STATE OF MICHIGAN

COURT OF APPEALS

KATHY HEPFINGER,

Plaintiff-Appellee/Cross-Appellee,

v

BRIAN WHITE, M.D.,

Defendant-Appellant,

and

ALPENA GENERAL HOSPITAL,

Defendant-Cross-Appellant,

and

MICHAEL HARTZLER, M.D.,

Defendant.

UNPUBLISHED
September 13, 2005

No. 253065
Alpena Circuit Court
LC No. 01-003114-NM

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendants appeal by leave granted from the trial court's order denying their motions for summary disposition, which challenged the sufficiency of the certification of the affidavits of merit filed in this medical malpractice action. We reverse the trial court's order denying the defense motions for summary disposition.

On March 16, 2000, plaintiff was admitted to the emergency room at defendant Alpena General Hospital with complaints of severe abdominal pain and bleeding. While admitted to the emergency room, radiological tests were performed, including an abdominal CT scan. Plaintiff alleged that defendant Dr. Brian White interpreted the abdominal CT scan and concluded that she had a small bowel obstruction and ascites in the left upper quandrant. During the next two days, plaintiff's condition deteriorated, and she was transferred to the intensive care unit. As a result of the deterioration, plaintiff alleged that the CT scan was interpreted again, and it was determined that there was "free air in the abdomen." Plaintiff further alleged that she was taken into surgery that resulted in the diagnosis of "bowel perforation and gross feculent peritonitis."

Plaintiff asserted that, as a result of the delay in diagnosis and treatment, she underwent a below knee, right leg amputation on March 29, 2000. Based on the alleged medical malpractice, plaintiff filed this litigation against defendants on April 20, 2001.[1]

With the complaint, plaintiff filed two affidavits of merit. The first affidavit was from Dr. Seth Glick, a doctor board certified in the field of radiology. The affidavit provided that, during the time of plaintiff's treatment, he was employed as a radiologist as well as a professor at the same university hospital located in Philadelphia, Pennsylvania. The affiant asserted that defendants breached the standard of care by failing to diagnose the presence of "free air" on the CT scan. It was alleged that, if the diagnosis had been appropriate, the perforated colon would have been discovered and treatment to plaintiff would not have been delayed. This affidavit contained an original signature, but did not contain any notarization, the certification that the affidavit had been subscribed and sworn to before a notary or "jurat."[2] On April 25, 2001, a copy of the same affidavit was filed with the court. However, this affidavit contained the notary certification. Specifically, it provided that the affidavit was subscribed and sworn to before notary public Merry E. Malos on April 18, 2001. The jurat indicated that Merry Malos was a notary public in Wayne County, Michigan with her commission set to expire on November 8, 2005.

In response to the complaint, defendant Dr. White filed affirmative defenses on July 19, 2001.[3] The affirmative defenses challenged the sufficiency of the affidavits of merit:

> 6. THAT Plaintiff may have failed to file an Affidavit of Merit that meets the statutory requirements of MCL 600.2912 as Plaintiff's Affidavit of Merit from Neal A. Crane, M.D. is stated and alleged to have been sworn to in the county of Alpena before a notary public on April 18, 2001 in or from the County of Wayne

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[1] The parties do not dispute that the notice of intent to file a medical malpractice action occurred on October 4, 2000. Further, there is no dispute that the claim of malpractice accrued on March 16, 2000. Accordingly, plaintiff had two years, or until March 16, 2002, to file her medical malpractice action against defendants. See MCL 600.5805(6).

[2] Michigan statutes refer to the subscription before a notary as a certificate of acknowledgment. MCL 565.265. This certification is also known as a "jurat." "Jurat" is defined as "A certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made. … A jurat typically says 'Subscribed and sworn to before me this ___ day of [month], [year],' and the officer (usu. a notary public) thereby certifies three things: (1) that the person signing the document did so in the officer's presence, (2) that the signer appeared before the officer on the date indicated, and (3) that the officer administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document." Black's Law Dictionary (8th ed), p 866.

[3] Dr. White filed an affidavit of meritorious defense on August 6, 2001. Therein, it was alleged that he did comply with the standard of care because he reported a small amount of air. Moreover, he alleged that any interpretation of the abdominal CT scan was not the proximate cause of plaintiff's injuries in light of her existing medical conditions and further complications arising there from.

> in the State of Michigan and said physician is not licensed in the State of Michigan. Further the Affidavit of Merit signed by Seth Glick, M.D. is represented to have been sworn to in the County of Alpena before the same above-mentioned notary public from Wayne County by Dr. Glick, who appears to reside in the State of Pennsylvania.

On January 30, 2002, plaintiff moved for leave to file an amended complaint to add Dr. Michael Hartzler, plaintiff's admitting physician, as a defendant. It was alleged that Dr. Hartzler was criticized for his treatment of plaintiff during the deposition of defendant Dr. White. Plaintiff requested a stay of proceedings pending the service of the notice of intent to file suit. On March 5, 2002, the trial court entered an order granting the motion for leave to file an amended complaint and to stay the proceedings until Dr. Hartzler was added as a party defendant.

On August 15, 2002, plaintiff filed a first amended complaint, adding Dr. Hartzler as a defendant.[4] Plaintiff submitted an affidavit from Dr. Paul Preston, a board certified general surgeon licensed in the state of Ohio. The affidavit was notarized and contained the notarial seal from the state of Ohio. Plaintiff submitted the two previously filed affidavits of merit from Dr. Glick and Dr. Crane. On September 12, 2002, plaintiff re-filed the affidavit of merit of Dr. Preston with certification from the Cuyahoga County clerk. Also on September 12, 2002, plaintiff re-filed the affidavit of merit of Dr. Glick. The content of the affidavit did not change. However, the notarization provided that it was subscribed to before Samaya Nicole Brown, a notary public of Lower Merion Township in Montgomery County, State of Pennsylvania. The affidavit also contained the imprinted notary seal.[5]

Defendants moved for summary disposition of the complaint on the basis of MCR 2.116(C)(7), (8), and (10). Specifically, it was alleged that the affidavit of merit filed by Dr. Glick failed to meet the requirements of MCL 600.2912d. Defendants alleged that the deposition testimony of Dr. Glick revealed that he did not sign the original affidavit in the presence of a notary public. Rather, he signed the affidavit of merit based on a telephone conversation with Malos. It was further alleged that Malos did not administer the oath or affirmation to Dr. Glick with regard to the contents of the affidavit. Lastly, defendants asserted that the most recent affidavit of merit filed by Dr. Glick, which was notarized in Pennsylvania, did not preclude dismissal of the litigation because it was filed after the statute of limitations had expired.

In response, plaintiff alleged that Dr. Glick was known to Malos based on previous telephone conversations and his distinctive accent. Further, in her affidavit, Malos stated that she was familiar with Dr. Glick's signature based on prior written communications. Malos indicated that she mailed the affidavit of merit to Glick, called him on the telephone to confirm that it was not necessary to make any changes to the affidavit, and asked him to swear or affirm

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[4] In response to the first amended complaint, defendant hospital also filed affirmative defenses challenging the notarization of the affidavits of merit.

[5] The sufficiency of the affidavits of merit filed in September 2002 is not at issue on appeal.

the factual allegations contained in the affidavit of merit. Plaintiff alleged that the oath issued over the telephone was sufficient to satisfy the affidavit of merit requirements.

After hearing oral arguments regarding the dispositive motions, the trial court, in a written opinion and order, denied the defense motions, stating as follows:

> After careful consideration, this Court finds that the notarized Affidavit of Merit as to the allegations against Dr. White filed on April 25, 2001, is a valid Affidavit of Merit. The affiant was under oath at the time he signed the Affidavit, and the Affidavit was notarized by a licensed notary who verified the affiant's identity. While Defendant cites a number of cases that he alleges stand for the proposition that the Affidavit is invalid, no case provided by Defendant is directly on point. Rather, this Court finds that Plaintiff's Affidavit of Merit with regard to Dr. White is in substantial compliance with MCL 600.2912d.
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> The Court notes that the April 25, 2001, Affidavit of Merit at issue was filed approximately five days after the filing of the original Complaint. However, this fact does not serve to invalidate the Complaint because at the time the Complaint was filed an Affidavit of Merit was filed with regard to Dr. White, it simply was not sufficient. The April 25, 2001, Affidavit of Merit, filed prior to the Complaint even being served on Defendants, cured any deficiencies in the first Affidavit of Merit filed with the Complaint.

The trial court also denied defendants' motion for reconsideration. Following the trial court's decision, the application for leave to appeal was granted.

Appellate review of summary disposition decisions is de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence when the motion is based on MCR 2.116(C)(7) or (10). *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent – the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Terms that are not defined in a statute must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

In order to commence a medical malpractice action, an affidavit of merit must be filed with the complaint:

> …[T]he 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:
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> (a) The applicable standard of practice or care.
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> (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.
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> (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.
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> (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. [MCL 600.2912d.]

A medical malpractice action that is filed without an affidavit of merit is insufficient to commence the litigation. *Scarsella v Pollack*, 461 Mich 547, 549; 607 NW2d 711 (2000). If the plaintiff fails to comply with the affidavit of merit requirement, the appropriate remedy is dismissal of the litigation without prejudice provided that the limitation period has not yet expired. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47-48; 594 NW2d 455 (1999); *Holmes v Mich Capital Medical Center*, 242 Mich App 703, 706-707; 620 NW2d 319 (2000). Dismissal without prejudice allows the plaintiff to refile the complaint with an affidavit of merit. *Holmes, supra*. However, if the complaint is time barred, dismissal with prejudice is appropriate. *Scarsella, supra*.

In *Holmes, supra*, the plaintiff filed a medical malpractice action on March 27, 1996, with the statute of limitation period set to expire on February 8, 1997. However, an affidavit of merit was not filed with the complaint. The plaintiff provided an unsworn affidavit on December 16, 1996, but the complaint was dismissed without prejudice in January 1997. On January 27, 1997, the plaintiff filed a second medical malpractice complaint without an affidavit of merit. Some time later, plaintiff provided an unsworn affidavit of merit, but the complaint was dismissed without prejudice in February 1998. On August 6, 1998, the plaintiff filed the third complaint with a notarized affidavit of merit. The defense moved for summary disposition, alleging that the previously filed affidavits of merit were invalid and did not operate to toll the statute of limitations. *Id*. at 710-711. This Court rejected the contention that the affidavits of merit, without the proper certification, were sufficient:

> We first observe that the trial court correctly determined that plaintiff's December 1996 statement did not satisfy MCL 600.2912d(1); MSA 27A.2912(4)(1) because it did not constitute a proper affidavit of merit. The unambiguous statutory language demands that plaintiff or his attorney "shall file with the complaint an *affidavit* of merit signed by a health professional." MCL 600.2912(1); MSA 27A.2912(4)(1) (emphasis added). To constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. *People v Sloan*, 450 Mich 160, 177, n 8; 538 NW2d 380 (1995); Black's Law Dictionary (7th ed). While plaintiff's document met the first two requirements, no indication exists that the information was provided under oath. Even if we assumed that the person who signed the statement affirmed its contents, no evidence establishes that the affirmation was made before a person authorized to administer an oath.
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> Plaintiff relies on two distinguishable cases to support his argument that an affidavit need not be notarized. *People v Lane*, 124 Mich 271; 82 NW 896 (1900), dealt with the requirements for a sworn criminal complaint, not an affidavit. Furthermore, the record indicated that the relevant evidence was provided under oath. *Id.* at 273. In *Wise v Yunker*, 223 Mich 203; 193 NW2d 890 (1923), the affidavit in question was not, as here, completely devoid of a jurat. In *Wise*, the notary dated the document and affixed the date her commission expired, but neglected to sign it. *Id.* at 205-206. The Supreme Court found the affidavit sufficient because the date and the notary's commission constituted evidence that the declarant swore to the information provided within the affidavit. *Id*. at 206-208. In this case, however, the December 1996 document completely lacks a jurat. Because no indication exists that the doctor confirmed the document's contents by oath or affirmation before a person authorized to issue the oath or affirmation, the document does not qualify as a proper affidavit. *Sloan, supra*.
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> Accordingly, plaintiff failed to file an affidavit of merit before the limitation period expired on February 5, 1997, and failed to seek an extension of the period for filing the affidavit, … [*Id*. at 711-713.]

Lastly, the *Holmes* Court concluded the *Scarsella* decision should be given retroactive application. *Id*. at 713-714. Thus, pursuant to the *Holmes* decision, a valid affidavit must be "confirmed by the oath or affirmation of the party making it, *taken before* a person having authority to administer such oath or affirmation." *Id*. at 711. (Emphasis added).

In the present case, the litigation was filed with an affidavit of merit, but the jurat was not contained on the document.[6] Within a short time of the filing, a copy of the affidavit of merit

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[6] A paper with only a blank jurat that does not establish who administered the oath or if the oath was ever administered has been held to be a nullity. *People v Burns*, 161 Mich 169, 173; 125 (continued…)

was filed with a jurat. However, the witness, Dr. Glick was in Pennsylvania at the time the affidavit was purportedly subscribed to and sworn before notary public Malos in Wayne County, Michigan. Defendants allege that the certification does not comport with statutory requirements, while plaintiff asserts that constructive acknowledgments are acceptable. We agree with defendants.

The Uniform Recognition of Acknowledgments Acts (URAA) defines notarial acts, addresses the certification of acknowledgments, and provides:

> "Notarial acts" means acts that the laws of this state authorize notaries public of this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgments of instruments, and attesting documents. Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by the following persons authorized pursuant to the laws and regulations of other governments in addition to any other person authorized by the laws of this state:
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> (i) A notary public authorized to perform notarial acts in the place in which the act is performed.
>
> (ii) A judge, clerk, or deputy clerk of any court of record in the place in which the notarial acts are performed.
>
> (iii) An officer of the foreign service of the United States, a consular agent or any other person authorized by regulation of the United States department of state to perform notarial acts in the place in which the act is performed.
>
> (iv) A commissioned officer in active service with the armed forces of the United States … [MCL 565.262(a)(i)-(iv).]

The URAA also establishes the requirements for certification of an acknowledgment:

> The person taking an acknowledgment shall certify that the person acknowledging *appeared before him* and acknowledged he executed the instrument; and the person acknowledging was known to the person taking the acknowledgment or that the person taking the acknowledgment had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument. [MCL 565.264 (emphasis added).]

The URAA also defines the terms utilized in the certification provision:

> The words "acknowledged before me" means:
>
> (a) That the person acknowledging appeared before the person taking the acknowledgment.

(…continued)

NW 740 (1910).

(b) That he acknowledged he executed the instrument.

* * *

(d) That the person taking the acknowledgment either knew or had satisfactory evidence that the person acknowledging was the person named in the instrument or certificate. [MCL 565.266.]

"Satisfactory evidence" means evidence upon which reliance is placed upon either of the following:

(i) The sworn word of a credible witness who is personally known to the notary public and who personally knows the signor.

(ii) A current identification card or document issued by a federal or state government that contains the bearer's photograph and signature. [MCL 565.262(b).]

Plaintiff alleges that MCL 565.566(a) was satisfied by constructive appearance. That is, the term "appeared before" encompasses telephone communications. We disagree. Because the URAA does not define the term "appeared before," it is appropriate to examine dictionary definitions. *Halloran, supra*. The term "appear" is defined as "to come into sight; become visible." Random House Webster's College Dictionary (2000), p 65. The term "before" is defined as "in the presence or sight of." Random House Webster's College Dictionary (2000), p 121. Thus, the plain language of the term "appeared before" encompasses physical presence before the notary and constructive presence through telephone communications was not provided for in the URAA. See *Neal, supra*.[7]

Despite the *Holmes* holding and the plain language of the URAA, plaintiff alleges that criminal cases support the proposition that constructive presence is all that is required for certification of an affidavit of merit. However, in the criminal context, the considerations for preparation of an affidavit are quite different. In that area, there is the possibility that evidence will be destroyed if prompt action does not occur. Consequently, the Legislature has expressly provided that an affidavit in support of a search warrant may be made by any electronic means of communication including facsimile or computer network. MCL 780.651(2)(b). Moreover, the oath may be orally administered over an electronic or electromagnetic means of communication. See MCL 780.651(2)(a), (5). The Legislature did not account for electronic communication in the URAA, did not provide that oaths could be administered orally through electronic means, and expressly utilized the term "appeared before" in the URAA. The Legislature is presumed to be aware of existing law; we do not assume that the Legislature inadvertently omitted from one

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[7] Our holding is consistent with the ruling in *Glancy v Steinberg*, unpublished opinion per curiam, issued June 24, 2003 (Docket Nos. 237963, 237976). We view this decision as persuasive, although unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1); see also *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2004).

statute the language that is placed in another. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Consequently, plaintiff's allegation, that constructive appearance is sufficient based on an analogy to the criminal law, is not supported by application of the rules of statutory construction.[8]

Plaintiff also alleged that electronic processing of signatures is permissible pursuant to the uniform electronic transaction act (UETA), MCL 450.831 *et seq*, and therefore, personal appearance by an affiant before the notary was not required. However, the UETA is expressly limited in scope to apply "only to transactions between parties each of which has agreed to conduct transactions by electronic means." MCL 450.835(2). The statute defines "transaction" as "an action or set of actions occurring between 2 or more persons relating to the conduct of business, commercial, or governmental affairs." MCL 450.832(p). This litigation does not constitute a transaction for purposes of the UETA, and there is no evidence of an agreement between the parties to waive the requirements of the URAA. Accordingly, this statute does not apply to the certification of the affidavits of merit in this case.

As previously stated, if a plaintiff fails to comply with the affidavit of merit requirement, the appropriate remedy is dismissal of the litigation without prejudice when the limitation period has not yet expired. *Dorris, supra*; *Holmes, supra*. However, if the complaint is time barred, dismissal is appropriate. *Scarsella, supra*. Irrespective of any defects contained in the affidavits of merit, plaintiff alleges that they are not "grossly nonconforming" such that dismissal of the litigation is unwarranted. However, in *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003), this Court held that a defective affidavit that did not comport with statutory requirements was insufficient to commence a medical malpractice action, irrespective of whether the adjective used to describe the affidavit was "defective" or "grossly nonconforming" or "inadequate." Accordingly, the trial court erred in denying the defense motions for summary disposition.[9]

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[8] Plaintiff also asserted that Malos had satisfactory evidence of the identification of Dr. Glick. However, MCL 565.264 requires certification that the affiant "appeared before him … *and* the person acknowledging was known to the person taking the acknowledgment or that the person taking the acknowledgment had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument." (Emphasis added). We need not address the second requirement of the statute addressing knowledge of identification because the first requirement was not satisfied. In any event, we note that Malos was never presented with the sworn word of a credible witness who personally knew Dr. Glick, MCL 565.262(b)(i), and there was no evidence that she was presented with an identification card bearing Dr. Glick's photograph and signature. MCL 565.262(b)(ii). Malos may have had conversations with a man whose voice she could identify and may have seen a signature that matched other signatures she had received. However, there was never any correlation of that activity to documentation to support that the person she spoke to was, in fact, Dr. Glick. Therefore, the second criterion was not satisfied.

[9] Plaintiff has filed supplemental authority, urging this panel to apply equitable or judicial tolling, relying on *Ward v Rooney-Gandy*, 265 Mich App 515; 696 NW2d 64 (2005). However, in the present case, plaintiff's counsel was alerted to the challenge to the affidavits of merit

(continued…)

Reversed and remanded for entry of an order granting the defense motions for summary disposition. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Bill Schuette

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within two months of the filing of the complaint and with eight months remaining until the expiration of the statute of limitations. Despite this notice and time to cure any deficiency, plaintiff's counsel did not take corrective action until months after the statute of limitations had expired. Under the circumstances, this case does not warrant the application of judicial tolling.