

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA ZWIERS,

Plaintiff-Appellant,

v

DR. SEAN GROWNEY and MICHIGAN PAIN
CONSULTANTS, P.C.,

Defendants-Appellees.

UNPUBLISHED

June 24, 2014

No. 312133

Kent Circuit Court

LC No. 08-002009-NO

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals from the trial court's August 6, 2012 order that granted summary disposition in favor of defendants. For the reasons set forth below, we reverse and remand for further proceedings.

The underlying facts, which are not in dispute, were set forth in this Court's opinion in *Zwiers v Growney*, 286 Mich App 38, 40-41; 778 NW2d 81 (2009):

Plaintiff alleged that she suffered injuries resulting from defendant Dr. Sean Growney's negligent placement of an intrathecal morphine pain pump on September 2, 2005. On August 30, 2007, plaintiff served her NOI [notice of intent] on defendants. On February 27, 2008, she filed her complaint and accompanying affidavit of merit. Plaintiff does not dispute that her complaint and affidavit of merit were filed one day too early in contravention of the 182-day notice and waiting period set forth in MCL 600.2912b(1). To be in compliance with MCL 600.2912b(1), the complaint and affidavit needed to be filed on or after February 28, 2008. The period of limitations, tolled by the NOI, MCL 600.5856(c), expired shortly thereafter.

The record indicates that the error in filing the complaint and affidavit a day early was entirely inadvertent, with counsel mistakenly interpreting his file note that the notice period expired on February 27, 2008, to mean that said date was the earliest the summons and complaint could be filed. There is no claim by the parties that they were involved in settlement negotiations on the date the complaint was filed, nor do defendants claim that plaintiff filed her pleadings a

day early in bad faith; it was a simple mistake, but one that ultimately deprived plaintiff of her day in court.

Defendants moved for summary disposition, arguing that under *Burton* [*v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005)], a complaint filed before the statutory waiting period expires does not effectively commence the action and, if the period of limitations elapses in the meantime, dismissal with prejudice is required. The trial court agreed and granted defendants' motion, indicating that it lacked discretion to rule otherwise.

Plaintiff appealed. In addressing the parties' arguments, we acknowledged the Supreme Court's holding in *Burton*, i.e., that a medical malpractice complaint filed before the expiration of the notice period provided by MCL 600.2912b is ineffective to toll the period of limitations. *Zwiers*, 286 Mich App at 45. However, because plaintiff argued that her premature filing of the complaint could be excused by MCL 600.2301,¹ a statute not discussed in *Burton*, and because the Supreme Court had shed new light on MCL 600.2301 and its effect on MCL 600.2912b in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), we stated that we could not blindly follow *Burton* if MCL 600.2301 and *Bush* demanded a different result. *Zwiers*, 286 Mich App at 46. We stated:

We recognize that *Bush* dealt with a violation or defect in regard to the NOI content requirements of § 2912b(4) and not a violation or defect in the proceedings arising out of § 2912b(1). However, *Bush* makes it abundantly clear that MCL 600.2301 is applicable to the entire NOI process and any compliance failures under the NOI statute. *Bush, supra* at 176–177 (service of an NOI is part of a medical malpractice proceeding and as a result “§ 2301 applies to the NOI ‘process’ ”). The *Bush* Court stated that § 2301 goes beyond the amendment of pleadings and reaches defects in any process, pleading, or proceeding. *Id.* at 176. MCL 600.2301 expressly speaks of errors or defects in the proceedings, and it cannot reasonably be disputed that the premature filing of a complaint under § 2912b(1) constitutes an error or defect in the proceedings. MCL 600.2301 also addresses the power of amendment relative to process, pleadings, and proceedings, and the concept of “process” clearly encompasses the issuance of a summons, the filing of a complaint, service of the summons and complaint on a defendant, and the overall commencement of an action that compels a defendant to respond. See MCR 2.101 *et seq.* Additionally, the filing of a complaint is part

¹ MCL 600.2301 provides:

The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

of any civil “proceedings.” See MCR 2.001 and 2.101(B). [*Zwiers*, 286 Mich App at 49-50.]

Then, using the two-part test articulated in *Bush* to determine whether MCL 600.2301 should be invoked, we held that MCL 600.2301 cured plaintiff’s premature filing of the complaint. We noted that the premature filing did not prejudice defendants, as there was no evidence of interrupted settlement negotiations, defendants had time and opportunity to investigate plaintiff’s allegations, and there was a complete absence of bad faith on the part of plaintiff. *Zwiers*, 286 Mich App at 50-51. Accordingly, we reinstated plaintiff’s complaint, reversed the trial court’s order granting summary disposition in favor of defendants, and remanded for further proceedings. *Id.* at 52-53.

On remand, defendants again moved for summary disposition. Defendants argued that in a subsequent decision, *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), the Supreme Court overruled the reasoning employed by this Court in *Zwiers*. Therefore, according to defendants, plaintiff’s complaint failed to commence the medical malpractice action and, because the limitations period had expired, the complaint must be dismissed. The trial court agreed and granted summary disposition in favor of defendants. The instant appeal ensued.

We review de novo a trial court’s decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper under MCR 2.116(C)(7) if a claim is barred by the statute of limitations. “If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred.” *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

We conclude that the trial court erred by granting summary disposition in favor of defendants under *Driver*.

The analysis engaged in by this Court in *Zwiers* is still applicable to the factual situation presented in the instant appeal. After this Court’s initial remand, defendants failed to present any evidence to suggest that they were prejudiced by plaintiff’s premature filing, i.e., there was no evidence of interrupted settlement negotiations, that defendants were deprived of the time and opportunity to investigate plaintiff’s allegations, or that there was bad faith on the part of plaintiff. Moreover, in *Furr v McLeod*, __ Mich App __; __ NW2d __ (Docket No. 310652; April 10, 2014), slip op at 2-3, a panel of this Court explicitly held that *Driver* applies to factual scenarios different than that present in the instant appeal, namely, “service of an NOI on a nonparty defendant beyond the limitations period and an attempt to amend an earlier timely NOI to add the nonparty defendant.” Accordingly, MCL 600.2301 cured plaintiff’s premature filing of her complaint, and the trial court erred by granting summary disposition in favor of defendants.²

² Due to this ruling, we decline to address plaintiff’s other arguments regarding equal protection and the law of the case doctrine.

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Douglas B. Shapiro