

STATE OF MICHIGAN
COURT OF APPEALS

DARREN FINDLING, Personal Representative of
the Estate of FRANK E. EARLY,

Plaintiff-Appellant,

v

JEFFREY PARKER, M.D., and JEFFREY
PARKER, M.D., P.C., d/b/a ADVANCED
SPORTS MEDICINE, P.C.,

Defendants-Appellees.

UNPUBLISHED
September 28, 2006

No. 267519
Oakland Circuit Court
LC No. 2005-064647-NH

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(7) based on the expiration of the statute of limitations, and pursuant to MCR 2.116(C)(8) based on the failure to file the affidavit of merit with the complaint, apparently due to a clerical error. We affirm the order granting summary disposition but direct that the order of dismissal be without prejudice so that the successor personal representative may refile the action accompanied with the affidavit of merit.

Following the decedent's death on August 31, 2002, Charlene Early Powell was appointed personal representative of his estate on October 4, 2002. She filed a notice of intent on July 27, 2004, and then resigned as personal representative on December 13, 2004, without having filed a lawsuit on behalf of the estate. Plaintiff was appointed successor personal representative on December 14, 2004. He filed a complaint on March 2, 2005. Although an affidavit of merit had been prepared on December 14, 2004, it was not filed with the complaint.

Defendants moved for summary disposition, arguing only that the filing of the complaint was defective since it was not accompanied by an affidavit of merit. At the hearing on the motion, defendants also argued that the limitations period had run since the complaint was not filed within two years of the appointment of the initial personal representative. The trial court concluded that "failing to file the Affidavit of Merit with the Complaint does not toll the Statute of Limitations," that the limitations period had expired, and that equitable tolling did not apply.

Plaintiff first argues that, based on *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 33; 658 NW2d 139 (2003), the trial court erred in concluding that the statute of

limitations had expired. We agree. Unlike the initial personal representative in *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), the initial personal representative in this case did not file any lawsuit. Moreover, unlike the successor personal representative in *McMiddleton v Bolling*, 267 Mich App 667; 705 NW2d 720 (2005), the successor personal representative here was not trying to revive an untimely lawsuit filed by the initial representative. Rather, the successor personal representative in this case filed the only lawsuit, and did so within two years of issuance of his letters of authority and within five years of the decedent's death, consistent with MCL 600.5852, as interpreted by *Eggleston and Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383; ___ NW2d ___ (2006). Accordingly, the lawsuit was timely.

Plaintiff next argues that the trial court erred in concluding that plaintiff's filing was fatally defective since he filed the complaint without appending the affidavit of merit. MCL 600.2912d(1) provides:

Subject to subsection (2), [which, on motion, allows the filing of the affidavit of merit within 28 days for good cause shown¹], 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 section 2169.

In *Scarsella v Pollak*, 461 Mich 547, 553; 607 NW2d 711 (2000), the Court held that where a plaintiff "wholly omits to file the affidavit, . . . the filing of the complaint is ineffective." The Court went on to note that it therefore "does not work a tolling of the applicable period of limitation." Here, there is no problem with the issue of tolling since the limitations period has not yet expired. We decline to address whether the subsequent filing of the affidavit cured the initial filing of the complaint.² Rather, we affirm the grant of summary disposition to defendants on the ground that the affidavit was not filed simultaneously with the complaint, but order that the dismissal be without prejudice to the refiling of the complaint. The successor personal representative may then refile so long as this is done before expiration of the limitations period.

Given our disposition of the above issues, we need not decide whether the trial court erred in holding that the limitations period was not equitably tolled.

¹ This extension does not apply here. The complaint was not served until March 30, 2005, which was 28 days after the filing of the complaint, and it did not come to plaintiff's attention that the affidavit had been omitted until April 20, 2005, when defendants filed the motion for summary disposition. Plaintiff then filed the affidavit on April 28, 2005.

² In *VandenBerg v VandenBerg*, 231 Mich App 497, 502-503; 586 NW2d 570 (1998), we suggested that there is no need to dismiss where an affidavit is ultimately filed in a timely manner. While the Supreme Court seems to endorse this view in *Scarsella, supra* at 551-552, we need not address the continuing viability of such a rule inasmuch as merely holding that the dismissal be without prejudice will still allow plaintiff to refile before the period of limitations expires.

Affirmed but remanded for correction of the order to reflect that the dismissal is without prejudice. We do not retain jurisdiction.

/s/ Alton T. Davis

/s/ David H. Sawyer