfying the affidavit of merit requirement, MCL 600.2912d(1), when the defendants have failed to satisfy MCL 600.2912b(7). However, defendants' failure to satisfy MCL 600.2912b(7) will not go unnoticed and is one factor that should be considered in examining the "circumstances" of this case, as this Court is required to do. *Geralds*, *supra*, 259 Mich App 233. At a minimum, based on the circumstances, plaintiff's attorney had a reasonable belief that Dr. Matthews was qualified to sign the affidavit of merit. Moreover, Dr. Matthews does indeed have a matching specialty to that of Dr. Lindenmuth, thus satisfying MCL 600.2169.

The trial court erred by granting defendants' motion for summary disposition. In light of our disposition of this issue, defendants' issues on cross-appeal are moot and do not warrant consideration here.

We reverse the trial court's order granting summary disposition to defendants and remand this case for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter

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[2] Plaintiff's notice of intent requested Dr. Lindenmuth to advise plaintiff's attorney whether he was board certified in internal medicine or any other specialty.