STATE OF MICHIGAN

IN THE SUPREME COURT

RODNEY HANNA,

Plaintiff-Appellee,

vs.

DR. DARIO MERLOS, DDS,

Defendant-Appellant.

Docket No. 142914

Court of Appeals No. 289513

Wayne Circuit Court
No. 07-732805-NH

BRIEF OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

PROOF OF SERVICE

KERR RUSSELL AND WEBER PLC
Daniel J. Schulte (P46929)
Joanne Geha Swanson (P33594)
Attorneys for Amicus Curiae
Michigan State Medical Society
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

BASIS FOR JURISDICTION

MSMS refers this Court to Defendant-Appellant Dr. Dario Merlos' Application for Leave to Appeal, which addresses the basis for jurisdiction.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

A statement of the questions presented for review is contained within Defendant-Appellant Dr. Dario Merlos' Application for Leave to Appeal. In this brief, MSMS addresses only one issue: Whether the Court of Appeals erred in applying a "serendipitous" compliance standard to the affidavit of merit requirement contained within MCL 600.2912d?

The Court of Appeals would say "no."

Plaintiff-Appellee says "no."

Defendant-Appellant says "yes."

Amicus Curiae MSMS says "yes."

STATEMENT OF FACTS

Lacking independent knowledge of the underlying proceedings, MSMS relies upon the Statement of Facts recounted in Defendant-Appellant Dr. Dario Merlos' Application for Leave to Appeal.

STATEMENT OF INTEREST OF MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association that represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has a continuing interest in issues which affect the medical profession and the patients it serves. MSMS greatly appreciates the many opportunities this Court has given MSMS and other interested groups to express their views on significant pending matters. The questions addressed in the application for leave to appeal in *Hanna v Merlos* are of that caliber.[1]

Hanna is a dental malpractice case. At issue is Mr. Hanna's non-compliance with the statutory notice of intent and affidavit of merit requirements. Mr. Hanna's omission with respect to the latter requirement involves his failure to file an affidavit of merit ("AOM") *with the complaint* as required by MCL 600.2912d(1). When Dr. Merlos raised the deficiency in a motion for summary disposition filed within the statutory limitations period, Mr. Hanna could have, but did not, re-file the complaint with the AOM. Nor did he attach the AOM to his response to the motion. Mr. Hanna instead erroneously insisted that the affidavit had been filed, which the Court record did not bear out and which the Court of Appeals determined was not true. Ultimately, the Court of Appeals held that Mr. Hanna "serendipitously" complied with the statute when, within the limitations period, he submitted a copy of the AOM as an exhibit to his answer to defendant's trial court reconsideration motion. *Hanna v Merlos,* unpublished opinion per curiam of the Court of Appeals, issued March 3, 2011 (Docket No. 289513), 2011 Mich App LEXIS 430 at *6-9. The Court of Appeals apparently overlooked the fact that Dr. Merlos was

[1] This Court directed the Michigan Court of Appeals to consider *Hanna* as if on leave granted after that Court initially denied leave to appeal. *Hanna v Merlos*, 483 Mich 1070; 765 NW2d 879 (2009). On December 14, 2010, the Court of Appeals issued an opinion which, upon reconsideration, it later vacated. The present appeal is from the opinion on reconsideration, which the Court issued on March 3, 2011.

not served with a copy of that answer until it was attached to a brief opposing Dr. Merlos' motion for reconsideration in the Court of Appeals, and that even then, the copy Dr. Merlos received did not attach the AOM. *See* Dr. Merlos' Application for Leave to Appeal at 2.

With all due respect, the *Hanna* court's theory of "serendipitous" compliance turns the statutory AOM requirement on its head and violates the consistently-applied rule of law established by this Court in *Scarsella v Pollack,* 461 Mich 547; 607 NW2d 711 (2000), *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), and *Ligons v Crittenton Hosp*, – Mich –; – NW2d –; 2011 Mich LEXIS 1376 (2011). MSMS is understandably concerned that the lower court's apparently dismissive view of the statutory requirements will undermine the effectiveness of the carefully-established protocol for medical and dental malpractice litigation, and thwart the purpose the framework was designed to achieve. MSMS respectfully submits the within brief to address this concern.[2]

[2] A second issue raised by Dr. Merlos addresses Mr. Hanna's failure to comply with the notice of intent ("NOI") requirement. Mr. Hanna asserted that a November 2006 letter he submitted to Dr. Merlos, followed by another letter from his attorney, constituted a NOI. Dr. Merlos argued that the letters did not satisfy the requirements of the NOI statute, MCL 600.2912b(4), because they did not recite the standard of care, describe how the standard was breached, explain what should have been done to comply with the standard of care, or state how the breach proximately caused the harm. Mr. Hanna's counsel ultimately sent out a letter that was actually identified as a NOI, but he only waited 58 days before filing the complaint. The Court of Appeals opined that Mr. Hanna's November 2006 letter qualified as a conforming NOI in most respects although it did not sufficiently address the manner in which the alleged breach proximately caused the harm. 2011 Mich App LEXIS 430 at *11-15. The Court decided that this nonconformance should be "disregarded" because plaintiff made a good faith effort to comply with the statute and minor defects could be cured by amendment under MCL 600.2301 or overlooked. *Id.* at *16-17. Computing the NOI period from the date of the earliest letter, the Court concluded that the complaint was not prematurely-filed. While MSMS supports Dr. Merlos' appeal of the NOI issue, it does not separately address that question in this brief.

ARGUMENT

I. The Issues Raised By the Application Are of Major Significance to the State's Jurisprudence and Require De Novo Review.

Over the past two decades, this Court has devoted a considerable amount of time and intellectual energy to issues involving the constitutionality, applicability and interpretation of the statutory requirements for medical and dental malpractice litigation. Many aspects of the law are by now well-established, affording greater clarity and certainty to litigants. Occasionally, however, new challenges propagate spurious theories of compliance that are seriously at odds with this Court's prior judicial pronouncements. These result-driven rationales are sometimes overly broad, ephemeral, and pliable, creating widening cracks in the statutory framework.

The issues presented by Dr. Merlos' appeal are of that ilk, addressing principles of extreme importance to the jurisprudence of this State. Because they involve questions of statutory interpretation, they are subject to de novo review. *Ligons*, 2011 Mich LEXIS 1376 at *8-9 (2011). The goal is "to give effect to the plain meaning of the text" and "[i]f the text is unambiguous, we apply the language as written without construction or interpretation." *Id. See also, Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003) ("If the language of a statute is clear, no further analysis is necessary or allowed."); *People v Herron*, 464 Mich 593, 611; 628 NW2d 528 (2001) (words of a statute must be given "their plain and ordinary meaning"). Regrettably, the Court of Appeals disregarded the plain meaning of the affidavit of merit statute in reaching the result in *Hanna*.

II. The Court of Appeals' "Serendipitous Compliance" Standard Conflicts With the Plain Language of the Affidavit of Merit Statute and Violates the Rule of Law Established by This Court.

The "serendipitous compliance" standard the Court of Appeals applied in *Hanna (On Reconsideration)* cannot be reconciled with the plain language of the AOM statute and threatens

to undermine the purpose of the carefully considered statutory framework. MCL 600.2912d was enacted in 1986 and amended in 1993 as part of the tort reform initiative established by the Legislature. *See Ligons,* 2011 Mich LEXIS 1376 at *9. Its purpose is to deter the filing of frivolous claims by requiring a pre-filing review by an expert in the field. In *Ligons*, this Court explained:

> By its terms, MCL 600.2912d requires that a plaintiff obtain a qualified expert willing to review the medical records and certify that the claim has merit because, in the expert's opinion, each defendant breached the applicable standard of practice or care, there were actions the defendant should have taken or omitted in order to comply with the standard, and the breach was the proximate cause of the injury alleged in the presuit notice. Consistently with its purpose to certify merit ***at the outset of the case***, MCL 600.2912d(1) directs that the ***plaintiff "shall file" the AOM "with the complaint."***[3]

Id. at *33 (emphasis added).

---

[3] In clear and unequivocal terms, the statute provides:

> Sec. 2912d. (1) Subject to subsection (2), 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. 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 and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

The statute contemplates that a plaintiff may not always be able to comply with the established timetable for filing the AOM and provides alternatives:

> If the plaintiff is unable to comply with this mandate, the statute provides two alternatives for recourse: MCL 600.2912d(2) permits the court to grant an additional 28 days in which to file the AOM "[u]pon motion of a party for good cause shown." And MCL 600.2912d(3) affords the plaintiff "91 days after the filing of the complaint" to file the AOM if the defendant failed "to allow access to medical records within the time period set forth in [MCL600.2912b(6)]."

Id.[4]

Here, although Mr. Hanna had ostensibly obtained an affidavit of merit and referred to it in the complaint, "he failed to actually file the AOM with the complaint in December 2007." *Hanna,* 2011 Mich App LEXIS 430 at *3. Even when informed of the omission, Mr. Hanna declined to re-file the complaint with the affidavit of merit to rectify the deficiency, and did not attach the affidavit to his summary disposition response. Nonetheless, the Court held that Mr. Hanna "serendipitously" complied with the statute when he submitted a copy of the affidavit as an exhibit to his answer to defendant's *motion for reconsideration* of the order denying summary disposition approximately two months before the statute of limitations expired. *Id.* at *6. Dr. Merlos was not served with a copy of that answer until it was attached to a brief opposing Dr. Merlos' motion for reconsideration in the Court of Appeals and even then, the copy Dr. Merlos

---

[4] MCL 600.2912d provides:

> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).
>
> (3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

None of the exceptions for late filing apply in this case.

received did not attach the AOM. See Dr. Merlos' Application for Leave to Appeal at 2. All of this was disregarded by the Court of Appeals, which held that the "belatedly submitted" copy of the AOM qualified as "file[d] with the Court" within the meaning of MCL 600.2912d(1):

> [W]e conclude that plaintiff did "serendipitously" comply with §2912d(1) when he later submitted a copy of the AOM on July 14, 2008, as an exhibit to his answer to defendant's motion for reconsideration of the order denying defendant's first motion for summary disposition. As noted earlier, the period of limitations in this case did not expire until September 18, 2008. Accordingly, it is beyond dispute that this belated copy of the AOM was filed before the expiration of the limitations period. ***The question remains whether this belatedly submitted copy of the AOM otherwise qualified as "file[d] with the complaint" within the meaning of §2912d(1). We conclude that it did.***

Id. at *6-7 (emphasis added).

The Court recognized that Mr. Hanna did not formally submit a conforming copy of the affidavit until after the trial court decided the first summary disposition motion. However, because it was attached as an exhibit to Dr. Merlos' first summary disposition motion and to Dr. Merlos' reply, the Court concluded that it had been "filed in the action" at the time of the Trial Court's summary disposition ruling. *Id.* at *8-9, fn 4. Consequently, the "belated-but-conforming" affidavit – which had no proximity in time or place to the filing of the complaint - was held to be sufficient to comply with the statute. *Id.* at 8-9. The Court relied upon *Wood v Bediako*, 272 Mich App 558, 561-562; 727 NW2d 654 (2006), in reaching this erroneous conclusion.

The facts and circumstances were completely different in *Wood*. In *Wood*, the Court of Appeals reversed the entry of summary disposition in defendants' favor because ***the Trial Court had failed to consider*** a subsequently filed affidavit which cured the defective affidavit filed with the complaint. *Id.* at 564. The earlier affidavit was defective because it was not notarized although two originally signed AOMs were notarized and had been placed in the files of plaintiff's counsel. A copy of the notarized affidavit was also attached to plaintiff's response to

a motion which had been filed on unrelated grounds within the limitations period. The Court of Appeals based its ruling on a perceived lack of prejudice to the defendants, stating:

> We note here that although defendants did not have a valid affidavit, they did have notice of plaintiff's theory of the case from the moment they received the complaint. Moreover, the trial court found that the unnotarized affidavit otherwise met the legal and medical requirements of the statute, and defendants did not challenge its sufficiency on these grounds. And, importantly, plaintiff remedied the lack of notarization when she later filed a notarized copy within the period of limitations. Hence, we conclude that defendants were not prejudiced by the delayed filing of the notarized affidavit. *Franchino v Franchino,* 263 Mich. App. 172, 191; 687 N.W.2d 620 (2004) (observing that actual prejudice is not caused by delay alone; rather, it occurs when an amendment to a pleading would deny the opposing party a fair trial).

Id.

This Court has not conditioned enforcement of the AOM requirement upon a showing of prejudice. Further, unlike *Wood*, the evidence before the Court in *Hanna* at the time of the first summary disposition ruling ***did not include an AOM filed by Mr. Hanna***. Only a contortion of the plain meaning of the statute could have allowed the *Hanna* court to conclude, as it did, that Dr. Merlos "filed" the AOM within the meaning of MCL 600.2912d(1) when he attached it as an exhibit to a motion for dismissal due to Mr. Hanna's violation of the AOM requirement. Given that the "substance of the affidavit ... is a qualified health professional's opinion that the plaintiff has a valid malpractice claim," *Scarsella v Pollak*, 461 Mich at 548, it strains credulity to conclude that by virtue of Dr. Merlos' challenge, "the AOM was 'then filed in the action' at the time of the trial court's April 14, 2008, ruling ..." *Hanna*, 2011 Mich App LEXIS 430 at *9, fn4. Dr. Merlos certainly had no interest in "filing" the AOM on Mr. Hanna's behalf.

This Court has consistently rejected attempts to allow the filing of an AOM at some later date to "amend" a filing which omits to attach the AOM. In *Scarsella, supra*, plaintiff argued that he should have been permitted to amend his complaint to append an untimely affidavit of

merit, which would relate back to the date of filing and render the amendment timely. This Court rejected that analysis as an effective repeal of the affidavit of merit requirement:

> ***Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date.*** This, of course, completely ***subverts the requirement of MCL 600.2912d(1); MSA 27A.2912(4)(1), that the plaintiff 'shall file with the complaint an affidavit of merit,' as well as the legislative remedy*** of MCL 600.2912d(2); MSA 27A.2912(4)(2), allowing a twenty-eight day extension in instances where an affidavit cannot accompany the complaint.

Id. at 550 (emphasis added). This Court concluded that where a plaintiff wholly omits to file the required affidavit, the filing of the complaint is ineffective and does not toll the applicable period of limitation. *Id.* at 552. The complaint must be ***dismissed*** with prejudice if the statute of limitations has expired and without prejudice if the statutory limitations period remains viable. Amendment is not an option. *See also*, *Ligons*, 2011 Mich LEXIS 1376 at *11-13 (observing that *Scarsella* "stressed the Legislature's 'mandatory and imperative' language" and where a complaint is filed without the AOM, the case must be dismissed); *Kirkaldy v Rim*, 478 Mich at 586 (if a challenge to a deficient affidavit is successful, the proper remedy is dismissal, citing *Scarsella*).[5]

---

[5] Similarly, in lieu of granting leave to appeal in *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007), a case involving the plaintiff's inadvertent failure to file an affidavit of merit with the complaint, this Court reversed the Court of Appeals' denial of summary disposition based on defendants' alleged waiver of the defense and remanded for entry of an order granting the defendants' motion for summary disposition "for the reasons stated in the Court of Appeals dissenting opinion." The Court of Appeals dissent had explained:

> I fully acknowledge that a defendant must raise certain defenses in its first responsive pleading, and that a failure to do so may result in the waiver of those defenses. See MCR 2.111(F)(2); MCR 2.111(F)(3). However, I conclude that defendants were never required to raise or plead their asserted defenses in the first instance ***because this medical malpractice action was never properly commenced.***

The *Hanna* court recognized the significance of *Scarsella*, explaining that the filing of a malpractice complaint without an affidavit of merit is insufficient to commence the lawsuit and "requires dismissal." *Hanna,* 2011 Mich App LEXIS 430 at *4. Yet, the serendipitous compliance standard applied by the *Hanna* court does not follow that rule. To the contrary, it wreaks the very same havoc with the statutory language that *Scarsella* sought to avoid, subverting the requirement that the affidavit be filed *with the complaint*, and that it be filed *by the plaintiff.* Under the "serendipitous compliance" standard, if the affidavit makes it into the court record by any means at any time within the limitations period, it must be deemed "filed with the complaint" in accordance with the statute. This flagrant disregard for the plain language of the statute is contrary to the Legislative intent and violates the spirit, if not the very letter, of this Court's holding in *Scarsella.*

Hanna is particularly at odds with *Ligons*. One of the issues in *Ligons* was whether plaintiff could amend his deficient affidavit of merit in light of MCR 2.118(A), *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), and/or MCL 600.2301. *Ligons* held that a medical malpractice action must be dismissed if a defective affidavit of merit is filed after both the statutory limitations and wrongful death savings periods have expired "because allowing amendment of the deficient AOM would directly conflict with the statutory scheme governing

---

> Plaintiffs' claims arose, at the latest, at the time of the myocardial infarction in March 2003. "[T]he mere tendering of a complaint without the required affidavit of merit is insufficient to commence [a medical malpractice] lawsuit," and therefore does not toll the two-year period of limitations [citing *Scarsella*]. . . . Regardless whether defendants properly raised and preserved the statute-of-limitations and affidavit-of-merit defenses in their first responsive pleading, the ***period of limitations was not tolled by plaintiffs' complaint***, and plaintiffs' claims were already time-barred at the time of the circuit court's ruling ...

Auslander v Chernick, unpublished opinion per curiam of the Court of Appeals issued May 1, 2007 (Docket No. 274079), 2007 Mich App LEXIS 1206 at *9-10 (Jansen, J., dissenting) (emphasis added).

medical malpractice actions, the clear language of the court rules and the precedent of this Court," *id.* at *1, which calls "for dismissal in the event of an absent or defective AOM." *Id.* at *25. With respect to amendment under MCR 2.118(A), this Court explained:

> [T]he statute clearly conveys that the AOM must be provided within the relevant time frames. For this reason, permitting a plaintiff to correct deficiencies in the AOM through amendment as a matter of course within 14 days after service of a responsive pleading, MCR 2.118(A)(2), would directly conflict with the legislative remedies provided in MCL 600.2912d(2) and (3), which allow a plaintiff who is unable to submit a conforming AOM with the complaint an additional 28 or 91 days, respectively, to complete and submit the AOM. Just as the *Scarsella* Court reasoned in rejecting retroactive "amendment" of untimely AOMs under MCR 2.118, permitting amendment of a deficient AOM would similarly subvert the AOM statute by allowing plaintiffs to routinely file complaints without conforming AOMs.

Id. at *33.

Ligons also rejected the assertion that amendment should be permitted pursuant to *Bush* and MCL 600.2301. One of the issues in *Bush* was the consequence of filing a defective NOI. *Id.* at 172. Noting that the Legislature had rejected a proposed mandatory dismissal clause in a companion statute when the notice of intent legislation was originally introduced, the *Bush* court concluded that the Legislature did not intend dismissal to be the penalty for a nonconforming NOI. *Id. at* 173-74. Dismissal [with prejudice], the Court said, was not consistent with the stated purpose of 2912b as a mechanism to promote settlement, reduce costs, and compensate meritorious claims that might otherwise be precluded by litigation costs, *Id.* at 175, and was not comparable to the "very minor" penalty prescribed for a defendant's noncompliance with the notice requirements. The *Bush* court focused on MCL 600.2301, which permits a court to disregard or correct defects "for the furtherance of justice" if the substantial rights of the parties are not impaired. *Id.* at 176. The statute 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.

The *Bush* court concluded that because "[s]ervice of an NOI is clearly part of a medical malpractice 'process' or 'proceeding' in Michigan," §2301 may be employed to cure defects. *Id.* at 176-77. Therefore, according to *Bush*, a trial court should only consider dismissal if plaintiff has not made a good-faith attempt to comply. *Id.* at 178. *See also*, *Driver v. Naini*, – Mich –; – NW2d – (2011), 2011 Mich LEXIS 1386 at *17 ("The *Bush* majority held that when an NOI fails to meet all of the *content* requirements under MCL 600.2912b(4), MCL 600.2301 allows a plaintiff to amend the NOI and preserve tolling unless the plaintiff failed to make a good-faith effort to comply with MCL 600.2912b(4)").

The *Ligons* court rejected application of the *Bush* analysis to an AOM explaining that "retroactive amendment of a deficient AOM has never been authorized under any court rule or statute" and "would actually be contrary to the specific statutory scheme governing medical malpractice actions." *Ligons*, 2011 Mich LEXIS at *35. The *Ligons* court noted that the Court has long recognized that an attachment to a complaint is neither a process nor a proceeding under MCL 600.2301, and even if it were, the requisite good-faith effort to comply was absent. Further, the substantial rights of the defendants would be affected:

> Allowing a medical malpractice plaintiff to proceed in an action against a defendant even though the plaintiff did not provide such an affidavit affects the defendant's substantial right to have the law mean what it says.

Id. at *37. The *Ligons* court therefore declined "to apply the rationale of *Bush* beyond its limited statutory focus." *Id.* at *38.

All of the above is to say that the "serendipitous compliance" standard applied by the Court of Appeals in *Hanna* cannot be reconciled with the mandate of *Scarsella* and *Ligons*, or the plain meaning of the AOM requirement. *Hanna* has, in effect, rewritten the AOM statute, the

plain meaning of which this Court has strived so consistently to preserve. While *Hanna* is unpublished, it purports to rely upon the published *Wood* decision and might very well influence future litigants and the direction of subsequent Court of Appeals' decisions on this issue. MSMS is genuinely concerned that absent the intervention of this Court, the utility of the statutory framework will become diluted. MSMS therefore supports Defendant's Application for Leave to Appeal and urges this Court to consider this issue.

RELIEF REQUESTED

For these reasons, MSMS respectfully urges this Court to grant Dr. Merlos' application for leave to appeal and/or to peremptorily reverse the Court of Appeals' decision in *Hanna* (*On Reconsideration*).

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: 

Joanne Geha Swanson (P33594)
Daniel J. Schulte (P46929)
Attorneys for Amicus Curiae
Michigan State Medical Society
500 Woodward Avenue. Suite 2500
Detroit, MI 48226
(313) 961-0200
(313) 961-0388 (Facsimile)

Dated: September 23, 2011

RODNEY HANNA, Plaintiff-Appellee, v DARIO MERLOS, D.D.S., Defendant-Appellant.

No. 289513

COURT OF APPEALS OF MICHIGAN

2011 Mich. App. LEXIS 430

March 3, 2011, Decided

PRIOR HISTORY: [*1]
Wayne Circuit Court. LC No. 07-732805-NH.

JUDGES: Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

OPINION

ON RECONSIDERATION

PER CURIAM.

After this Court initially denied defendant's application for leave to appeal, [1] our Supreme Court remanded the case to this Court for consideration as on leave granted. [2] After having given plenary consideration to defendant's arguments, we now affirm the trial court's orders denying his motions for summary disposition.

1 *Hanna v Merlos*, unpublished order of the Court of Appeals, entered March 16, 2009 (Docket No. 289513).

2 *Hanna v Merlos, 483 Mich 1070 (2009).*

I

Plaintiff sought dental care from defendant between July and September 2006. Plaintiff filed this action for dental malpractice alleging that defendant had installed the wrong sized crown on one tooth and had failed to perform root canals on that tooth and another tooth. In November 2006, plaintiff sent a letter to defendant, which plaintiff later explained he intended to serve as a notice of intent to sue (NOI) under *MCL 600.2912b*. Plaintiff's counsel then sent defendant a formal NOI in October 2007. Plaintiff ultimately filed suit in December 2007. Although plaintiff had obtained an affidavit of merit (AOM), [*2] he neglected to file it with the complaint as required by *MCL 600.2912d*. Before the statute of limitations expired, defendant filed a motion for summary disposition on the ground that plaintiff had failed to comply with both § 2912b and § 2912d. That motion was denied. After the limitations period expired, defendant renewed his claims in two additional motions for summary disposition. The trial court denied both additional motions as well.

II

We review de novo the trial court's ruling on a motion for summary disposition. *Gillie v Genesee Co Treasurer, 277 Mich App 333, 344; 745 NW2d 137 (2007)*. In addition, whether an AOM or an NOI is sufficient to comply with the statutory requirements is a question of law that we review de novo. See *Jackson v*

Detroit Med Ctr, 278 Mich App 532, 545; 753 NW2d 635 (2008).

III

Defendant argues that the trial court erred by failing to dismiss plaintiff's claims on the ground that a proper AOM was never filed. We disagree.

The limitations period for a malpractice claim is two years from the time the claim accrues. *MCL 600.5805(1)* and *(6)*. A medical malpractice claim accrues at the time of the act or omission that gives rise to the claim "regardless of the time [*3] the plaintiff discovers or otherwise has knowledge of the claim." *MCL 600.5838a(1)*. There appears to be no dispute that plaintiff's claim accrued no later than September 19, 2006, his last day of treatment with defendant. Therefore, plaintiff had until September 19, 2008, to file his complaint. Plaintiff filed the complaint on December 13, 2007, well within the limitations period.

However, plaintiff was statutorily required to "file with the complaint an affidavit of merit signed by a health professional . . . ." *MCL 600.2912d(1)*. As explained previously, although plaintiff had obtained an AOM and referenced it in the complaint, he failed to actually file the AOM with the complaint in December 2007. Instead, the record shows that he did not formally submit a copy of the AOM to the trial court until July 14, 2008, when he attached it as an exhibit to his answer to defendant's motion for reconsideration of the trial court's order denying defendant's first motion for summary disposition. Among other things, defendant suggests that any such belated filings of plaintiff's AOM were insufficient to comply with the requirements of § 2912d(1).

In *Scarsella v Pollak, 461 Mich 547, 549; 607 NW2d 711 (2000)*, [*4] our Supreme Court held that the filing of a malpractice complaint without the requisite affidavit of merit "'is insufficient to commence the lawsuit'" and requires dismissal. If the limitations period has not expired, the case should be dismissed without prejudice and the plaintiff may refile the complaint. However, if the limitations period has expired and a conforming AOM has not been filed, the case must be dismissed with prejudice. *Id. at 549-553*.

As an initial matter, we note that the record belies plaintiff's assertion that he filed the AOM contemporaneously with the complaint in December 2007. The original complaint, which is contained in the lower court file, has no AOM attached to it. Nor does the trial court's register of actions indicate that an AOM was filed contemporaneously with the complaint. Plaintiff contends that the AOM must have become unattached from the copy of the complaint contained in the lower court file and that the court must have failed to record his December 2007 filing of the AOM in the register of actions due to a "mechanical or clerical error." But without proof, such as an affidavit from plaintiff's counsel averring that the AOM was indeed attached [*5] to the complaint at the time of filing, [3] this contention is nothing more than an unsupported, conclusory assertion that is entitled to no evidentiary weight. Indeed, a presumption arises that, had the AOM been filed contemporaneously with the complaint in December 2007, the clerk would have inserted it into the lower court file and would have made an appropriate corresponding entry in the register of actions. See *People v Alexander, 234 Mich App 665, 673; 599 NW2d 749 (1999)*; see also *Burgess v Lasby, 91 Mont 482, 491; 9 P2d 164 (1932)*. The unsupported assertions of plaintiff's counsel are insufficient to overcome this presumption. See *Capman v Harper-Grace Hosp, 96 Mich App 510, 515; 294 NW2d 205 (1980)*. Despite plaintiff's protestations to the contrary, the mere fact that the complaint references the AOM does not somehow prove that the AOM was actually attached to the complaint at the time of filing in December 2007.

> 3 We note that neither plaintiff nor his attorneys have sought to present such an affidavit or moved to expand the record with such an affidavit here.

Plaintiff also asserts that he refiled the AOM on January 14, 2008, after discovering "that the affidavit may have come [*6] unattached [from the original complaint]." But the record belies this assertion as well. The trial court's register of actions does not indicate that any AOM was filed in January 2008. As noted earlier, we presume that, had the AOM been filed, the clerk would have made the proper entry in the register of actions. See *Alexander, 234 Mich App at 673*; see also *Burgess, 91 Mont at 491*. It is true that plaintiff has produced a copy of the AOM bearing a Wayne County Clerk's time stamp with the date of January 14, 2008. However, unlike the time stamps appearing on the other pleadings, papers, and documents filed in this case, the time stamp on the affidavit of January 14, 2008, contains the word

"RECEIVED" rather than the word "FILED." In other words, although it appears that plaintiff or his counsel took a copy of the affidavit to the office of the Wayne County Clerk and had it time stamped on January 14, 2008, there is still no evidence that the affidavit was *actually filed* in the lower court file on that date.

Nevertheless, we conclude that plaintiff did "serendipitously" comply with § 2912d(1) when he later submitted a copy of the AOM on July 14, 2008, as an exhibit to his answer to defendant's [*7] motion for reconsideration of the order denying defendant's first motion for summary disposition. As noted earlier, the period of limitations in this case did not expire until September 19, 2008. Accordingly, it is beyond dispute that this belated copy of the AOM was filed before the expiration of the limitations period. The question remains whether this belatedly submitted copy of the AOM otherwise qualified as "file[d] with the complaint" within the meaning of § 2912d(1). We conclude that it did.

In *Wood v Bediako, 272 Mich App 558, 561-562; 727 NW2d 654 (2006)*, the plaintiff attached a defective AOM to her complaint, and the defendants thereafter moved for summary disposition. At the hearing on the defendants' motion for summary disposition, the plaintiff noted that she had subsequently and "serendipitous[ly]" submitted a conforming copy of the AOM to the trial court before the expiration of the limitations period. She argued that this later-filed, conforming AOM "'serendipitously' cured the defect and tolled the [limitations] period." *Id. at 561*. This Court agreed with the plaintiff, observing that "a trial court is required to consider all admissible evidence then filed in the [*8] action when deciding a summary disposition motion . . . ." *Id. at 565*. Because the plaintiff's later-filed, "serendipitous" AOM was submitted before the expiration of the period of limitations and was contained in the lower court file, this Court ruled that "the court erred in failing to consider the subsequently filed . . . affidavit when it granted [the] defendants summary disposition[.]" *Id.*

As in *Wood*, plaintiff in the present case "serendipitous[ly]" filed a belated-but-conforming copy of his AOM when he submitted it as an exhibit to his answer to defendant's motion for reconsideration on July 14, 2008. This conforming copy of the AOM was filed before the expiration of the period of limitations and was contained in the lower court file at the time of the trial court's decisions on defendant's subsequent motions for summary disposition. As explained in *Wood*, the trial court was "required to consider all admissible evidence then filed in the action" when deciding defendant's subsequent motions for summary disposition in this case. *Id. at 565*. Under the reasoning of *Wood*, we conclude that plaintiff's belated-but-conforming AOM, filed as an exhibit to his answer to defendant's motion [*9] for reconsideration, was sufficient to comply with the requirements of § 2912d. *Wood, 272 Mich App at 565*. [4]

> 4 We acknowledge that plaintiff did not formally submit a conforming copy of his AOM until after the trial court's decision on defendant's first motion for summary disposition. However, a conforming copy of plaintiff's AOM *was* filed before the trial court's ruling on this first motion. Defendant, himself, attached a complete copy of plaintiff's AOM as Exhibit D to his first motion for summary disposition on January 28, 2008, and as Exhibit B to his reply to plaintiff's response to that motion on March 13, 2008. Consequently, the AOM was "then filed in the action" at the time of the trial court's April 14, 2008, ruling on defendant's first motion for summary disposition. *Wood, 272 Mich App at 565*.

IV

Defendant also argues that the trial court erred by failing to dismiss plaintiff's claims on the ground that he did not wait until 182 days after the filing of the NOI to file his complaint. Specifically, defendant asserts that plaintiff's letter of November 2006 was insufficient to constitute an NOI under the provisions of § 2912b. Again, we disagree.

Under § 2912b(1), a plaintiff asserting [*10] a medical malpractice claim must serve the defendant with an NOI and wait 182 days before filing suit. "The unambiguous language of *MCL 600.2912b(4)* requires a medical malpractice plaintiff to include in her notice of intent a statement of (1) the factual basis for the claim, (2) the applicable standard of practice or care alleged by the claimant, (3) the manner in which it is claimed that the applicable standard of practice or care was breached, (4) the alleged action that should have been taken to comply with the alleged standard, (5) the manner in which it is claimed that the breach was the proximate cause of the injury claimed in the notice, and (6) the names of all professionals and facilities the claimant is

notifying." *Roberts v Mecosta Co Gen Hosp (After Remand), 470 Mich 679, 682; 684 NW2d 711 (2004).* Even if an NOI is sufficient to apprise the defendant "of the nature and gravamen of [the] plaintiff's allegations, this is not the statutory standard"; instead, the NOI must contain all the information required under § 2912b(4). *Boodt v Borgess Medical Ctr, 481 Mich 558, 560-561, 563; 751 NW2d 44 (2008).*

We have carefully reviewed plaintiff's letter dated November 8, 2006, and [*11] we conclude that it did, indeed, qualify as a conforming NOI. Plaintiff's letter reviews in detail "[defendant's] lack of x-ray diagnosis, and proper treatment of my two teeth, #3 and #18," and alleges that defendant diagnosed "tooth #3 as good without taking an x-ray," when in fact "tooth #3 [was] abscessed and the only way the gum area [could] be healthy again [was] to have a root canal." The 7-page letter describes each visit by plaintiff to defendant's office and details the alleged errors committed by defendant during each visit. For example, with respect to plaintiff's visit of July 11, 2006, the letter explains that defendant "said tooth #3 is a good tooth without taking an x-ray," and that defendant misdiagnosed the condition of tooth #18. Concerning plaintiff's visit of August 1, 2006, the letter alleges that defendant "gave me more painful antibiotic shots . . . even though tooth #3 was abscessed and that is the reason why my gum was swollen and painful," and that notwithstanding the fact that plaintiff's "gum in this area was now infected, swollen and painful," defendant "still decided to put in a permanent crown." With regard to plaintiff's visit of September 5, 2006, the [*12] letter alleges that defendant "found a gap between tooth #17 and #18 because the new permanent crown [defendant] put in on Tuesday, August 1 was not large enough to cover this gap," that "[defendant] said that [he] believe[d] the materials [he] used caused the gum infection," and that instead of repairing the problem, defendant merely "put what [he] described as a 'sealant' on tooth #18 . . . ." Plaintiff's letter went on to detail the pain caused by the allegedly misdiagnosed dental conditions between September 15 2006, and September 19, 2006, alleging that plaintiff visited defendant twice more during that time period but that defendant only "injected more antibiotic shots . . . into my gum area," "told me I would be okay," and finally "put more medicine and cement on the crown and put it back in place." The letter specifically references the opinions and diagnoses of a second dentist, who allegedly stated that "Dr. Merlos had misdiagnosed both teeth," that "[t]ooth #3 was abscessed and that was why the gum in that area had swollen and that this tooth needed a root canal done now," and that "tooth #18 needed a root canal and a new crown because the one Dr. Merlos had put in was too [*13] small--since there was a gap between tooth #17 and #18." According to the letter, this second dentist also "confirmed that the gum area by tooth #18 was very infected." Lastly, the letter explains that plaintiff consulted a third dentist, who concurred with the opinions and diagnoses of the second dentist and agreed that defendant had misdiagnosed and negligently treated plaintiff's dental conditions. This third dentist ultimately performed the necessary root canals on tooth #3 and tooth #18.

This letter of November 8, 2006, certainly satisfies § 2912b(4)(a) and § 2912b(4)(f) by setting forth "the factual basis for the claim" and "the names of all professionals and facilities the claimant is notifying." See *Roberts, 470 Mich at 682.* This much is beyond dispute. We further conclude that plaintiff's letter satisfies § 2912b(4)(b) and § 2912b(4)(d). This Court has repeatedly observed that an NOI is sufficient to satisfy the requirements of § 2912b(4)(b) and (d) as long as it provides notice of what the standard of care would have required in a particular case. For instance, in *Esselman v Garden City Hosp, 284 Mich App 209, 213-220; 772 NW2d 438 (2009)*, this Court held that the NOI complied [*14] with § 2912b(4)(b) where it alleged that the standard of care required the defendants to timely diagnose and treat gallbladder disease, to perform timely tests, to obtain x-rays, to not delay surgery, and to timely identify and treat the signs and symptoms of sepsis. Similarly, in *Potter v McLeary (On Remand), 278 Mich App 279, 284-285; 748 NW2d 599 (2008)*, rev'd on other grounds *484 Mich 397 (2009)*, this Court observed that the NOI complied with § 2912b(4)(b) and (d) where it alleged merely that the defendant was required to "correctly read, interpret, and report the results [of an MRI test.]" Indeed, we specifically noted in that case that an NOI will generally comply with § 2912b(4)(d) so long as "no guesswork is necessary to determine what action was required of [the defendant] to comply with the standard of care." *Id. at 285.*

We also conclude that plaintiff's letter of November 8, 2006, was sufficient to satisfy § 2912b(4)(c). Plaintiff's letter makes clear that defendant (1) failed to do an x-ray prior to ruling out the need for root canals, (2) otherwise continued to misdiagnose both teeth, even after they

became infected, (3) failed to perform necessary root canals on both teeth, [*15] and (5) placed an inadequate crown on tooth #18. On the basis of plaintiff's detailed allegations, we conclude that "[a] reader of the document is not left to guess" concerning the manner in which the applicable standard of care was breached. See *Ligons v Crittenton Hosp, 285 Mich App 337, 345; 776 NW2d 361 (2009)*.

We do note that plaintiff's letter did not precisely identify "[t]he manner in which . . . the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice" as required by § 2912b(4)(e). As our Supreme Court has noted, "it is not sufficient . . . to merely state that [a defendant's] alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury." *Roberts*, 470 at 699-700 n 16 (emphasis in original). Although plaintiff's letter contained the detailed statements described above, it did not specifically and separately address the issue of proximate causation.

However, we find that plaintiff's failure to precisely address the issue of proximate cause in conformance with § 2912b(4)(e) [*16] should be disregarded, and does not prevent the letter of November 8, 2006, from qualifying as a conforming NOI. In *Bush v Shabahang, 484 Mich 156, 178-181; 772 NW2d 272 (2009)*, our Supreme Court held that when a plaintiff makes a good-faith attempt to comply with the requirements of § 2912b(4), minor defects may be disregarded or cured by amendment under *MCL 600.2301*. In the present case, it is beyond dispute that plaintiff made a good-faith attempt to comply with the requirements of § 2912b(4). As discussed above, his letter is at least minimally sufficient with respect to most of the requirements of § 2912b(4), and only omits a proper discussion of the "[t]he manner in which . . . the breach of the standard of practice or care was the proximate cause of the injury" under § 2912b(4)(e). In light of plaintiff's good-faith attempt to comply with § 2912b(4), and given that the only deficiency we have identified was later cured by the formal NOI sent by plaintiff's counsel in October 2007, we find that any deficiencies in the letter of November 8, 2006, should be disregarded in the interests of justice. *MCL 600.2301*; *Bush, 484 Mich at 180-181*; see also *Swanson v Port Huron Hosp*, Mich App ; NW2d (2010).

We [*17] have concluded that plaintiff's letter of November 8, 2006, satisfied the provisions of § 2912b(4)(a), (b), (c), (d), and (f). See *Roberts, 470 Mich at 682*. We have also concluded that plaintiff's failure to precisely satisfy the requirement set forth in § 2912b(4)(e) must be overlooked in the interests of justice. *MCL 600.2301*; *Bush, 484 Mich at 180-181*. Accordingly, we must reject defendant's argument that plaintiff did not wait until 182 days after the filing of the NOI to file his complaint. The complaint in this case, which was filed on December 13, 2007, was certainly filed more than 182 days after November 8, 2006. See *MCL 600.2912b(1)*.

V

In light of our resolution of the issues, we need not consider the remaining arguments raised by the parties on appeal.

Affirmed. As the prevailing party, plaintiff may tax costs pursuant to *MCR 7.219*.

/s/ Douglas B. Shapiro

/s/ Kathleen Jansen

/s/ Pat M. Donofrio