IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-[redacted]01512

* * *

JANICE CALDWELL AND HUSBAND,
ROBERT C. CALDWELL

APPELLEES

V.

NORTH MISSISSIPPI MEDICAL CENTER, INC.,
AND ELIZABETH BROWN, EXECUTRIX OF THE
ESTATE OF ALAN PAUL BROWN, M.D., DECEASED

APPELLANTS

ON INTERLOCUTORY APPEAL FROM THE
CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI
CAUSE NO. CV06-072-(A)L

BRIEF OF APPELLANTS

ORAL ARGUMENT IS REQUESTED

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NORTH MISSISSIPPI MEDICAL
CENTER, INC. AND ELIZABETH
BROWN, EXECUTRIX OF THE ESTATE
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V.	
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Janice Caldwell, plaintiff/appellee;
2. Robert Caldwell, plaintiff/appellee;
3. John H. Cocke, attorney for plaintiffs/appellees;
4. Frank A. Russell, attorney for plaintiffs/appellees;
5. North Mississippi Medical Center, Inc., defendant/appellant;
6. Elizabeth Brown, Executrix of the Estate of Alan Paul Brown, M.D., deceased, defendant/appellant;
7. John G. Wheeler, attorney for defendants/appellants;
8. Honorable Sharion R. Aycock, Circuit Judge (former);
9. Honorable James L. Roberts, Jr., Circuit Judge.

John G. Wheeler

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE ISSUES

1. **Whether the filing of a complaint lacking a certificate of expert consultation as required by Miss. Code Ann. § 11-1-58 results in an equitable tolling of the statute of limitations until the dismissal of the action for violation of the statutory requirement.**

2. **Whether the failure of a plaintiff to serve the statutorily required certificate of expert consultation on the defendant along with the summons and complaint causes the statute of limitations to commence running again 120 days following the filing of the complaint.**

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

This is a medical negligence case. On March 24, 2006, the plaintiffs, Janice Caldwell and Robert C. Caldwell, filed their complaint against North Mississippi Medical Center, Inc. ("NMMC") and the Estate of Alan Paul Brown, M.D. ("Dr. Brown"), alleging that they suffered personal injuries as a result of substandard health care services provided by Dr. Brown to Ms. Caldwell during an August 24, 2003, presentation to the NMMC emergency department. (R. 2-4.) NMMC and Dr. Brown timely answered the complaint and asserted as an affirmative defense that the action was barred by the applicable statute of limitations. NMMC and Dr. Brown thereafter filed a motion for summary judgment on the ground that the action was time-barred. The trial court denied the motion for summary judgment, holding that the instant matter was timely filed because the filing of a previous action by the plaintiffs arising from the precise same operative facts had tolled the running of the applicable statute of limitations during the pendency of the previous litigation. NMMC and Dr. Brown filed a petition for an interlocutory appeal from the order denying summary judgment, and this Court granted the petition.

Statement of Facts

On August 24, 2003, Janice Caldwell was treated in the NMMC emergency department by Dr. Alan Brown and discharged home. Ms. Caldwell returned to the emergency department on a subsequent date and was ultimately admitted to the hospital for treatment of sepsis. The Caldwells contend that Dr. Brown was negligent in his evaluation of Ms. Caldwell on August 24, 2003, causing injury to her and necessitating her subsequent hospitalization and treatment. A statute, Miss. Code Ann. § 11-1-58,

requires, with certain exceptions inapplicable to this case, that a plaintiff alleging medical negligence file with his or her complaint a certification by plaintiff's counsel that he or she has conferred with a competent medical expert and, based on that consultation, believes the claim to be meritorious. On May 5, 2005, the Caldwells filed a complaint in the Circuit Court of Lee County against NMMC and Dr. Brown ("*Caldwell I*") alleging medical negligence arising from the precise health care services at issue in the instant case. Dr. Brown later died, his estate was substituted as a party defendant, and the Caldwells filed an amended complaint against NMMC and Dr. Brown's estate. The Caldwells failed to include, with either the original complaint or the amended complaint, the statutorily required expert consultation certification.

NMMC and Dr. Brown's estate filed a motion to dismiss the suit based on the Caldwells' failure to file the required certificate. On March 21, 2006, the trial court granted the motion and dismissed the *Caldwell I* matter without prejudice. Three days later, the Caldwells commenced the instant litigation ("*Caldwell II*"), this time filing with the complaint the requisite certificate of expert consultation. The Caldwells also pursued an appeal of the dismissal of *Caldwell I.* The Court of Appeals affirmed the dismissal of that suit, holding that the filing of the prescribed certificate with the complaint is mandatory and that a suit filed without the required certificate of consultation is not valid and must be dismissed.[1]

[1] *See Caldwell v. North Mississippi Medical Center*, 956 So. 2d 888, 894-95 ¶ 24 (Miss. 2007).

SUMMARY OF THE ARGUMENT

The application of equitable tolling in this case is precluded by the very provisions of Miss. Code Ann. § 11-1-58, in that tolling would render certain statutory provisions superfluous and would allow others to be easily circumvented, thus, defeating the purpose of the statute. Tolling is foreclosed by the construction of the statute given by previous decisions from this Court, which have held that the filing of an expert consultation certificate with the complaint is mandatory and the failure to file such certificate cannot be cured by subsequent filing. Decisions from other jurisdictions construing statutes similar to section 11-1-58, which hold that the filing of a complaint without satisfying statutory prerequisites or co-requisites does not toll the statute of limitations, provide strong persuasive authority for the position of NMMC and Dr. Brown herein and should be followed. Numerous decisions establish that tolling is based upon equitable principles and is not applied where the equities do not favor the plaintiff. In this case, there are no factors which would give the Caldwells a plausible claim to the benefits of equitable tolling. The complaint in this matter is time-barred.

In the alternative, even where equitable tolling is applied, it is forfeited when a plaintiff fails to serve process within 120 days in the precise manner provided for by law. In this case, the Caldwells' service of process was defective because they did not serve a certificate of consultation along with the summons and complaint. Accordingly, if the statute of limitations was tolled at all by the filing of the first action, the statute resumed running 120 days after such filing, and the instant action is still time-barred.

ARGUMENT

I. The filing of a complaint lacking a certificate of expert consultation as required by Miss. Code Ann. § 11-1-58 does not result in an equitable tolling of the statute of limitations during the pendency of that action.

The trial court herein applied what it perceived to be the general rule under Mississippi law that the filing of an action tolls the statute of limitations during the pendency of that litigation, so that if that suit is dismissed without prejudice, the plaintiff may file a subsequent suit on the same cause of action within the time that remained of the limitations period at the time the first suit was filed. The trial court accepted the Caldwells' argument that this general rule also applies to a medical negligence suit where the plaintiff fails to comply with Miss. Code Ann. § 11-1-58 and does not file with the complaint the statutorily prescribed certificate of expert consultation. The trial court erred in its ruling, because the Caldwells' position is foreclosed by a rational application of the terms of the statute itself, is contrary to the statute's intent and purposes, and is inconsistent with the principles of equitable tolling.

The Caldwells' position is at odds with the terms and structure of section 11-1-58 and the principles set forth in the decisions of this Court interpreting the statute. Section 11-1-58(1)(a) provides that, unless an exception applies, a plaintiff must file with the complaint a certificate from his or her counsel stating that counsel has conferred with a medical expert and, based on that consultation, believes that there is a reasonable basis for bringing the action. The statute, in subsection (1)(b), provides an exception where the attorney is unable to confer with an expert in time to supply the certificate prior to expiration of the applicable limitations period. In such case, the attorney must file with the complaint a certificate attesting to the inability to confer timely, and then supply the certificate of consultation within 60 days of the filing of the complaint. If the Mississippi

Legislature had intended that the filing of a complaint without the required certificate would constitute the proper commencement of an action so as to stop or toll the statute of limitations, there would have been absolutely no need to include the grace provision of subsection (1)(b); a plaintiff who, for whatever reason, did not possess the certificate of consultation by the end of the limitations period could simply file the action to avoid the bar of limitations and submit the certificate at some future time of his or her own choosing.

This Court has recognized that section 11-1-58 must not be interpreted in a way that would defeat its legislative purpose or render some of its provisions meaningless. In *Walker v. Whitfield Nursing Center*, 931 So. 2d 583 (Miss. 2006), the Court flatly rejected the argument that a plaintiff could avoid the requirement of pre-suit consultation with an expert by submitting a disclosure of an expert's opinion after the complaint was filed, per a provision of the statute that allows such an expert disclosure to be submitted "in lieu of" the certificate of consultation. The Court held that a disclosure in lieu of the certificate must be made prior to filing the complaint. The court reasoned that adopting the plaintiff's position would render the pertinent portion of the statute meaningless, contrary to the requirement that statutes be construed to give them full effect. *Id.* at 590 ¶ 26. The Court also recognized that any interpretation of section 11-1-58 must be rejected if that interpretation allows the requirements of the statute to be "easily circumvented." *Id.*

Allowing a complaint filed in contravention of the statutory requirement of consultation and certification to toll the statute of limitations likewise would allow the statute to be easily circumvented. The clear intent and purpose of the Legislature in enacting section 11-1-58 was to avoid baseless suits by requiring a medical negligence

plaintiff to verify the validity of his or her claim through obtaining an expert's opinion supporting the alleged cause of action before suit is filed. Under the Caldwells' position herein, there would be no incentive (other than the minor one of avoiding a second filing fee) for a plaintiff or his attorney to be diligent in obtaining such expert support before filing suit.

The Caldwells' position is also inconsistent with the rationale of decisions of this Court interpreting section 11-1-58 that have not directly confronted the precise issue herein. In *Walker*, as well as in *Community Hospital v. Goodlett*, 968 So. 2d 391 (Miss. 2007), the Court held that the statutory requirement of filing a certificate with the complaint was indeed mandatory, that strict compliance with the terms of the statute was required, and that an action filed in contravention of the statute must be dismissed. *Walker*, 931 So. 2d at 589 ¶¶ 17-19; *Goodlett*, 968 So. 2d at 397 ¶ 13. Consequently, the strict requirement of pre-suit consultation and certification at filing could not be avoided by, for example, allowing the certificate of consultation to be filed after the filing of the complaint, or by allowing the plaintiff to amend the complaint and to file the certificate with the amended complaint. *See Goodlett*, 968 So. 2d at 396, 397 ¶¶ 8, 13. These rulings by the Court reflect, in essence, the judgment that an action putatively commenced by filing a complaint without complying with the statutory requirements is void *ab initio*. Otherwise, the trial court would, as in the typical case of a complaint which fails to state a claim,[2] be given the discretion to allow the amendment of the complaint (with the requisite certificate) or the equivalent (the filing of the certificate without amendment), rather than being required to dismiss the suit. *See Friedlander v.*

from the beginning →

[2] The filing of complaint without the certificate of consultation is a failure to state a claim upon which relief can be granted. *Walker*, 931 So. 2d at 591 ¶ 31.

Nims, 755 F. 2d 810, 813 (11th Cir. 1985) (court should give opportunity to amend complaint that fails to state claim rather than dismissing action, where plaintiff may be able to more carefully draft complaint to state cause of action); *Hobgood v. Koch Pipeline Southeast, Inc.*, 769 So. 2d 838, 842 ¶ 14 (Miss. App. 2000). A complaint which is a nullity does not toll the statute of limitations.

Stated another way, this Court's specific refusal to allow the defect to be cured by a subsequent filing in the same action is inconsistent with allowing the defect to be cured by a subsequent filing in a new action through the application of equitable tolling. *Walker* and *Goodlett* hold that the requirements of the statute must be strictly enforced, and the statute, by its terms, requires that a certificate of consultation, or its specified alternative, be filed with the complaint. Since the statute of limitations requires that the complaint be filed before the limitations period expires, then section 11-1-58 requires that the certificate of consultation be filed before the statute of limitations has run (unless the plaintiff avails himself of the 60-day grace provision). Thus, the Caldwells' position is contrary to *Walker*'s requirement of strict compliance with section 11-1-58, because their position would allow a plaintiff, contrary to the terms of the statute, to file the certificate after the statute of limitations has run.

That the structure of a statute may preclude tolling was recognized by the court in *Doyle v. Fenster*, 55 Cal. Rptr. 2d 327 (Cal. App. 1996), in which the court interpreted a statute, Cal. Code Civ. P. § 340.1, which governed the filing of a tort action alleging sexual abuse suffered as a child. The statute required that an adult plaintiff over a certain age file two certificates—one from his attorney stating that the attorney had conferred with a mental health professional and believed the case to be meritorious and one from a mental health professional who had examined the plaintiff, stating the practitioner's

opinion that there was a reasonable basis to believe that the plaintiff had been abused as a child. The statute included a safe haven provision, subdivision (e)(3), virtually identical to Miss. Code Ann. § 11-1-58(1)(b), for situations where the certificates of merit could not be supplied prior to the running of the statute of limitations; subdivision (e)(3) provided that, in such case, the plaintiff's attorney should file a certificate attesting to the inability to obtain the certificates prior to the running of the statute of limitations and counsel could then file the certificates within 60 days after the filing of the complaint. *Doyle*, 55 Cal. Rptr. 2d at 328. In *Doyle*, the plaintiff filed the complaint some three months before the end of the limitations period without the certificates of merit, and did not file the certificates until after the limitations period had ended. The defendant moved to dismiss the action as time-barred. The plaintiff argued because the complaint had been filed before the limitations period expired, the suit was properly commenced to toll the running of the statute of limitations. The appellate court held that the statute required the certificates to be filed with the complaint and that to permit the filing of the certificates after the statute had run would make subdivision (e)(3) superfluous. The court reasoned that subdivision (e)(3) "has meaning only if the Legislature intended that the certificates of merit . . . be filed within the statute of limitations." The court also noted that the plaintiff's position would have the perverse effect of benefiting those who disregarded the requirements of the statute, since those who complied with the statute by furnishing the certificate of inability would have to file the certificates of merit within 60 days, while those who did not could take a longer time to file the certificates, and that such a result could not have been the intent of the California Legislature. *Id.* at 329-30.

Likewise, Miss. Code Ann. § 11-1-58(1)(b) is mere surplusage if a plaintiff is free to file a complaint without the required certificate of expert consultation, have that suit

dismissed (as *Walker* and *Goodlett* require), and then re-file the suit after the statute of limitations has run. As in *Doyle*, the Caldwells' position would have the bizarre effect of benefitting those who disregard the requirements of the statute. Section 11-1-58(1)(b) requires that, at the latest, a plaintiff's attorney must accomplish the expert consultation requirement within 60 days of filing the complaint. However, under the Caldwells' theory, a plaintiff could stretch out the consultation period by several months by ignoring the statutory requirements and filing a complaint without a certificate, because of the time involved in the normal progress of litigation. In the instant case, for example, the trial court's order dismissing *Caldwell I* was entered over ten months after the complaint was filed without the prescribed certificate. As the *Doyle* court recognized, a result that is so at odds with the plain requirements and obvious purposes of the statute cannot be what the Mississippi Legislature intended.

The Legislature recognized that the consultation requirements of the statute entail potential problems with respect to the statute of limitations and crafted a solution to that problem, providing a mechanism to accommodate those who could not obtain the certificate within the limitations period. For a court to tack on to the legislative scheme a further tolling provision would be an unwarranted intrusion into the legislative process and would frustrate the purposes of the statute by granting more time to obtain the certificate than the Legislature in its considered judgment provided, encouraging the filing of actions before, or even without, consultation, contrary to the clear directives of the statute, and perversely benefitting those who choose to disregard the statute's requirements.

In other states that have adopted notice or expert-consultation prerequisites for a medical negligence suit similar to Mississippi's legislative scheme, the courts have held

that the filing of a complaint in contravention of the statutory requirements does not toll the running of the statute of limitations. For example, in *Scarsella v. Pollak*, 607 N.W. 2d 711 (Mich. 2000), the court considered a Michigan statute that required a plaintiff to file an "affidavit of merit" stating a medical professional's opinion that the plaintiff's claim is valid. The statute included a provision under which a plaintiff could obtain an additional 28 days to file the affidavit. The plaintiff in *Scarsella* filed the complaint but did not file an affidavit of merit or request the available extension of time to do so. Several months after the expiration of the limitation period, the defendant filed a motion for summary judgment based on the plaintiff's failure to comply with the affidavit requirement. Before the court ruled on the motion, the plaintiff filed the required affidavit. The trial court dismissed the action because of the plaintiff's failure to comply with the statute. The trial court also held that the complaint filed without the affidavit did not toll the statute of limitations. Thus, since a subsequent suit would be time-barred, the trial court dismissed the action with prejudice. *Id.* at 712-13. The Michigan Supreme Court affirmed, holding that because the statute provided that the plaintiff "shall" file an affidavit with the complaint, such filing was "mandatory and imperative," and therefore the filing of a complaint without the required affidavit was insufficient to commence the lawsuit, and thus, did not toll the statute of limitations. *Id.* at 713. The court also rejected the argument that the plaintiff should be allowed to cure the defect by filing an amended complaint with the affidavit, reasoning that allowing the plaintiff to file the affidavit after filing the complaint would "effectively repeal[] the statutory affidavit of merit requirement." *Id.* Like the Michigan statute, Miss. Code Ann. § 11-1-58 provides that the plaintiff "shall" file a certificate with the complaint, and as under the Michigan statute, that language makes such filing mandatory and does not permit the defect to be

cured by a subsequent filing. *Walker*, 931 So. 2d at 589 ¶ 19; *Goodlett*, 968 So. 2d at 397 ¶ 13. Thus, following the cogent reasoning of *Scarsella*, which mirrors the Court's reasoning in *Walker*, the filing of a medical negligence complaint in Mississippi without the certificate of consultation mandated by section 11-1-58 does not toll the statute of limitations.

Similarly, in *Public Health Trust of Dade County v. Knuck*, 495 So. 2d 834 (Fla. App. 1986), the statute in question required pre-suit notice to the defendant and the filing of a "good faith certificate alleging compliance with statutory requirements." *Id.* at 835. The court held that the filing of the action without complying with the statutory requirements did not properly commence the action and toll the statute of limitations.[3] The court reached that result on the basis of Florida Supreme Court precedent holding (in accord with the later holding of *Walker*) that "compliance with statutory conditions precedent and allegations of compliance are essential to the complaint." *Id.* at 836. The court also noted that Florida's statutory scheme provided a procedure to protect a plaintiff from being barred from suit where there was not enough time left in the statutory period to comply with the pre-suit requirements. In such case, a plaintiff, by following the procedure, could have the statute tolled for a period of time to give him time to comply with the requirements. The court reasoned that since tolling was available to one who complied with statute, it was not available to those who did not. By the same rationale, since section 11-1-58(1)(b) provides a procedure to avoid the imminent expiration of the limitations period, there is no warrant for affording tolling to one who disregards the statutory requirements.

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[3] Then, as now, Fla. R. Civ. P. 1.050 provided that an action was commenced by the filing of a complaint. *See Szabo v. Essex Chemical Corp.*, 461 So. 2d 128, 129 (Fla. App. 1984).

In *Colby v. Columbia County*, 550 N.W. 2d 124 (Wis. 1996), the court interpreted a sovereign immunity statute that required a pre-suit notice of claim, analogous to the pre-suit notice for a medical negligence suit required by Miss. Code Ann. § 15-1-36(15). In *Colby*, the plaintiff failed to submit the requisite notice of claim before filing suit less than three weeks before the statute of limitations was to run. Several months later, the suit was dismissed because of the failure to give notice. The plaintiff promptly filed a second suit, which the trial court dismissed as time-barred. *Id.* at 126-27. On appeal, the plaintiff argued that the second suit was timely because the statute of limitations was tolled during the pendency of the first action. The Wisconsin Supreme Court held that that the filing of a complaint without submitting the required notice of claim did not properly commence the action and was not sufficient to toll the statute of limitations.[4]

The foregoing cases exemplify the general rule that where a statute prescribes certain prerequisites for bringing a civil action, a suit instituted without compliance with the prerequisites is not properly commenced so as to toll the statute of limitations. *See* 51 Am. Jur. 2d Limitation of Actions § 253.

In light of the great weight of logic and authority as set forth above, this Court should hold that the Caldwells' filing of the complaint without the certificate of consultation in *Caldwell I* did not toll the statute of limitations, and, therefore, the complaint in *Caldwell II* is time-barred. Even if that conclusion were not compelled by the very terms of section 11-1-58, by the reasoning of other decisions of the Court

[4] Wisconsin law provides that a civil action is commenced by the filing of a summons and complaint with the court. Wis. Stat. § 801.02(1).

interpreting that statute, and the logic of the decisions of courts construing similar statutes of other states, it would be compelled by the application of general principles of tolling.

Suspending a statute of limitations during all or part of a pending action is a species of equitable tolling, and thus, is denied where the equities are not in the plaintiff's favor. *Price v. Illinois Central Gulf R. Co.*, 584 So. 2d 1279, 1281-82 (Miss. 1991). Tolling is applied "when strict application of the statute of limitations would be inequitable." *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995). Accordingly, the courts have recognized that the mere filing of a complaint does not always result in tolling of the statute of limitations.

For example, where a plaintiff voluntarily dismisses an action, no tolling is recognized, and the time during which the action was pending prior to dismissal is not excluded from the limitations period. In other words, the voluntary dismissal renders that action as though it had never been filed for purposes of tolling the statute of limitations. *Smith v. Copiah County*, 232 Miss. 838, 100 So. 2d 614, 616 (1958); *see also Dean v. Pilgrim's Pride Corp.*, 395 F.3d 471, 476 (4th Cir. 2005); *Beck v. Caterpillar, Inc.*, 50 F.3d 405, 407 (7th Cir. 1995); *Basco v. American General Ins. Co.*, 43 F.3d 964, 965 (5th Cir. 1994); *National R.R. Passenger Corp. v. International Association of Machinists and Aerospace Workers*, 915 F.2d 43, 48 (1st Cir. 1990).

The Court of Appeals appears to have applied the foregoing rule in *Marshall v. Kansas City Southern R. Co.*, -- So. 2d --, No. 2006-CA-00519-COA, 2007 WL 3257011 (Miss. App. 2007). In that case, the plaintiff filed an action in federal court but voluntarily dismissed the suit and re-filed the action in state court. The trial court held that the statute of limitations was not tolled during the pendency of the federal court action because of the voluntary dismissal. The Court of Appeals affirmed. The court

noted that *Norman v. Bucklew*, 684 So. 2d 1246 (Miss. 1996) and *Boston v. Hartford Accident & Indemnity Co.*, 822 So. 2d 239 (Miss. 2002) had held that the filing of a federal action including a state law claim subject to the federal court's pendent or supplemental jurisdiction tolls the statute of limitations on the state law claim during the pendency of the federal action. The court also noted, however, that this rule was based on a federal statute that so provided, 28 U.S.C. § 1367, and held that the statute, and thus the rule of *Norman* and *Boston*, did not apply in *Marshall* because the state law claim asserted in the federal court action was within the court's original jurisdiction rather than its supplemental jurisdiction. Thus, the Court of Appeals upheld the trial court's refusal to find that the statute of limitations had been tolled during the pendency of the federal court action because the voluntary dismissal annulled the tolling of the statute of limitations that otherwise would have occurred.

The tolling of the statute of limitations by commencing an action is also annulled by a dismissal of the action for want of prosecution. *Justice v. United States*, 6 F.3d 1474, 1478 (11th Cir. 1993); *Houswerth v. Neimiec*, 603 So. 2d 88, 89 (Fla. App. 1992). The principle that tolling is imposed only where equity so demands is also illustrated by the rule that, where the statute of limitations is tolled by the filing of a complaint, tolling ends, and the statute of limitations resumes running, if the plaintiff fails to serve process within the 120-day service period prescribed by Miss. R. Civ. P. 4. *See Owens v. Mai*, 891 So. 2d 220, 223 ¶ 14 (Miss. 2005). In such case, the plaintiff, by his lack of diligence in failing to serve process, has forfeited his claim to the continued benefit of equity.

Thus, it is entirely consistent with settled law and equitable principles to refuse to apply equitable tolling where, as here, a plaintiff has disregarded the dictates of section

11-1-58 by filing a complaint with the blatant omission of the prerequisites and co-requisites prescribed by the statute. In this case, there is nothing to warrant equitable tolling. The requirement of filing a certificate of consultation with the complaint is clearly and unambiguously stated in the statute, and the two-year statute of limitations (section 15-1-36) provides ample time to accomplish the consultation. The statute makes allowances for a plaintiff who is unable to procure the certificate prior to the expiration of the limitations period because of legitimate time constraints. Furthermore, even if the Caldwells' counsel had been unaware or confused about the statutory requirement, the responsive pleadings of NMMC and Dr. Brown to the original and amended complaints in *Caldwell I*, which asserted the failure to file the certificate as a defense, should have alerted the Caldwells to the deficiency of their pleadings. When the original answer was served, the Caldwells, without equitable tolling, still had over two months remaining in the limitation period. Had the Caldwells been diligent, they could have voluntarily dismissed the action and filed another suit in compliance with section 11-1-58 before the limitations period expired.[5] As the United States Supreme Court stated in *Burnett v. New York Central R. Co.*, 380 U.S. 424, 429-30 (1965), equitable tolling is applied to aid those who do not sleep on their rights but are diligent in prosecuting their claims. In this case, the Caldwells plainly were not diligent, and thus have no plausible claim to the indulgence of equity. Moreover, as a general proposition, equitable principles do not support tolling the statute of limitations where a complaint is filed without a certificate of consultation contrary to the clear dictates of section 11-1-58, because allowing such

[5] The health care services in question occurred on August 24, 2003. The complaint in the first action was filed on May 5, 2005, with approximately three months and 19 days remaining in the limitations period. The initial responsive pleading with defenses was served on June 8, 2005. (R. 42, 44.)

tolling would allow a dilatory plaintiff to manipulate the statute and, as noted above, would benefit those who disobey the statute over those who comply.

In support of its holding, the trial court herein relied on an unpublished federal district court opinion, *Gray v. Mariner Health Central, Inc.*, 2006 WL 2632211, 2006 U.S. Dist. LEXIS 65725 (N.D. Miss. 2006), in which the plaintiffs filed a malpractice action without giving prior notice and without filing a certificate of consultation as required by statute, then, after that action was dismissed, filed a new suit in compliance with the statute. The defendants moved to dismiss the second suit as time-barred. The court held that the filing of the first suit tolled the statute of limitations until it was dismissed, and that the second suit thus was timely filed.

The decision in *Gray* is, of course, merely an *Erie* guess about Mississippi law that is not binding on the state courts. Furthermore, the court in *Gray* did not address the specific question of whether the deficiency of the plaintiffs' pleading in not including a certificate of consultation would preclude the application of the general rule of equitable tolling, either because the complaint lacking the certificate was not properly filed under Rule 3 so as to commence the action or because the equitable considerations underlying the general rule were not applicable in that situation. It appears from the sketchy, unpublished opinion of the district court that the defendants in *Gray* did not make that argument. *See id.* at *2 n. 1. Since the court in *Gray* did not address the question of whether the general rule of equitable tolling, recognized in cases where the plaintiff has filed suit in compliance with the applicable statutes, should apply with equal force to a situation where the plaintiff flouted the controlling law, the district court's holding is scant persuasive support for the trial court's ruling.

The trial court herein also reasoned that the affirmance by the Court of Appeals of the trial court's order in *Caldwell I* dismissing the action without prejudice was a *sub silentio* holding that *Caldwell I* tolled the statute of limitations with respect to *Caldwell II*. That view is erroneous; the mere dismissal of an action without prejudice does not necessarily mean that a subsequent action will not be time-barred. As the Court held in *W.T. Raleigh Co. v. Barnes*, 143 Miss. 597, 109 So. 8, (Miss. 1926):

> The only effect of the words "without prejudice" in the order by which the first suit was dismissed is to prevent the dismissal of that suit in operating as a bar to any new suit which plaintiff might therefore desire to bring on the same cause of action. The dismissal of a suit without prejudice "does not deprive the defendant of any defense he may be entitled to make to the new suit, nor confer any new right or advantage on the complainant [plaintiff], and hence it will not have the effect of excepting from the period prescribed by the statute of limitations, the time during which that suit was pending."

109 So. at 9 (citations omitted). In other words, that a dismissal is without prejudice relates only to a potential defense of *res judicata* in a subsequent suit, not to a defense of limitations. Consequently, a court can dismiss a case without prejudice without also holding that a subsequent suit will not be time-barred. *See, e.g.*, *Owens v. Mai*, 891 So. 2d 220 (Miss. 2005); *Watters v. Stripling*, 675 So. 2d 1242 (Miss. 1996) (in each case, court dismissed first action without prejudice, yet subsequent suit was held time-barred). In *Caldwell I*, the Court of Appeals was not presented with, and did not address directly or by implication, the question of whether a subsequent action would be barred by the statute of limitations. *See Caldwell v. North Mississippi Medical Center*, 956 So. 2d 888 (Miss. 2007). The statement that the trial court was correct in dismissing the action without prejudice can only be interpreted as a recognition that a dismissal for failure to file a certificate of consultation is not a preclusive judgment. It cannot plausibly be viewed as a pronouncement on an unraised statute of limitations issue.

In sum, for the reasons set forth above, the filing of the complaint in *Caldwell I* without the required certificate of consultation did not toll the statute of limitations on the Caldwells' claims. Therefore, the complaint in *Caldwell II* is barred by limitations, and the trial court erred in denying the motion for summary judgment of NMMC and Dr. Brown.

II. In the alternative, the failure of the Caldwells to serve the required certificate of consultation on NMMC and Dr. Brown along with the summons and complaint caused the statute of limitations to start running again 120 days following the filing of the complaint.

Even where equitable tolling applies, if the plaintiff, after filing a complaint, does not effect proper service of process on the defendant within the 120-day service period provided by Rule 4(h) of the Mississippi Rules of Civil Procedure, the statute of limitations, tolled by the filing of the complaint, begins to run again. *Owens v. Mai*, 891 So. 2d 220, 223 ¶ 14 (Miss. 2005). This resumption of the statute's running occurs whether or not the case is dismissed for failure to serve process. Thus, in *Owens*, the statute began running upon the expiration of the 120-day service period, some 14 months before the defendant moved to dismiss the action, and the limitations period had expired before the defendant's motion to dismiss was filed. *Id.* ¶ 16. Similarly, in *Triple C Transport v. Dickens*, 870 So. 2d 1195, 1200 ¶¶ 34-36, (Miss. 2004), the statute resumed running some five months before the defendant filed a motion to dismiss.

The resumption of the running of the limitation period for failure to serve process is not limited to cases where the plaintiff completely fails to make any service or give any notice to the defendant; it also occurs where the plaintiff makes a form of service that is incomplete or insufficient under the applicable law. In *Parmley v. Pringle*, 976 So. 2d 422, 424-25 ¶ 9 (Miss. App. 2008), the plaintiff filed suit with 105 days left in the limitation period and, within the 120-day period, "served" the defendant by certified

mail. Since the defendant was a resident of Mississippi, and Rule 4 did not provide for service by certified mail on a resident defendant, the putative service was insufficient, and the statute of limitations automatically began to run again after 120 days had passed "without process being correctly served."

Process is insufficient, and therefore will not continue the tolling past the 120-day period, where the plaintiff fails to serve all the required documents. In *Macaluso v. N. Y. State Dept. of Environmental Conservation*, 115 F.R.D. 16, 19 (E.D. N.Y. 1986), the court held that there was insufficient service of process within the 120-day period where the defendant was served with a copy of the summons but not with a copy of the complaint. Similarly, service was defective where the plaintiff served a copy of the complaint but not a summons. *Triple C Transport*, 870 So. 2d at 1199 ¶ 25. Service was also insufficient where the plaintiff served a copy of a complaint that differed substantially from the complaint that had been filed, *West Coast Theater Corp. v. City of Portland*, 897 F.2d 1519 (9th Cir. 1990), and where the plaintiff served a summons that was not signed, *Ayres v. Jacobs & Crumplar, P.A.*, 99 F.3d 565, 569 (3rd Cir. 1996).

Since section 11-1-58 requires the filing of a certificate of expert consultation or its equivalent with the complaint, the statute also requires that the certificate be served on the defendant along with a copy of the complaint and the summons. Accordingly, the service of process on the defendants without the required certificate was insufficient to continue the tolling of the statute of limitations beyond the 120-day period. Therefore, even if the statute of limitations was tolled by the filing of the complaint in *Caldwell I*, the running of the statute recommenced after 120 days, and the limitation period expired some three months and 19 days later, or on or about December 2, 2005, some three months before the Caldwells filed the complaint in the instant action. Consequently,

even if equitable tolling were applied, this action is nevertheless barred by the statute of limitations.

CONCLUSION

Since the filing of *Caldwell I* contrary to the requirements of section 11-1-58 did not toll the statute of limitations on the Caldwells' claims, the instant action was barred by limitations, and the trial court was in error in denying the motion for summary judgment of NMMC and Dr. Brown. Therefore, this Court should reverse the order of the trial court denying summary judgment, and should render judgment for NMMC and Dr. Brown.

Respectfully submitted,

NORTH MISSISSIPPI MEDICAL CENTER, INC. AND ELIZABETH BROWN, EXECUTRIX OF THE ESTATE OF ALAN PAUL BROWN, M.D., DECEASED,
Appellants

By: _____
JOHN G. WHEELER
Mississippi Bar No. 8622

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, John G. Wheeler, one of the attorneys for the Appellants, North Mississippi Medical Center, Inc. and Elizabeth Brown, Executrix of the Estate of Alan Paul Brown, M.D., Deceased, hereby certify that I have this day served a true and correct copy of the above and foregoing BRIEF OF APPELLANTS by placing said copy in the United States Mail, postage prepaid, addressed to the following:

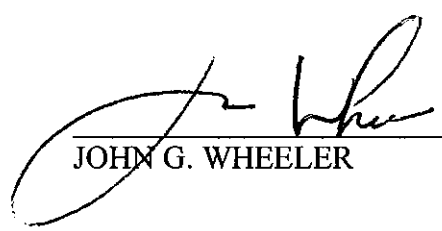
Hon. James L. Roberts
Circuit Court Judge
Post Office Drawer 1100
Tupelo, Mississippi 38802-1100

Hon. Sharion Aycock
U.S. District Judge
301 West Commerce Street, Room 218
Post Office Box 847
Aberdeen, Mississippi 39730

John H. Cocke, Esq.
Merkel & Cocke, P.A.
30 Delta Avenue
Clarksdale, MS 38614

ATTORNEY FOR APPELLANTS

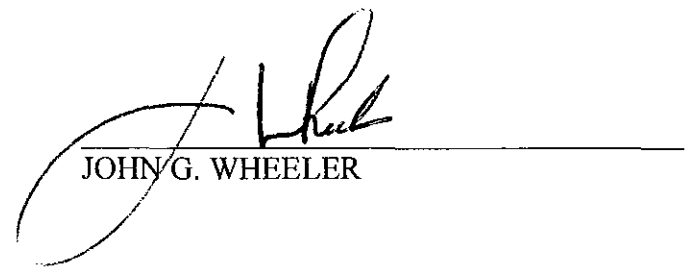
This the 1st day of May, 2008.



JOHN G. WHEELER

CERTIFICATE OF FILING

I hereby certify that I have mailed via first-class, United States mail, postage prepaid, the original and three copies of the Brief of Appellants and an electronic diskette containing same on May 1, 2008, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



JOHN G. WHEELER

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-M-01512

* * *

JANICE CALDWELL AND HUSBAND,
ROBERT C. CALDWELL

APPELLEES

V.

NORTH MISSISSIPPI MEDICAL CENTER, INC.,
AND ELIZABETH BROWN, EXECUTRIX OF THE
ESTATE OF ALAN PAUL BROWN, M.D., DECEASED

APPELLANTS

ON INTERLOCUTORY APPEAL FROM THE
CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI
CAUSE NO. CV06-072-(A)L

ADDENDUM OF STATUTES AND OTHER AUTHORITIES

Miss. Code Ann. § 11-1-58

West's Annotated Mississippi Code Currentness
Title 11. Civil Practice and Procedure
Chapter 1. Practice and Procedure Provisions Common to Courts (Refs & Annos)
§ 11-1-58. Medical malpractice; certificate of expert consultation; exemptions; confidentiality

(1) In any action against a licensed physician, health care provider or health care practitioner for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff declaring that:

(a) The attorney has reviewed the facts of the case and has consulted with at least one (1) expert qualified pursuant to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence who is qualified to give expert testimony as to standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or
(b) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because a limitation of time established by Section 15-1-36 would bar the action and that the consultation could not reasonably be obtained before such time expired. A certificate executed pursuant to this paragraph (b) shall be supplemented by a certificate of consultation pursuant to paragraph (a) or (c) within sixty (60) days after service of the complaint or the suit shall be dismissed; or
(c) The attorney was unable to obtain the consultation required by paragraph (a) of this subsection because the attorney had made at least three (3) separate good faith attempts with three (3) different experts to obtain a consultation and that none of those contacted would agree to a consultation.

(2) Where a certificate is required pursuant to this section only, a single certificate is required for an action, even if more than one (1) defendant has been named in the complaint or is subsequently named.

(3) A certificate under subsection (1) of this section is not required where the attorney intends to rely solely on either the doctrine of "res ipsa loquitur" or "informed consent." In such cases, the complaint shall be accompanied by a certificate executed by the attorney declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate under subsection (1) of this section.

(4) If a request by the plaintiff for the records of the plaintiff's medical treatment by the defendants has been made and the records have not been produced, the plaintiff shall not be required to file the certificate required by this section until ninety (90) days after the records have been produced.

(5) For purposes of this section, an attorney who submits a certificate of consultation shall not be required to disclose the identity of the consulted or the contents of the consultation; provided, however, that when the attorney makes a claim under paragraph (c) of subsection (1) of this section that he was unable to obtain the required consultation with an expert, the court, upon the request of a defendant made prior to compliance by the plaintiff with the provisions of this section, may require the attorney to divulge to the court, in camera and without any disclosure by the court to any other party, the names of physicians refusing such consultation.

(6) The provisions of this section shall not apply to a plaintiff who is not represented by an attorney.

(7) The plaintiff, in lieu of serving a certificate required by this section, may provide the defendant or defendants with expert information in the form required by the Mississippi Rules of Civil Procedure. Nothing in this section requires the disclosure of any "consulting" or nontrial expert, except as expressly stated herein.

CREDIT(S)

Added by Laws 2002, 3rd Ex. Sess., Ch. 2, § 6, eff. Jan. 1, 2003.

HISTORICAL AND STATUTORY NOTES

Laws 2002, 3rd Ex. Sess., Ch. 2 relates to medical malpractice tort reform. Section 12 of Laws 2002, 3rd Ex.Sess., Ch. 2 is a severability provision, and reads:

"If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provision of this act are declared severable."

Section 13 of Laws 2002, 3rd Ex.Sess., Ch. 2 provided:

"This act shall take effect and be in force from and after January 1, 2003, and shall apply to all causes of action filed on or after that date."

CROSS REFERENCES

Comparative negligence, see § 11-7-15.
Wrongful death, see § 11-7-13.

LAW REVIEW AND JOURNAL COMMENTARIES

Checking up on the medical malpractice liability insurance crisis in Mississippi: Are additional tort reforms the cure? Farish Percy, 73 Miss. L.J. 1001 (Spring 2004)

The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims. Schwartz, Tedesco, 71 Miss.L.J. 531 (Winter 2001)

Mississippi's Civil Justice System: Problems, Opportunities and Some Suggested Repairs. Joyce, Hotra, 71 Miss.L.J. 395 (Winter 2001)

A Proposed Remedy for Mississippi's Medical Malpractice Miseries. O'Connell, 22 Miss.C.L.Rev. 1, (Fall 2002).

Regulation Masquerading as Judgment: Chaos Masquerading as Tort Law. Krauss, 71 Miss.L.J. 631 (Winter 2001).

Sleeping double in a single bed---Personal consumption in wrongful death. Fiser, Brooking, Fender, 25 Miss. C. L. Rev. 159 (Spring, 2006)

The Three-Legged Pig: Risk Redistribution and Antinomianism in American Legal Culture. Galanter, 22 Miss.C.L.Rev. 47 (Fall 2002).

Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy. Vidmar, Brown, 22 Miss.C.L.Rev. 9 (Fall 2002).

550 N.W.2d 124; Colby v. Columbia County; 202 Wis.2d 342

550 N.W.2d 124 (Wis. 1996)
202 Wis.2d 342

Clinton J. COLBY, Plaintiff-Appellant,
v.
COLUMBIA COUNTY, Wisconsin and Columbia County Highway Commissioner, Kurt Dey, or his predecessor in interest, Defendants-Respondents-Petitioners.

No. 93-3348.

Supreme Court of Wisconsin.

June 28, 1996

Oral Argument January 30, 1996.

Page 125

[Copyrighted Material Omitted]

Page 126

[202 Wis.2d 345] For the defendants-respondents-petitioners there were briefs by Bradley D. Armstrong, Paul Voelker and Axley Brynelson, Madison and oral argument by Paul Voelker.

For the plaintiff-appellant there there was a brief by Eric A. Farnsworth and DeWitt Ross & Stevens, S.C., Madison and oral argument by Eric A. Farnsworth.

JON P. WILCOX, Justice.

The defendant-respondent-petitioner Columbia County seeks review of a decision of the court of appeals which reversed a circuit court order dismissing a personal injury action against Columbia County and Columbia County Highway Commissioner Kurt Dey (Columbia County) filed by the plaintiff-appellant-respondent Clinton J. Colby (Colby). See Colby v. Columbia County, 192 Wis.2d 397, 531 N.W.2d 404 (Ct.App.1995). The circuit court had dismissed the action against Columbia County on the ground that Colby's claim had accrued more than 3 years before the commencement of the action and, therefore, the action was barred by the statute of limitations[202 Wis.2d 346] under Wis.Stat. § 893.54 (1993-94). [(fn1)] The appellate court reversed, holding that the 3-year statute of limitations had been tolled when Colby filed his first complaint against Columbia County, despite such action having been dismissed as premature. Colby, 192 Wis.2d at 398-99, 531 N.W.2d 404.

We are presented with two issues on this appeal. First, was the premature filing of a summons and complaint that was subsequently dismissed because of the failure to comply with the provisions of Wis.Stat. § 893.80(1)(b), sufficient to toll the statute of limitations? Secondly, we are asked to consider whether the decision of the court of appeals in Fox v. Smith, 159 Wis.2d 581, 464 N.W.2d 845 (Ct.App.1990), failed to observe the precedent established by this court in Maynard v. De Vries, 224

Wis. 224, 272 N.W. 27 (1937) and should be reversed.

I.

The facts on this review are not in dispute. On March 10, 1990, Colby was injured in a motor vehicle accident in Columbia County when the vehicle in which he was a passenger struck a concrete abutment located approximately two feet from the highway. Colby was rendered a quadriplegic as a result of the accident. Though retaining counsel in August 1990, Colby did not file a notice and claim with the clerk of Columbia County, pursuant to Wis.Stat. § 893.80(1)(b), until February 24, 1993, less than three [202 Wis.2d 347] weeks before the statute of limitations was set to expire, on March 10, 1993. Section 893.80(1) provides in relevant part as follows:

[N]o action may be brought or maintained against any ... political corporation, governmental subdivision or agency thereof ... upon a claim or cause of action unless:

. . . . .

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the ... corporation, subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance.

Thereafter, a summons and complaint was filed against Columbia County in Columbia County Circuit Court on February 26, 1993, by Colby and his parents. The Columbia County Board formally denied the claim on March 17, and in its answer, moved to dismiss the complaint. Columbia County contended that the action was filed prematurely, as Colby had failed to wait the required 120 days to file the complaint after filing his claim, as required by Wis.Stat. § 893.80(1). On July 19, 1993, the Honorable Andrew B.

Bissonette granted the motion in a memorandum decision, and an order of dismissal without prejudice was entered on August 9, 1993.

On August 10, 1993, Colby filed a second summons and complaint, which Columbia County again moved to dismiss, claiming that it was not timely filed under Wis.Stat. § 893.54. The motion was granted by the circuit court on November 5, 1993, the Honorable [202 Wis.2d 348] Daniel W. Klossner presiding. The circuit court reasoned that the statute of limitations had not been tolled when the plaintiff filed his initial claim because that filing had not commenced an action. In its holding, the circuit court acknowledged a decision of the appellate court which had addressed this issue, Fox v. Smith, 159 Wis.2d 581, 464 N.W.2d 845 (Ct.App.1990), and had concluded that Wis.Stat. § 893.13(2) tolled the running of a statute of limitations where the first complaint was defective because it was prematurely filed under Wis.Stat. § 893.80(1)(b). However, the circuit court declined to follow this decision, stating that the Fox opinion conflicted with an earlier decision of this court, Maynard v. De Vries, 224 Wis. 224, 272 N.W. 27 (1937), which clearly required that Colby's second complaint be dismissed.

Colby appealed, and Columbia County filed a Petition to Bypass, which was denied by this court on July 19, 1994. On March 2, 1995, the court of appeals released its opinion reversing the decision of the circuit court. The appellate court concluded that the commencement of a suit prior to the expiration of the statute of limitations does toll the statute under Wis.Stat. § 893.13 [(fn2)] even if the action is later

dismissed for failure to comply with the 120-day period for disallowance[202 Wis.2d 349] by the county, as prescribed under Wis.Stat. § 893.80. Colby, 192 Wis.2d at 400-01, 531 N.W.2d 404. Further, the court of appeals stated that its decision in Fox was controlling on the issue, and was not in conflict with this court's earlier decision in Maynard. Id. at 406, 531 N.W.2d 404. Columbia County thereafter filed a Petition for Review which was accepted by this court on May 10, 1995.

II.

On this review, we are asked to interpret the relationship between Wis.Stat. § 893.13, Wis.Stat. § 893.23 and Wis.Stat. § 893.80. A question of statutory interpretation involves a question of law that this court reviews without deference to the decisions of the circuit or appellate courts. Pufahl v. Williams, 179 Wis.2d 104, 107, 506 N.W.2d 747 (1993) (citations omitted). When the court confronts an inconsistency between statutes, it should try to reconcile them without nullifying one or the other, in a manner that will effect legislative intent. Phillips v. Wisconsin Personnel Comm'n, 167 Wis.2d 205, 217, 482 N.W.2d 121 (Ct.App.1992).

The determination of this issue, as the parties suggest, requires a unique balancing of a plaintiff's right to access the courts with a governmental entity's fundamental right [(fn3)] to invoke a statute of limitations, as well as its legislatively mandated right to have a claim [202 Wis.2d 350] presented to it before it is forced into costly and expensive litigation. Periods of limitation employ various policies espoused by the legislature:

The bar created by operation of a statute of limitations is established independently of any adjudicatory process. It is legislative expression of policy that prohibits litigants from raising claims--whether or not

they are meritorious--after the expiration of a given period of time. Under Wisconsin law the expiration of the limitations period extinguishes the cause of action of the potential plaintiff and it also creates a right enjoyed by the would-be defendant to insist on that statutory bar.

In re Estate of Fessler, 100 Wis.2d 437, 448, 302 N.W.2d 414 (1981) (citations omitted). The present case marks the intersection at which an alleged dilatory plaintiff confronts the clear public policies articulated in the Wisconsin Statutes involving the right of a county to limit judicial proceedings against it.

Columbia County's primary contention in this case is that a plaintiff may not commence an action against the county until the provisions in Wis.Stat. § 893.80 have been satisfied. The County bases this presumption upon the extensive legislative history as well as the words of the statute, focusing particularly upon the statement that "no action may be brought or maintained." The County contends that in construing the statute, the phrase "no action may be brought" has a peculiar meaning in the law, such that "brought" and "commenced" are commonly deemed to be synonymous. See Schwartz v. City of Milwaukee, 43 Wis.2d 119, 168 N.W.2d 107 (1969). Therefore, the County asserts that [202 Wis.2d 351] the statutory language "no action can be brought" can only mean that "no action may be commenced." We agree with this construction.

The County then directs our attention to this court's earlier decision in Maynard to support its contention that since Wis.Stat. § 893.80(1)(b) provides that no action may be brought or maintained against a governmental subdivision unless the claim has been rejected or 120 days have passed since the

notice was filed, Colby did not commence his action when he served a summons and complaint under Wis.Stat. § 893.02 without first fulfilling the requirements of § 893.80. Therefore, Columbia County concludes that because no action had been commenced prior to the expiration of the period of limitations, Colby was not entitled to the benefit of the tolling provision in Wis.Stat. § 893.13, which requires a commencement to trigger the saving provisions of the statute. Thus, the County urges this court to reverse the decision of the court of appeals, and dismiss Colby's action as untimely.

Assuming, arguendo, that Columbia County is correct in its contention that the legislature intended to prohibit a plaintiff from commencing an action against a governmental subdivision until the requirements of Wis.Stat. § 893.80 are satisfied, and the plaintiff is not entitled to the tolling statute, Wis.Stat. § 893.13, then the plaintiff, in effect, would be subjected to a "statutory prohibition" from filing until the expiration of the 120-day disallowance period. If in fact Colby is precluded from filing his claim against Columbia County by virtue of § 893.80, he argues that nevertheless, he is entitled to the tolling provisions contained within Wis.Stat. § 893.23 which states:

[202 Wis.2d 352] 893.23 When action stayed. When the commencement of an action is stayed by injunction or statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. (Emphasis added).

The plain language of the statute clearly states that when the commencement of an action is stayed by statutory prohibition, the limitations period is tolled until such prohibition is terminated. The legislative history of this statutory provision is scarce and uninformative, and the parties have not provided us with any additional insight as to the relative applicability of the statute to the facts presented before us. There are only two reported cases involving earlier versions of the statute, neither of which are applicable to the facts before us or instructive as to the statute's force and effect [(fn4)], and Columbia

County has not presented an argument which overcomes the language of the statute.

A number of statutes, city charters, and ordinances generally prescribe that one who has a tort [202 Wis.2d 353] claim against a governmental body shall provide to such body a written notice of the claim within a specified time period, precluding the commencement of an action until a designated time has expired after the giving of the notice or until the claim has been rejected. One commentator has noted that such a statutory prohibition does, in fact, operate to toll the statute of limitations:

Where the law not only requires a presentation or notice of claim but also prohibits the claimant from bringing suit until the claim is rejected or until the lapse of a definite period of time after presentation or notice, the majority view is that the claimant has no cause of action until the expiration of the time during which he is prohibited from bringing suit, and therefore the period of limitations does not begin to run until the end of the statutory prohibition.

Limitation Period as Affected By Requirement of Notice or Presentation of Claim Against Governmental Body, 3 A.L.R.2d 711, 712-13 (1949). Other states have enacted statutes which provide that where the commencement of an action has been stayed by injunction or by statutory prohibition, the time of the continuance of the stay is not part of the time limited for the commencement of an action. Id. at 719. [(fn5)]

[202 Wis.2d 354] A tolling provision for statutory waiting periods virtually identical to that

contained in Wis.Stat. § 893.23 can be found in the statutory framework of the state of New York. N.Y. CPLR Law § 204 (McKinney 1996), with historical origins dating back to the Field Codes in 1848, provides as follows:

§ 204. Stay of commencement of action; demand for arbitration.

(a) Stay. Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.

(b) Arbitration. Where it shall have been determined that a party is not obliged to submit a claim to arbitration, the time which elapsed between the demand for arbitration and the final determination that there is no obligation to arbitrate is not part of the time within which an action upon such claim must be commenced. The time within which the action must be commenced shall not be extended by this provision beyond one year after such final determination.

Section CPLR 204(a) operates to toll the statute of limitations when the commencement of an action is stayed by statutory prohibition, thereby extending the period of limitations. For example, N.Y. PAL Law § 1276(1) (McKinney 1996) provides that a tort action may not be commenced against the Metropolitan Transportation Authority until after 30 days have elapsed from service upon the Authority of a notice of claim and the Authority has neglected or refused to adjust or pay the claim. In Burgess v. Long Island R.R. Authority, 79 N.Y.2d 777, 579 N.Y.S.2d 631, 587 N.E.2d 269 (1991), the court of appeals viewed the 30-day waiting period as a "stay" within the meaning of CPLR [202 Wis.2d 355] 204 (a). Thus, the period of the stay was not to be counted as part of the 1-year limitations period for an action against the Authority, and the plaintiff could commence

the action at any time up to 1 year and 30 days from the accrual of the cause of action. [(fn6)]

Recognizing the inconsistent extensions of time which resulted when calculating a plaintiff's period of limitations for bringing actions against various quasi-governmental entities, the New York legislature sought to clarify and make uniform existing provisions [202 Wis.2d 356] with respect to the filing of claims and the commencement of actions when it enacted Section 50-i of the General Municipal Law. [(fn7)] The statutory language thereby renders the toll of CPLR 204(a) largely inoperative in tort actions against cities, counties, towns, villages, fire districts and school districts, as GML 50-i(1) prescribes a limitations period of 1 year and 90 days for all such actions. Neither the 30-day waiting period following service of a notice of claim nor the time required when the municipality conducts an examination of the claimant will operate to extend the limitations period, see GML 50-i(3). The no-extension language evinces the legislature's intent to preclude the applicability of CPLR 204(a) in actions governed by GML 50-i. See Astromovich v. Huntington Sch. Dist. No. 3, 80 A.D.2d 628, 436 N.Y.S.2d 93 (N.Y.A.D. 2 Dept., 1981), aff'd, 56 N.Y.2d 634, 450 N.Y.S.2d 786, [202 Wis.2d 357] 436 N.E.2d 192 (1982). [(fn8)] Following passage of the legislation in 1959, the court of appeals, in Baez v. New York City Health and Hospitals Corp., 80 N.Y.2d 571, 592 N.Y.S.2d 640, 607 N.E.2d 787 (1992), held that in actions against the New York City Health and Hospitals Corporation, "the Legislature did not intend [the 30-day waiting period between service of a notice of claim and commencement of the action and the time for claimant's compliance with a pre-action examination request] to extend the limitations period." Id. 592 N.Y.S.2d at 642, 607 N.E.2d at 789.

In the present case, we conclude that the interplay between Wis.Stat. § 893.23 and

Wis.Stat. § 893.80, in effect, creates a statute of limitations equal to 3 years and 120 days when filing a claim under § 893.80. The 120-day waiting period, required prior to the commencement of an action against the county, must be added to the statutory limitation of 3 years in order to obtain the time within which the action may be brought, thereby producing a 3-year-120-day limitations period on tort claims against the county by operation of the statutory stay of § 893.23. Section 893.80(1)(b) requires that the plaintiff first provide the county with a notice of claim, followed by either a denial of such claim by the county, or the expiration of the 120-day disallowance period, prior to the filing of a [202 Wis.2d 358] summons and complaint. These requirements must be completed within the 3 year and 120-day period of limitations. Though we recognize that § 893.23 frustrates the clear public policies which underlie the utilization of the notice of claims statute [(fn9)], unless an exception can be found in the statute to preclude its applicability, it cannot be imported by this court. The solution to this conflict is a matter reserved to the province of the legislature.

Although Colby had not complied with the notice requirements of Wis.Stat. § 893.80 at the time he filed his first summons and complaint, he argues, nevertheless, that the 3-year statute of limitations was tolled by his premature filing of a summons and complaint on February 26, 1993. We conclude that the filing of a summons and complaint, absent prior satisfaction of the notice requirement of § 893.80, is not sufficient to toll the statute of limitations, as the action has not yet been commenced at such point. In addition, Wis.Stat. § 893.23 does not operate as a saving statute in the present case which would permit Colby to prevail. Colby's first summons and complaint, filed February 26, 1993, was defective, as he had failed to wait until the County had either denied his claim, or the 120-day disallowance period had expired. The second summons and complaint was filed August 10, 1993, and was clearly outside the 3-year and 120-day period of limitations. As a result, Colby is incorrect in his assertion that § 893.23 saves his first summons and complaint.

[202 Wis.2d 359] However, Colby also presents this court with the assertion that his second summons and complaint was timely filed, predicated upon an interpretation of the tolling effect of Wis.Stat. § 893.13(2) which provides that the statute of limitations is "tolled by the commencement of the action to enforce the cause of action to which the period of limitation applies." Colby rests upon the reasoning advanced by the court of appeals in the case before us, wherein it stated:

[Colby] had thirty days from the trial court's order of August 9, 1993, dismissing the first complaint to file the second complaint. The thirty-day period of § 893.13(3) would apply because at the time Colby filed the first complaint on February 26, 1993, there were fewer than thirty days left until the expiration of the statute of limitations. The filing of the second complaint on August 10, 1993, is within the thirty-day period.

Colby, 192 Wis.2d at 401, 531 N.W.2d 404 (footnote omitted). The cornerstone for the court of appeals' conclusion can be traced to an earlier decision of the court of appeals in Fox, in which that court had occasion to construe Wis.Stat. § 893.80(1)(b), and concluded:

The provision in section 893.80(1)(b), Stats., that "no action may be brought or maintained" until either the claim is disallowed or the 120-day period has expired merely makes an action premature unless one of those events has occurred. It does not override the clear language of sections 893.13(3) and 893.02, STATS., which combine to toll the statute of limitations whenever an action is commenced-that is, whenever there is the physical act of filing with the court a "summons naming the defendant [202 Wis.2d 360] and the complaint," provided there is proper service within 60 days.

Fox, 159 Wis.2d at 586-87, 464 N.W.2d 845. Columbia County argues that the court of appeals' decision in Fox failed to observe the precedent established by this court in Maynard regarding the effect that the notice of claim requirement has on the commencement of an action.

In Maynard, this court was asked to construe the meaning of then Wis.Stat. § 59.76(1) (1927), the very language at issue before us, which read, in pertinent part as follows:

Sec. 59.76 Claims against counties; actions on; disallowance. (1) No action shall be brought or maintained against a county upon any account, demand or cause of action ... unless such claim shall have been duly presented to such board and they shall have failed to act upon the same within the time fixed by law....

Maynard, 224 Wis. at 227, 272 N.W. 27 (ellipses by the court). We determined that the plaintiff's attempt to bring an action against the county without first complying with the statutory requirements to bringing such action, necessitated a finding that the action had not been truly commenced within the meaning of the statute. The court found it immaterial that a summons and complaint had been properly served on the defendant county, remarking:

We see no escape from the conclusion that this action was prematurely brought and cannot be maintained. Under the provisions of [Wis.Stat. § 59.76(1) and 59.77(1)(a)], when the instant action was begun on December 26, 1935, there was no cause of action in existence in favor of the plaintiff against Columbia County. Furthermore, the statute[202 Wis.2d 361] prohibited the commencement of any action or its maintenance after it was commenced without first filing a claim. Unless we ignore the plain letter of these statutory provisions, the contention of the defendant county must be sustained.

Id. The controlling language utilized in Maynard was thereafter cited with approval by this court in Armes v. Kenosha County, 81 Wis.2d 309, 260 N.W.2d 515 (1977), wherein we stated:

In Maynard v. De Vries ... the claimant failed to prove compliance with the filing requirements of sec. 59.76 and 59.77, Stats. We held that "[t]he filing of a ... claim is under the statutes of this state a condition precedent to the existence of a cause of action."

Id. at 313, 260 N.W.2d 515. [(fn10)]

Maynard and its progeny clearly establish that a cause of action is not properly commenced when a plaintiff prematurely files a summons and complaint, without first complying with notice requirements such as those inscribed in Wis.Stat. § 893.80. Section 893.80 prohibited the commencement of the original action by Colby in this case, where suit was filed only two days [202 Wis.2d 362] after the statutory claim was filed with Columbia County, precluding the County from undertaking a thorough investigation of the claim. We hold that in a case involving § 893.80, where a claim has not been properly filed, a court need not reach the issue of whether Wis.Stat. § 893.13 tolls the running of the statute of limitations, because the operation of § 893.13 applies only to commenced actions, and under § 893.80, an action cannot be commenced if a claim has not been properly filed. Commencement of an action, where commencement is barred by statute, cannot toll a statute of limitations.

The decision of the court of appeals in Fox which concluded that Wis.Stat. § 893.02 and Wis.Stat. § 893.13 overrides the notice provisions in Wis.Stat. § 893.80, thereby tolling the statute of limitations whenever there is the physical act of filing a summons and complaint with the court, directly conflicts

with the well-established precedent of this court. A plain reading of § 893.80 dictates that no action may be commenced until the claim has actually been disallowed or 120 days have passed since its filing. Since an action has not truly been commenced, we need not reach the point at which § 893.13, which requires a commencement of the action to trigger the tolling, need be interpreted, as it is not applicable.

Moreover, the court of appeals' decision in Schwetz v. Employers Ins. of Wausau, 126 Wis.2d 32, 374 N.W.2d 241 (Ct.App.1985), upon which the Fox court relied, does not support its conclusion that Wis.Stat. § 893.13 operates to toll the statute of limitations, despite the notice requirements of Wis.Stat. § 893.80. In Schwetz, the court of appeals concluded that the plaintiff's action against the school district should be dismissed, noting:

[202 Wis.2d 363] The Schwetzes did not properly commence their first action. Under sec. 893.80(1)(b), Stats., the Schwetzes could not commence a suit unless the school district actually disallowed the itemized relief statement or 120 days had passed since its filing.... Because the Schwetzes failed to wait the 120 days required before filing, the trial court correctly dismissed the first action. As a result, the statute of limitations was not tolled because, under the statute, no action was commenced.

Schwetz, 126 Wis.2d at 34-5, 374 N.W.2d 241. Because the court of appeals in Fox failed to follow the precedent established by this court in Maynard and its progeny, we hold that the Fox decision is overruled. [(fn11)]

We conclude that this holding should only be applied prospectively and therefore affirm the decision of the court of appeals on different grounds. Generally, this court adheres to the "Blackstonian Doctrine," which provides that a decision overruling or repudiating an earlier decision operates retrospectively. Harmann v. Hadley, 128 Wis.2d 371, 377, 382 N.W.2d 673 (1986). The court has, however, acknowledged that inequities may occur when a court departs from precedent and announces a new rule of law.

"This court has, therefore, recognized exceptions to the 'Blackstonian Doctrine' and has used the device of prospective overruling, sometimes dubbed 'sunbursting,' to limit the effect of a newly announced rule." Id. at 377-78, 382 N.W.2d 673; see also Olson v. Augsberger, 18 Wis.2d 197, 200, 118 N.W.2d 194 (1962). This court's decision to [202 Wis.2d 364] apply a judicial holding prospectively is a question of policy and involves balancing the equities peculiar to a particular case or rule so as to mitigate hardships that may occur in the retroactive application of new rules. Bell v. County of Milwaukee, 134 Wis.2d 25, 31, 396 N.W.2d 328 (1986). Sunbursting has been applied to developments within the common law as well as changes in the way that courts interpret statutes. See Fairchild, Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting," 51 MARQ.L.REV. 254 (1967-68) (passim).

Retroactive operation has been denied where the purpose of the new ruling cannot be served by retroactivity, and where retroactivity would tend to thrust an excessive burden on the administration of justice. Fitzgerald v. Meissner & Hicks, Inc., 38 Wis.2d 571, 576, 157 N.W.2d 595 (1968). In tort cases, this court is concerned that courts would have to relitigate cases already disposed of by previous litigation or settlements. In the present case, we have concluded that an action is not truly commenced under Wis.Stat. § 893.80 until the notice and claim provision is satisfied, thereby precluding the applicability of Wis.Stat. § 893.13 to a prematurely filed summons and complaint.

This holding establishes a new principle of law which overrules past precedent (i.e., Fox), upon

which Colby relied. In light of the number of tort claims aimed at the various governmental subdivisions or agencies thereof which would be affected by our holding regarding the statute of limitations, we have examined the inequity imposed by retroactive application, and conclude that in order to avoid injustice or hardship by a [202 Wis.2d 365] holding of retroactivity, that portion of our

holding which addresses the relationship between Wis.Stat. § 893.13 and Wis.Stat. § 893.80 will be applied prospectively. [(fn12)] As such, we find that Colby's action against Columbia County should be permitted to proceed.

The decision of the court of appeals is affirmed.

Notes:

[(fn1)] All future statutory references are to the 1993-94 volume unless otherwise indicated. Section 893.54 provides in relevant part:

893.54. Injury to the person. The following action shall be commenced within 3 years or be barred:

[(fn1)] An action to recover damages for injuries to the person.

[(fn2)] Section 893.13(2) and (3) provide in relevant part:

893.13 Tolling of statutes of limitation.... (2) A law limiting the time for commencement of an action is tolled by the commencement of the action to enforce the cause of action to which the period of limitation applies. The law limiting the time for commencement of the action is tolled for the period from the commencement of the action until the final disposition of the action.

[(fn3)] If a period of limitation is tolled under sub. (2) by the commencement of an action and the time remaining after final disposition in which an action may be commenced is less than 30 days, the period within which the action may be commenced is extended 30 days from the date of final disposition.

[(fn3)] See Maryland Cas. Co. v. Beleznay, 245 Wis. 390, 393, 14 N.W.2d 177 (1944) (recognizing that under Wisconsin law the limitations of actions is a right as well as a remedy, extinguishing the right on one side and creating a right on the other, which is as of high dignity as regards judicial remedies as any other right).

[(fn4)] See Albright v. Albright, 70 Wis. 528, 36 N.W. 254 (1888) (holding that notice of the widow's election to take the provision made for her by law instead of that made by her husband's will must be filed within one year after the death of the husband; and such time is not extended by a stay of proceedings during the pendency of an appeal from an order refusing to admit the will to probate); Wescott v. Upham, 127 Wis. 590, 107 N.W. 2 (1906) (concluding that statute providing for action against sureties on a bond providing that if the person entitled to bring an action shall be under any legal disability to sue, the want of legal capacity to sue refers to some characteristic of the person disqualifying him in some degree from acting freely for the protection of his rights, not to an impediment to the maintenance of the particular cause of action).

[(fn5)] See Brehm v. City of New York, 104 N.Y. 186, 10 N.E. 158 (1887); Amex Asphalt Co. v. New York, 263 A.D. 968, 33 N.Y.S.2d 182 (N.Y.A.D. 2 Dept., 1942), aff'd, 288 N.Y. 721, 43 N.E.2d 97; D & D Chemist Shops v. New York, 181 Misc. 686, 47 N.Y.S.2d 163 (N.Y.Sup., 1944), rev'd on other grounds, 269 A.D. 741, 55 N.Y.S.2d 114 (1945); Woodcrest Constr. Co. v. New York, 185 Misc. 18, 57 N.Y.S.2d 498 (N.Y.Sup., 1945), aff'd, 273 A.D. 752, 75 N.Y.S.2d 299 (N.Y.A.D. 1 Dept., 1947); Unadilla v. Felder, 145 Ga. 440, 89 S.E. 423 (1916); Rome v. Rigdon, 192 Ga. 742, 16 S.E.2d 902 (1941), aff'd, 192 Ga. 742, 16 S.E.2d 902 (1941); Atlanta v. Truitt, 55 Ga.App. 365, 190 S.E. 369 (1937).

[(fn6)] See also De Jose v. Town of Hempstead, 25 Misc.2d 780, 208 N.Y.S.2d 6 (N.Y.Sup., 1960) (finding that where commencement of action against municipality is stayed by statute for period during which a prescribed procedure is to be carried out, the period of limitations within which action may be brought is extended for full period of statutory stay); Berman v. City of Syracuse, 14 Misc.2d 893, 179 N.Y.S.2d 142 (N.Y.Sup., 1958) (holding that when a statute provides a mandatory waiting period for the commencement of an action against a municipality, the extent of the waiting period must be added to the statutory limitation of one year to obtain the time within which such action may be brought); Sullivan v. City of Watervliet, 285 A.D. 179, 136 N.Y.S.2d 411 (N.Y.A.D. 3 Dept., 1954) (noting that charter provision providing that action against city for personal injuries must be begun within one year of alleged injury, but staying commencement of any action until three months after presentation of claim to council, three months' stay of action should be added to the limitation of one year to obtain time within which action may be brought, thus giving one year and three month limitation on tort claims against city); Feinson v. City of Long Beach, 137 N.Y.S.2d 98 (N.Y.Sup., 1954) (same); Mulligan v. Westchester County, 272 A.D. 929, 71 N.Y.S.2d 153 (N.Y.A.D. 2 Dept., 1947) (concluding that under law providing that no action for damages shall be commenced against a county until expiration of three months after service of notice of claim, three month period was not part of time limited for the commencement of the action, since commencement was stayed by statutory prohibition).

[(fn7)] N.Y. GML Law § 50-i (McKinney 1996) provides as follows:

[(fn1)] No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained ... unless, (a) a notice of claim shall have been made and served upon the ... in compliance with section fifty-e of this chapter, ... (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.

[(fn2)] This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter.

[(fn3)] Nothing contained herein or in section fifty-h of this chapter shall operate to extend the period limited by subdivision one of this section for the commencement of an action or special proceeding. (Emphasis added).

[(fn8)] Prior to the adoption of GML 50-i, the period of limitations for tort actions against municipalities was 1 year, but this was subject to inconsistent tolls caused by diverse waiting periods. The legislature sought to achieve uniformity by eliminating any tolls for waiting periods and compensating for this by lengthening the statute of limitations to 1 year and 90 days. See Note of Commission on Legislative Purpose, Laws of 1959, ch. 788 appendix; see also Joiner v. City of New York, 26 A.D.2d 840, 274 N.Y.S.2d 362 (N.Y.A.D. 2 Dept., 1966).

[(fn9)] See Armes v. Kenosha County, 81 Wis.2d 309, 319-20, 260 N.W.2d 515 (1977) (observing that statutory limitations on actions are designed to ensure prompt litigation of valid claims and to protect a defendant from fraudulent or stale claims brought after memories have faded or evidence has been lost).

[(fn10)] See also Yotvat v. Roth, 95 Wis.2d 357, 290 N.W.2d 524 (Ct.App.1980), which construed then Wis.Stat. § 895.45(1), the Claims Against State Employees Statute, holding:

Section 895.45(1), Stats., provides that no action may be "brought" against a state officer, employee or agent unless the prescribed notice is given.... Armes v. Kenosha County is controlling.... Armes applied Maynard v. De Vries, 224 Wis. 224, 228, 272 N.W. 27 (1937), which held that compliance with sec. 59.76, Stats.1971, "is under the statutes of this state a condition precedent to the existence of a cause of action."

Id. at 360-61, 290 N.W.2d 524 (citations omitted).

[(fn11)] We similarly overrule that portion of Schwetz, 126 Wis.2d at 37 n. 4, 374 N.W.2d 241, which is in conflict with the remainder of our holding in the present case.

[(fn12)] As one commentator has noted:

Prospective limitation ... allows the courts freedom to make needed changes unrestrained by concerns about the effect of those changes on past events. While the cornerstone of the technique is the protection of justified reliance, its use also promotes the stability, certainty and finality of judicial decisionmaking. Further, it is argued, in insulating precedent from changes in personnel on the state or federal high courts, prospectivity enhances public confidence in the fairness and objectivity of the judiciary.

See Moody, Retroactive Application of Law-Changing Decisions in Michigan, 28 WAYNE L.REV. 439, 443 (1982) (footnotes omitted).

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55 Cal.Rptr.2d 327; Doyle v. Fenster; 47 Cal.App.4th 170

Felicia DOYLE, Plaintiff and Appellant, v. Isadore FENSTER et al., Defendants and Respondents.

No. B092269.

Court of Appeal, Second District, Division 2, California.

July 31, 1996.

[47 Cal.App.4th 1702] Houle & Sedin and Richard Houle, Bakersfield, for Plaintiff and Appellant.

Rotenberg & Rotenberg, Robert N. Pafundi and Frederick R. Rotenberg, Pasadena, for Defendants and Respondents.

[47 Cal.App.4th 1703] NOTT, Associate Justice.

Code of Civil Procedure section 340.1 1 requires the filing of certificates of merit for actions alleging childhood sexual abuse where the plaintiff is 26 years old or more. The statute does not specify when the certificates must be filed.

In this case, following a sustained demurrer, appellant Felicia Doyle's action for sexual abuse she allegedly suffered as a child was dismissed for failure to file certificates of merit within the statutory limitations period. She contends that it was error to grant the demurrer because the complaint itself was filed within the limitations period. We conclude that the statute requires the filing of the certificates of merit before the running of the statute of limitations, and we therefore affirm the judgment of dismissal.

BACKGROUND

Section 340.1, subdivision (a) provides that an action for damages suffered as a result of childhood sexual abuse must be brought "within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual

abuse, whichever period expires later." (See Debbie Reynolds Prof. Rehearsal Studios v. Superior Court (1994) 25 Cal.App.4th 222, 230, 30 Cal.Rptr.2d 514 [filing deadline extended to plaintiff's 26th birthday or to within three years of date on which plaintiff knows or should know the injury resulted from the abuse].)

Appellant's complaint was filed on March 15, 1994, when she was 28 years old. It alleges that she discovered in June 1991 that she had psychological injury resulting from sexual abuse that occurred from 1971 to 1974, when appellant was between the ages of 5 and 8. It is not disputed that appellant's complaint was filed within the statutory limitations period.

There are additional filing requirements under section 340.1 where, as here, the plaintiff is 26 years old or more. (§ 340.1, subd. (d).) Pursuant to subdivision (e)(1), a certificate of merit must be executed by the plaintiff's attorney, stating that he or she reviewed the facts; consulted with at least one licensed

mental health practitioner, who is not a party to the action; and, [47 Cal.App.4th 1704] based on the review and consultation, concluded that the action has reasonable and meritorious cause. A mental health practitioner must also file a certificate of merit, stating, among other things, that the practitioner has interviewed the plaintiff and knows the relevant facts and issues; and that in the practitioner's opinion, there is a reasonable basis to believe that the plaintiff had been abused as a child. (§ 340.1, subd. (e)(2).) 2 Subdivision (e)(3) states that if the attorney is unable to obtain the consultation of a mental health practitioner in time to comply with the statute of limitations, the attorney should file a certificate so stating, and further stating that the certificates required by paragraphs (1) and (2) could not be obtained before the running of the statute. In such case, the certificates required under paragraphs (1) and (2) must be filed within 60 days after the filing of the complaint. 3

Moreover, a complaint filed pursuant to subdivision (d) may not name the defendant until the certificates of merit are reviewed and the trial court has found that there is reasonable and meritorious cause for the filing of the action. (§ 340.1, former sub. (g).) 4

[47 Cal.App.4th 1705] In this case, the certificates of merit were not filed with the complaint, nor were they filed before June 1994, when the three-year statutory period ended in this case. The certificates by counsel for appellant and by her therapist were filed on August 24, 1994, after new counsel had substituted into the case. The certificates were made part of appellant's application to name respondents, which was granted.

After the complaint was served on respondents, they filed a demurrer pursuant to section 340.1, subdivision (i), which states: "The failure to file certificates in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435." Respondents argued that the certificates of merit are required to be filed prior to or at the filing of the complaint, unless the attorney files a certificate under section 340.1, subdivision (e)(3), explaining why the certificates could not be obtained before the running of the statute of limitations. The trial court agreed and sustained the demurrer.

DISCUSSION

Section 340.1 Requires the Filing of the Certificates of Merit Within the Statutory Period

In determining the meaning of a statute, we must ascertain the intent of the Legislature to effectuate the purpose of the law. In determining such intent, a court looks first to the words of the statute, giving the language its usual, ordinary import. The words must be construed in context, keeping in mind the statutory purpose, and statutory sections relating to the same subject must be harmonized, both internally and with each other to the extent possible. (Central Pathology Service Medical Clinic, Inc. v. Superior Court (1992) 3 Cal.4th 181, 186-187, 10 Cal.Rptr.2d 208, 832 P.2d 924; Lambert Steel Co. v. Heller Financial, Inc. (1993) 16 Cal.App.4th 1034, 1040, 20 Cal.Rptr.2d 453.) Construction of a statute making some words surplusage is to be avoided. (Lambert Steel Co. v. Heller Financial, Inc.,supra, [47 Cal.App.4th 1706] at p. 1040, 20 Cal.Rptr.2d 453.) Moreover, where the language of a statutory provision is susceptible of two constructions, courts should apply the one which will render it reasonable, fair and harmonious with its manifest purpose. (Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal.3d 408, 425, 261 Cal.Rptr. 384, 777 P.2d 157.)

On appeal, appellant contends that the trial court erred in granting the demurrer because the defect in filing the certificates was not jurisdictional. While no subdivision of section 340.1 states when the

certificates must be filed, subdivision (e)(3) refers to the statute of limitations in the context of the filing of the certificates. Under (e)(3), if the plaintiff's attorney is unable to consult with a mental health practitioner and obtain the practitioner's certificate of merit before the running of the statute of limitations, the attorney must file a certificate explaining that, and the attorney is then given 60 days after the filing of the complaint to file certificates of merit required by (e)(1) and (e)(2).

Reading section 340.1 to permit the filing of certificates of merit after the running of the statute of limitations would make subdivision (e)(3) surplusage. There would be no reason for (e)(3), which advises the attorney to file the complaint to preserve the statute of limitations and a certificate explaining why the certificates of merit are not being filed, and requires that the certificates of merit be filed within 60 days. Subdivision (e)(3) has meaning only if the Legislature intended that the certificates of merit under subdivisions (e)(1) and (e)(2) be filed within the statute of limitations. If we were to accept appellant's argument that the certificates of merit can be filed at any time as long as the complaint is timely filed, attorneys who file subdivision (e)(3) certificates would have to file the certificates of merit within 60 days, but those who filed only the complaint could go beyond the 60 days, as did counsel herein. That reading of the statute would benefit those

who did not comply with (e)(3), while those who complied would be disadvantaged, a result that the Legislature could not have intended.

To support her position, appellant cites to subdivision (h), which states: "A violation of this section may constitute unprofessional conduct and may be the grounds for discipline against the attorney." She contends that the Legislature did not include dismissal among the repercussions of failing to timely file the certificate.

Appellant's argument fails to consider subdivision (i), which, unlike subdivision (h), explicitly refers to the filing of the certificates [47 Cal.App.4th 1707] and permits the defendant to bring a demurrer (§ 430.10) or a motion to strike (§ 435) on the ground that the plaintiff failed to file certificates in accordance with this section. A statute of limitations defense may be raised by demurrer (see Saliter v. Pierce Bros. Mortuaries (1978) 81 Cal.App.3d 292, 300, 146 Cal.Rptr. 271) or by motion to strike (see PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1683, 40 Cal.Rptr.2d 169), both of which test the legal sufficiency of the complaint. (Schmidt v. Foundation Health (1995) 35 Cal.App.4th 1702, 1706, 42 Cal.Rptr.2d 172, review den.; PH II, Inc. v. Superior Court, supra, at p. 1683, 40 Cal.Rptr.2d 169.) The fact that the Legislature designated the demurrer and motion to strike as means to challenge plaintiff's failure to file certificates as required by section 340.1 indicates that the Legislature views the certificates as an aspect of the complaint, and further supports our interpretation of the statute.

Appellant argues that dismissal of the action for late filing of the certificates of merit is impermissible because it is not explicitly provided for by section 340.1. Appellant contends that the Legislature has provided for dismissals "in plain language" in other statutes, citing former section 411.30, which allowed dismissal of a medical malpractice action filed without a certificate of merit.

A provision of a statute repealed in 1989 is not a persuasive tool for interpreting section 340.1, which was substantially rewritten in 1990. (See Historical and Statutory Notes, 13A West's Ann.Code Civ.Proc., § 340.1 (1996 pocket supp.) pp. 63-64.) In any event, even though dismissal is not mentioned in section 340.1, dismissal is impliedly permitted by defendant's remedy for the failure to file or the improper filing of the certificates, i.e., bringing a demurrer or a motion to strike. (See Guinn v. Dotson (1994) 23 Cal.App.4th 262, 271, 28 Cal.Rptr.2d 409 [Affirming a dismissal following a sustained demurrer permitted by § 411.35, which requires a certificate of merit in malpractice actions against

architects, engineers or surveyors and permits the defendant to bring demurrer or motion to strike for "failure to file a certificate in accordance with this section." (§ 411.35, subd. (g).)].)

We hold that section 340.1, subdivisions (e)(1) and (e)(2) certificates of merit, required by subdivision (d), must be filed within the statute of limitations as found in subdivision (b). The trial court properly sustained respondents' demurrer without leave to amend and dismissed the action.

[47 Cal.App.4th 1708]

DISPOSITION

The judgment is affirmed.

BOREN, P.J., and ZEBROWSKI, J., concur.

Footnotes:

1 All further statutory references are to the Code of Civil Procedure.

2 Subsequent to the filing of the complaint in this case, section 340.1, subdivision (e)(2) was amended to require the mental health practitioner to declare that he or she "is not treating and has not treated the plaintiff."

3 The language of the statute referred to above is as follows:

"(e) Certificates of merit shall be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff declaring, respectively, as follows, setting forth the facts which support the declaration:

"(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one mental health practitioner who is licensed to practice and practices in this state and who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action, and that the attorney has concluded on the basis of that review and consultation that there is reasonable and meritorious cause for the filing of the action. The person consulted may not be a party to the litigation.

"(2) That the mental health practitioner consulted is licensed to practice and practices in this state and is not a party to the action, has interviewed the plaintiff and is knowledgeable of the relevant facts and issues involved in the particular action, and has concluded, on the basis of his or her knowledge of the facts and issues, that in his or her professional opinion there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse.

"3. That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificates required by paragraphs (1) and (2) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificates required by paragraphs (1) and (2) shall be filed within 60 days after filing the complaint." (§ 340.1, former subd. (e).) The only portion of subdivision (e) that was amended in 1994 is paragraph (2), as noted in footnote 2.

4 Before it was amended in 1994, subdivision (g) stated: "A complaint filed pursuant to subdivision (d) may not name the defendant or defendants until the court has reviewed the certificates of merit filed pursuant to subdivision (e) and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action. At that time, the complaint may be amended to name the defendant or defendants. The duty to give notice to the defendant or defendants shall not attach until that time."

The amended subdivision provides: "A complaint subject to subdivision (d) may not be served upon the defendant or defendants until the court has reviewed the certificates of merit filed pursuant to subdivision (e) and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action. At that time, the complaint may be served upon the defendant or defendants. The duty to serve the defendant or defendants with process shall not attach until that time."

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607 N.W.2d 711
461 Mich. 547, 607 N.W.2d 711
(Cite as: 461 Mich. 547, 607 N.W.2d 711)

▷
Scarsella v. Pollak
Mich.,2000.

Supreme Court of Michigan.
Richard SCARSELLA, Plaintiff-Appellant,
v.
Norman L. POLLAK, M.D., Defendant-Appellee.
Docket No. 114630.

March 28, 2000.

Plaintiff in medical malpractice action appealed from order of the Oakland Circuit Court, Alice L. Gilbert, J., which granted summary judgment for physician based on plaintiff's failure to file required affidavit within applicable statute of limitations. The Court of Appeals affirmed, 232 Mich.App. 61, 591 N.W.2d 257. Plaintiff appealed, and the Supreme Court adopted the opinion of the Court of Appeals in its entirety, and held that filing of complaint, in which plaintiff wholly omitted required affidavit, did not commence lawsuit for limitations purposes, or operate to toll statute of limitations.

Affirmed.

Michael F. Cavanagh and Marilyn J. Kelly, JJ., filed a joint statement.

West Headnotes

[1] Limitation of Actions 241 ⇐118(2)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k118 In General
241k118(2) k. Filing Pleadings. Most Cited Cases
Mere tendering of medical malpractice complaint without the required affidavit of merit is insufficient to commence the lawsuit for limitations purposes. M.C.L.A. §§ 600.2912d(1), 600.5805(4).

[2] Limitation of Actions 241 ⇐118(2)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k118 In General
241k118(2) k. Filing Pleadings. Most Cited Cases
Filing of medical malpractice complaint without required affidavit of merit did not commence lawsuit or toll limitations period, where plaintiff did not move for 28-day extension in which to file the required affidavit. M.C.L.A. §§ 600.2912d(1, 2), 600.5805(4).

[3] Limitation of Actions 241 ⇐130(5)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k130 New Action After Dismissal or Nonsuit or Failure of Former Action
241k130(5) k. Dismissal or Nonsuit in General. Most Cited Cases

Pretrial Procedure 307A ⇐693.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak693 Operation and Effect
307Ak693.1 k. In General. Most Cited Cases
A plaintiff who files a medical malpractice complaint without the affidavit required by statute is subject to a dismissal without prejudice, and can refile properly at a later date; however, plaintiff still

must comply with the applicable period of limitation. M.C.L.A. §§ 600.2912d(1), 600.5805(4).

[4] Limitation of Actions 241 ⇐119(3)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k119 Issuance and Service of Process
241k119(3) k. Service of Process. Most Cited Cases
In general, a statute of limitations requires only that a complaint be filed within the limitations period, and the summons can be served within 91 days thereafter, unless a second summons, which is valid for a definite period not exceeding one year, is issued within the first 91-day period. MCR 2.102(A, D).

[5] Limitation of Actions 241 ⇐118(2)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k118 In General
241k118(2) k. Filing Pleadings. Most Cited Cases
Where medical malpractice plaintiff wholly omits to file the affidavit required by statute, filing of the complaint is ineffective, and does not toll applicable limitations period. M.C.L.A. §§ 600.2912d(1, 2), 600.5805(4).

****712 *548** Dib & Fagan, P.C. (by Albert J. Dib), Detroit, and Bendure & Thomas (by Victor S. Valenti), Detroit, of counsel, for plaintiff-appellant.
Schwartz & Jalkanen (by Karl E. Hannum), Southfield, for defendant-appellee.
PER CURIAM.

[1][2] In this case, the Court of Appeals has crafted a clear, concise opinion that correctly resolves an important issue. 232 Mich.App. 61, 591 N.W.2d 257 (1998). We adopt this opinion in its entirety, and reprint it below. At its conclusion, we will add two additional points of clarification.

* * *

This is a medical malpractice action. Plaintiff appeals as of right from an order granting summary disposition in favor of defendant Dr. Norman Pollak (defendant) premised on plaintiff's failure to file an affidavit of merit with his complaint before the period of limitation had expired. We affirm.

MCL 600.2912d(1); MSA 27A.2912(4)(1), as amended by 1993 PA 78, the 1993 tort reform legislation, provides that the plaintiff in a medical malpractice action "shall file with the complaint an affidavit of merit...." The substance of the affidavit, in essence, is a qualified health professional's opinion that the plaintiff has a valid malpractice claim. MCL 600.2912d(2); MSA 27A.2912(4)(2) provides a measure of relief when an affidavit of merit cannot be filed with the plaintiff's complaint. That section allows, on motion for ***549** good cause shown, an additional twenty-eight days in which to file the required affidavit.

In this case, plaintiff filed his medical malpractice complaint against defendant and others on September 22, 1995, approximately two to three weeks before plaintiff's claim would be barred by the applicable two-year limitation period. MCL 600.5805(4); MSA 27A.5805(4). Plaintiff did not file an affidavit of merit with the complaint, however, and he did ****713** not move for a twenty-eight-day extension in which to file an affidavit.

On March 12, 1996, defendant filed a motion seeking summary disposition for failure to comply with M.C.L. § 600.2912d(1); MSA 27A.2912(4)(1). On April 22, 1996-two days before the trial court heard defendant's motion-plaintiff filed an affidavit of merit. The trial court, however, ruled that plaintiff's failure to file an affidavit of merit with his complaint rendered the complaint null and void.

The court then reasoned that because the filing was a nullity, it did not toll the period of limitation and therefore plaintiff's claim was time-barred months before the affidavit of merit was finally furnished. The case was dismissed with prejudice.

We find no error in the trial court's analysis. Generally, a civil action is commenced and the period of limitation is tolled when a complaint is filed. See MCR 2.101(B) and M.C.L. § 600.5856; MSA 27A.5856. However, medical malpractice plaintiffs must file more than a complaint; they "shall file with the complaint an affidavit of merit...." MCL 600.2912d(1); MSA 27A.2912(4)(1). See also MCR 2.112(L). Use of the word "shall" indicates that an affidavit accompanying the complaint is mandatory and imperative. *Oakland Co. v. Michigan,* 456 Mich. 144, 154, 566 N.W.2d 616 (1997). We therefore conclude that, for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit. Compare *Hadley v. Ramah,* 134 Mich.App. 380, 384-385, 351 N.W.2d 305 (1984); *Stephenson v. Union Guardian Trust Co.,* 289 Mich. 237, 241-242, 286 N.W. 226 (1939).

***550** Because plaintiff's complaint without an affidavit of merit was insufficient to commence his action, the period of limitation expired in October 1995. Accordingly, the trial court correctly concluded that plaintiff's claim, as completed in April 1996, was time-barred.[FN1] Furthermore, because the complaint without an affidavit was insufficient to commence plaintiff's malpractice action, it did not toll the period of limitation. See *Solowy v. Oakwood Hosp. Corp.,* 454 Mich. 214, 229, 561 N.W.2d 843 (1997), suggesting that, in order to toll the period of limitation, a medical malpractice plaintiff filing a complaint without an affidavit of merit must move for the twenty-eight-day extension provided for under M.C.L. § 600.2912d(2); MSA 27A.2912(4)(2).

> FN1. We recognize that in *VandenBerg v. VandenBerg,* 231 Mich.App. 497, 586 N.W.2d 570 (1998), [the Court of Appeals] held that dismissal is not an appropriate remedy when a medical malpractice plaintiff fails to file an affidavit of merit. However, *VandenBerg* did not involve a statute of limitations problem and hence is factually and legally distinguishable from this case.

Plaintiff contends that he should have been allowed to amend his September 22, 1996, complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, see MCR 2.118(D), making timely the newly completed complaint. We reject this argument for the reason that it effectively repeals the statutory 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 M.C.L. § 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 M.C.L. § 600.2912d(2); MSA 27A.2912(4)(2), allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint.

* * *

551** As indicated, we wish to add two additional points. One concerns *Gregory v. Heritage Hosp.,* decided sub nom. ****714Dorris v. Detroit Osteopathic Hosp. Corp.,* 460 Mich. 26, 47-48, 594 N.W.2d 455 (1999). In that case, we wrote:

As to the appropriate sanction for failure to file an affidavit of merit, we find in the present case that dismissal without prejudice is also appropriate. In *VandenBerg v. VandenBerg,* 231 Mich.App. 497, 502, 586 N.W.2d 570 (1998), the Court of Appeals found that the purpose of the statute was to prevent frivolous medical malpractice claims. In that case,

plaintiff did not file an affidavit of merit at the time of filing the complaint; however, the defendants did receive an affidavit of merit at the same time they were served with the summons and the complaint. The Court of Appeals found that defendants did not suffer any prejudice because "they had access to the affidavit of merit from the moment they received the complaint." Id. at 503, 586 N.W.2d 570. In the present case, plaintiff's complaint was unaccompanied by an affidavit of merit at the time of filing and service upon the defendant, and at no time has plaintiff ever supplemented her complaint with an affidavit of merit. Under these circumstances, we hold that dismissal without prejudice would be the appropriate sanction for plaintiff's failure to comply with § 2912d.

[3] That is all true. However, the difference between *Dorris /Gregory* and the present case is that today's plaintiff has a statute of limitations problem.[FN2] As we explained in *Dorris,* a plaintiff who files a medical-malpractice complaint without the required affidavit ***552** is subject to a dismissal without prejudice, and can refile properly at a later date. However, such a plaintiff still must comply with the applicable period of limitation.

> FN2. In *Dorris/Gregory,* we were presented with no issue regarding the statute of limitations. Ms. Gregory's failure to file the affidavit of merit stemmed from the fact that her attorney did not believe the complaint to be one for medical malpractice. Instead, the complaint alleged assault and battery, and was framed as an ordinary negligence claim. Part of this Court's opinion was devoted to resolving the nature of the case. 460 Mich. at 43-47, 594 N.W.2d 455.

[4][5] That brings us to our second point of clarification. MCL 600.5856(a); MSA 27A.5856(a) provides that a period of limitation is tolled "[a]t the time the complaint is filed and a copy of the summons and complaint are served on the defendant." [FN3] In the present case, the plaintiff did file and serve a complaint within the limitation period. The issue thus arises whether that filing and service tolled the limitation period, so that it still had not expired when the affidavit was filed the following spring.[FN4]

> FN3. In general, of course, a statute of limitations requires only that a complaint be filed within the limitation period. *Buscaino v. Rhodes,* 385 Mich. 474, 481, 189 N.W.2d 202 (1971), partially overruled on other grounds, *McDougall v. Schanz,* 461 Mich. 15, 597 N.W.2d 148 (1999). The summons can be served within ninety-one days thereafter, unless a second summons (valid for a definite period not exceeding one year) is issued within the first ninety-one day period. MCR 2.102(A), (D).

> FN4. A tolling issue under M.C.L. § 600.5856(a); MSA 27A.5856(a) could not have arisen in *VandenBerg,* because the affidavit of merit was served at the same time as the complaint. 231 Mich.App. at 498, 503, 586 N.W.2d 570.

As explained by the Court of Appeals in the opinion we are adopting today, such an interpretation would undo the Legislature's clear statement that an affidavit of merit "shall" be filed with the complaint. MCL 600.2912d(1); MSA 27A.2912(4)(1). And the Court of Appeals also correctly noted *Solowy v. Oakwood Hosp. Corp., supra* at 228-229, 561 N.W.2d 843, where we counseled persons who cannot provide the required affidavit to obtain an extension under M.C.L. § 600.2912d(2); MSA 27A.2912(4)(2).[FN5]

> FN5. 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). [MCL 600.2912d(2); MSA 27A.2912(4)(2).]

**715 *553 Today, we address only the situation in which a medical malpractice plaintiff wholly omits to file the affidavit required by M.C.L. § 600.2912d(1); MSA 27A.2912(4)(1).[FN6] In such an instance, the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation. This holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective.[FN7]

FN6. The statutory requirement is also reflected in the court rules.

Medical Malpractice Actions. In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in M.C.L. § 600.2912d, 600.2912e; MSA 27A.2912(4), 27A.2912(5). Notice of filing the affidavit must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court. [MCR 2.112(L), effective April 1, 1998, 456 Mich. ccxx (1998).]

FN7. We do not decide today *how* well the affidavit must be framed. Whether a timely filed affidavit that is grossly nonconforming to the statute tolls the statute is a question we save for later decisional development. Neither do we decide the proper handling of a case like *Gregory(Dorris*) in which there is a bona fide dispute regarding the nature of the case.

For the reasons stated by the Court of Appeals, as clarified in this opinion, [FN8] we affirm the judgments of the circuit court and the Court of Appeals. MCR 7.302(F)(1).

FN8. The plaintiff also raised a second issue, but it does not warrant discussion.

WEAVER, C.J., and TAYLOR, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

*554 MICHAEL F. CAVANAGH and MARILYN J. KELLY, JJ.

We would grant or deny leave to appeal, but would not dispose of this case by opinion per curiam.

Mich.,2000.
Scarsella v. Pollak
461 Mich. 547, 607 N.W.2d 711

END OF DOCUMENT

CIV. PROC. § 340.1

Statutes

CODE OF CIVIL PROCEDURE

PART 2. OF CIVIL ACTIONS

CIV. PROC. § 340.1

CIV. PROC. § 340.1

TITLE 2. OF THE TIME OF COMMENCING CIVIL ACTIONS

CHAPTER 3. THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY

(a) In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, for any of the following actions:

(1) An action against any person for committing an act of childhood sexual abuse.

(2) An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.

(3) An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.

(b) (1) No action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff's 26th birthday.

(2) This subdivision does not apply if the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard.

(c) Notwithstanding any other provision of law, any claim for damages described in paragraph (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b) that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003. Nothing in this subdivision shall be construed to alter the applicable statute of limitations period of an action that is not time barred as of January 1, 2003.

(d) Subdivision (c) does not apply to either of the following:

(1) Any claim that has been litigated to finality on the merits in any court of competent jurisdiction

prior to January 1, 2003. Termination of a prior action on the basis of the statute of limitations does not constitute a claim that has been litigated to finality on the merits.

(2) Any written, compromised settlement agreement which has been entered into between a plaintiff and a defendant where the plaintiff was represented by an attorney who was admitted to practice law in this state at the time of the settlement, and the plaintiff signed the agreement.

(e) "Childhood sexual abuse" as used in this section includes any act committed against the plaintiff that occurred when the plaintiff was under the age of 18 years and that would have been proscribed by Section 266j of the Penal Code; Section 285 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 286 of the Penal Code; subdivision (a) or (b) of Section 288 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 288a of the Penal Code; subdivision (h), (i), or (j) of Section 289 of the Penal Code; Section 647.6 of the Penal Code; or any prior laws of this state of similar effect at the time the act was committed. Nothing in this subdivision limits the availability of causes of action permitted under subdivision (a), including causes of action against persons or entities other than the alleged perpetrator of the abuse.

(f) Nothing in this section shall be construed to alter the otherwise applicable burden of proof, as defined in Section 115 of the Evidence Code, that a plaintiff has in a civil action subject to this section.

(g) Every plaintiff 26 years of age or older at the time the action is filed shall file certificates of merit as specified in subdivision (h).

(h) Certificates of merit shall be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff declaring, respectively, as follows, setting forth the facts which support the declaration:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one mental health practitioner who is licensed to practice and practices in this state and who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action, and that the attorney has concluded on the basis of that review and consultation that there is reasonable and meritorious cause for the filing of the action. The person consulted may not be a party to the litigation.

(2) That the mental health practitioner consulted is licensed to practice and practices in this state and is not a party to the action, that the practitioner is not treating and has not treated the plaintiff, and that the practitioner has interviewed the plaintiff and is knowledgeable of the relevant facts and issues involved in the particular action, and has concluded, on the basis of his or her knowledge of the facts and issues, that in his or her professional opinion there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificates required by paragraphs (1) and (2) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificates required by paragraphs (1) and (2) shall be filed within 60 days after filing the complaint.

(i) Where certificates are required pursuant to subdivision (g), the attorney for the plaintiff shall execute a separate certificate of merit for each defendant named in the complaint.

(j) In any action subject to subdivision (g), no defendant may be served, and the duty to serve a defendant with process does not attach, until the court has reviewed the certificates of merit filed pursuant to subdivision (h) with respect to that defendant, and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action against that defendant. At that time, the duty to serve that defendant with process shall attach.

(k) A violation of this section may constitute unprofessional conduct and may be the grounds for discipline against the attorney.

(l) The failure to file certificates in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(m) In any action subject to subdivision (g), no defendant may be named except by "Doe" designation in any pleadings or papers filed in the action until there has been a showing of corroborative fact as to the charging allegations against that defendant.

(n) At any time after the action is filed, the plaintiff may apply to the court for permission to amend the complaint to substitute the name of the defendant or defendants for the fictitious designation, as follows:

(1) The application shall be accompanied by a certificate of corroborative fact executed by the attorney for the plaintiff. The certificate shall declare that the attorney has discovered one or more facts corroborative of one or more of the charging allegations against a defendant or defendants, and shall set forth in clear and concise terms the nature and substance of the corroborative fact. If the corroborative fact is evidenced by the statement of a witness or the contents of a document, the certificate shall declare that the attorney has personal knowledge of the statement of the witness or of the contents of the document, and the identity and location of the witness or document shall be included in the certificate. For purposes of this section, a fact is corroborative of an allegation if it confirms or supports the allegation. The opinion of any mental health practitioner concerning the plaintiff shall not constitute a corroborative fact for purposes of this section.

(2) Where the application to name a defendant is made prior to that defendant's appearance in the action, neither the application nor the certificate of corroborative fact by the attorney shall be served on the defendant or defendants, nor on any other party or their counsel of record.

(3) Where the application to name a defendant is made after that defendant's appearance in the action, the application shall be served on all parties and proof of service provided to the court, but the certificate of corroborative fact by the attorney shall not be served on any party or their counsel of record.

(o) The court shall review the application and the certificate of corroborative fact in camera and, based solely on the certificate and any reasonable inferences to be drawn from the certificate, shall, if one or more facts corroborative of one or more of the charging allegations against a defendant has been shown, order that the complaint may be amended to substitute the name of the defendant or defendants.

(p) The court shall keep under seal and confidential from the public and all parties to the litigation, other than the plaintiff, any and all certificates of corroborative fact filed pursuant to subdivision (n).

(q) Upon the favorable conclusion of the litigation with respect to any defendant for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this

section, the court may, upon the motion of a party or upon the court' s own motion, verify compliance with this section by requiring the attorney for the plaintiff who was required by subdivision (h) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (h) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in camera and in the absence of the moving party. If the court finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney' s fees, incurred by the defendant for whom a certificate of merit should have been filed.

(r) The amendments to this section enacted at the 1990 portion of the 1989-90 Regular Session shall apply to any action commenced on or after January 1, 1991, including any action otherwise barred by the period of limitations in effect prior to January 1, 1991, thereby reviving those causes of action which had lapsed or technically expired under the law existing prior to January 1, 1991.

(s) The Legislature declares that it is the intent of the Legislature, in enacting the amendments to this section enacted at the 1994 portion of the 1993-94 Regular Session, that the express language of revival added to this section by those amendments shall apply to any action commenced on or after January 1, 1991.

(t) Nothing in the amendments to this section enacted at the 1998 portion of the 1997-98 Regular Session is intended to create a new theory of liability.

(u) The amendments to subdivision (a) of this section, enacted at the 1998 portion of the 1997-98 Regular Session, shall apply to any action commenced on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date, including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999. Nothing in this subdivision is intended to revive actions or causes of action as to which there has been a final adjudication prior to January 1, 1999.

801.02

Statutes and Session Law

CHAPTER 801 CIVIL PROCEDURE -- COMMENCEMENT OF ACTION AND VENUE

NO SUBCHAPTER DESIGNATED

801.02 Commencement of action.

801.02 Commencement of action.

(1) Except as provided in s. 20.931 (5) (b), a civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.

(2) A civil action in which only an in rem or quasi in rem judgment is sought is commenced as to any defendant when a summons and a complaint are filed with the court, provided service of an authenticated copy of the summons and of either the complaint or a notice of object of action under s. 801.12 is made upon the defendant under this chapter within 90 days after filing.

(3) The original summons and complaint shall be filed together. The authenticated copies shall be served together except:

(a) In actions in which a personal judgment is sought, if the summons is served by publication, only the summons need be published, but a copy of the complaint shall be mailed with a copy of the summons as required by s. 801.11, and;

(b) In actions in which only an in rem or quasi in rem judgment is sought, the summons may be accompanied by a notice of object of action pursuant to s. 801.12 in lieu of a copy of the complaint and, when the summons is served by publication, only the summons need be published, but a copy of the complaint or notice of object of action shall be mailed with the copy of the summons as required by s. 801.12.

(4) No service shall be made under sub. (3) until the action has been commenced in accordance with sub. (1) or (2).

(5) An action seeking a remedy available by certiorari, quo warranto, habeas corpus, mandamus or prohibition may be commenced under sub. (1), by service of an appropriate original writ on the defendant named in the writ if a copy of the writ is filed forthwith, or by filing a complaint demanding and specifying the remedy, if service of an authenticated copy of the complaint and of an order signed by the judge of the court in which the complaint is filed is made upon the defendant under this chapter within the time period specified in the order. The order may specify a time period shorter than that allowed by s. 802.06 for filing an answer or other responsive pleading.

(6) Fees payable upon commencement of a civil action shall be paid to the clerk at the time of filing.

(7) (a) In this subsection:

1. "Correctional institution" means any state or local facility that incarcerates or detains any adult accused of, charged with, convicted of, or sentenced for any crime. A correctional institution includes a Type 1 prison, as defined in s. 301.01 (5), a Type 2 prison, as defined in s. 301.01 (6), a county jail and a

house of correction.

2. "Prisoner" means any person who is incarcerated, imprisoned or otherwise detained in a correctional institution or who is arrested or otherwise detained by a law enforcement officer. "Prisoner" does not include any of the following:

a. A person committed under ch. 980.

b. A person bringing an action seeking relief from a judgment terminating parental rights.

c. A person bringing an action seeking relief from a judgment of conviction or a sentence of a court, including an action for an extraordinary writ or a supervisory writ seeking relief from a judgment of conviction or a sentence of a court or an action under s. 809.30, 809.40, 973.19, 974.06 or 974.07.

d. A person bringing an action under s. 809.50 seeking relief from an order or judgment not appealable as of right that was entered in a proceeding under ch. 980 or in a case specified under s. 809.30 or 809.40.

e. A person who is not serving a sentence for the conviction of a crime but who is detained, admitted or committed under ch. 51 or 55 or s. 971.14 (2) or (5).

3. "Prison or jail conditions" means any matter related to the conditions of confinement or to the effects of actions by government officers, employees or agents on the lives of prisoners.

(b) No prisoner may commence a civil action or special proceeding, including a petition for a common law writ of certiorari, with respect to the prison or jail conditions in the facility in which he or she is or has been incarcerated, imprisoned or detained until the person has exhausted all available administrative remedies that the department of corrections has promulgated by rule or, in the case of prisoners not in the custody of the department of corrections, that the sheriff, superintendent or other keeper of a jail or house of correction has reduced to writing and provided reasonable notice of to the prisoners.

(bm) A prisoner commencing an action or special proceeding shall first comply with the provisions of s. 893.80 or 893.82 unless one of the following applies:

1. The prisoner is filing a petition for a common law writ of certiorari.

2. The prisoner is commencing an action seeking injunctive relief and the court finds that there is a substantial risk to the prisoner's health or safety.

(c) At the time of filing the initial pleading to commence an action or special proceeding, including a petition for a common law writ of certiorari, related to prison or jail conditions, a prisoner shall include, as part of the initial pleading, documentation showing that he or she has exhausted all available administrative remedies. The documentation shall include copies of all of the written materials that he or she provided to the administrative agency as part of the administrative proceeding and all of the written materials the administrative agency provided to him or her related to that administrative proceeding. The documentation shall also include all written materials included as part of any administrative appeal. The court shall deny a prisoner's request to proceed without the prepayment of fees and costs under s. 814.29 (1m) if the prisoner fails to comply with this paragraph or if the prisoner has failed to exhaust all available administrative remedies.

(d) If the prisoner seeks leave to proceed without giving security for costs or without the payment of any service or fee under s. 814.29, the court shall dismiss any action or special proceeding, including a petition for a common law writ of certiorari, commenced by any prisoner if that prisoner has, on 3 or more prior occasions, while he or she was incarcerated, imprisoned, confined or detained in a jail or prison, brought an appeal, writ of error, action or special proceeding, including a petition for a common law writ of certiorari, that was dismissed by a state or federal court for any of the reasons listed in s. 802.05 (4) (b) 1. to 4. The court may permit a prisoner to commence the action or special proceeding, notwithstanding this paragraph, if the court determines that the prisoner is in imminent danger of serious physical injury.

History: Sup. Ct. Order, 67 Wis. 2d 585, 589 (1975); 1975 c. 218; 1981 c. 289, 317; 1995 a. 27; 1997 a. 133, 187; 2001 a. 16; Sup. Ct. Order No. 03-06A, 2005 WI 86, 280 Wis. 2d xiii; 2007 a. 20.

Judicial Council Note, 1981: Sub. (1) is amended to allow an action seeking an extraordinary remedy to be commenced in the same manner as any other civil action.

Sub. (5) allows the additional option of using an order to shorten the time for filing a response to the complaint in lieu of a summons. This option is for the emergency situation when the case may be moot before a response would be filed. The order serves the same purpose as the alternative writ and the order to show cause used to initiate the action under writ procedures. In all other matters of procedure, the rules of civil procedure govern to the extent applicable. Sub. (5) applies only to procedure in the circuit court. In seeking an extraordinary remedy in the supreme court or court of appeals, s. 809.51, stats., should be followed. [Bill 613-A]

FLORIDA RULES OF CIVIL PROCEDURE

2008 Edition

Rules reflect all changes through 32 FLW S726. Subsequent amendments, if any, can be found at www.floridasupremecourt.org/decisions/rules.shtml.

THE FLORIDA BAR

CONTINUING LEGAL EDUCATION PUBLICATIONS

RULE 1.010. SCOPE AND TITLE OF RULES

These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply. The form, content, procedure, and time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. These rules shall be known as the Florida Rules of Civil Procedure and abbreviated as Fla.R.Civ.P.

RULE 1.030. NONVERIFICATION OF PLEADINGS

Except when otherwise specifically provided by these rules or an applicable statute, every written pleading or other paper of a party represented by an attorney need not be verified or accompanied by an affidavit.

Committee Notes

1976 Amendment. Subdivisions (a)–(b) have been amended to require the addition of the filing party's telephone number on all pleadings and papers filed.

RULE 1.040. ONE FORM OF ACTION

There shall be one form of action to be known as "civil action."

RULE 1.050. WHEN ACTION COMMENCED

Every action of a civil nature shall be deemed commenced when the complaint or petition is filed except that ancillary proceedings shall be deemed commenced when the writ is issued or the pleading setting forth the claim of the party initiating the action is filed.

RULE 1.060. TRANSFERS OF ACTIONS

(a) Transfers of Courts. If it should appear at any time that an action is pending in the wrong court of any county, it may be transferred to the proper court within said county by the same method as provided in rule 1.170(j).

(b) Wrong Venue. When any action is filed laying venue in the wrong county, the court may transfer the action in the manner provided in rule 1.170(j) to the proper court in any county where it might have been brought in accordance with the venue statutes. When the venue might have been laid in 2 or more counties, the person bringing the action may select the county to which the action is transferred, but if no such selection is made, the matter shall be determined by the court.

(c) Method. The service charge of the clerk of the court to which an action is transferred under this rule shall be paid by the party who commenced the action within 30 days from the date the order of transfer is entered, subject to taxation as provided by law when the action is determined. If the service charge is not paid within the 30 days, the action shall be dismissed without prejudice by the court that entered the order of transfer.

Court Commentary

1984 Amendment. Because of confusion in some circuits, subdivision (c) is added:

(a) to specify who is to pay the clerk's service charge on transfer;

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mencement only if the pleading is also served on the defendant within a certain time, or with due diligence, after the filing.[2]

◆ **Definition:** The phrase "the statute of limitations is tolled" should be reserved for instances in which the running of the statute is temporarily suspended by a specified condition, and should not be used to describe the filing of a complaint. While a plaintiff's act of filing a complaint fixes the date on which the action was commenced, thus allowing the defendant and the court to determine whether the action was commenced within the period prescribed by the applicable statute of limitations, the statute of limitations may be tolled, i.e., its operation suspended, by various circumstances, events, or acts.[3]

§ 253 Filing a complaint without completing prerequisites

The statute of limitations continues to run until all the prerequisites for filing a case are met.[1] Thus, an attempt to commence an action, when such a commencement is barred by a statute, does not toll a statute of limitations, as when a summons and complaint are filed without the required prior satisfaction of a notice requirement for actions against government subdivisions.[2]

1960); Kocsis v. Harrison, 249 Neb. 274, 543 N.W.2d 164 (1996); Grill v. City of Newark, 311 N.J. Super. 149, 709 A.2d 333 (Law Div. 1997); Meiboom v. Watson, 125 N.M. 462, 1998 -NMCA- 091, 963 P.2d 539 (Ct. App. 1998), cert. granted, 125 N.M. 654, 964 P.2d 818 (1998) and rev'd on other grounds, 2000 -NMSC- 004, 128 N.M. 536, 994 P.2d 1154 (2000), as corrected, (Feb. 15, 2000); Fry v. Village of Tarrytown, 89 N.Y.2d 714, 658 N.Y. S.2d 205, 680 N.E.2d 578 (1997) (distinguished by, Mandala v. Jablonsky, 242 A.D.2d 271, 660 N.Y.S.2d 593 (2d Dep't 1997)) and (distinguished by, Kitch v. Markham, 174 Misc. 2d 611, 665 N.Y.S.2d 1019 (Sup. Ct. 1997)) and on remand to, 176 Misc. 2d 275, 671 N.Y.S.2d 633 (Sup. Ct. 1998) and (distinguished by, Zimmer v. Lake Shore Hosp., 707 N.Y.S.2d 563 (App. Div. 4th Dep't 2000)); Sousa v. Casey, 111 R.I. 623, 306 A.2d 186 (1973); Lord v. Hubbell, Inc., 210 Wis. 2d 150, 563 N.W.2d 913 (Ct. App. 1997), review denied, 215 Wis. 2d 422, 576 N.W.2d 279 (1997) and (distinguished by, Brown v. State, 230 Wis. 2d 355, 602 N.W.2d 79 (Ct. App. 1999)).

Filing either a complaint or a praecipe for writ of summons commences the action. Siler v. Khan, 456 Pa. Super. 177, 689 A.2d 972 (1997).

As to when an action is deemed commenced, generally, see Am. Jur. 2d, Actions §§ 70 et seq.

Annotation References: Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 A.L.R. 2d 236 § 4.

[2]§ 258.

[3]Cuadra v. Millan, 17 Cal. 4th 855, 72 Cal. Rptr. 2d 687, 952 P.2d 704 (1998) (disapproved of on other grounds by, Samuels v. Mix, 22 Cal. 4th 1, 91 Cal. Rptr. 2d 273, 989 P.2d 701 (1999)).

[Section 253]

[1]Broker House Intern., Ltd. v. Bendelow, 952 P.2d 860 (Colo. Ct. App. 1998) (distinguished by, People v. Davenport, 998 P.2d 473 (Colo. Ct. App. 2000)) and (declined to follow by, Dipoma v. McPhie, 2000 UT App 130, 2000 WL 530363 (Utah Ct. App. 2000)).

The plaintiff did not properly commence an action, and did not toll the statute of limitations, because he failed to file a summons when filing the complaint with the county clerk. Burrell v. Countrytowne Apartment Partnership, 247 A.D.2d 805, 669 N.Y.S.2d 430 (3d Dep't 1998).

The mere tendering of a medical malpractice complaint, without the required affidavit of merit, is insufficient to commence the lawsuit. Scarsella v. Pollak, 461 Mich. 547, 607 N.W.2d 711 (2000).

[2]Colby v. Columbia County, 202 Wis. 2d 342, 550 N.W.2d 124 (1996).