

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA WILLIAMS, Personal Representative of
the Estate of VERA BULLOCK, Deceased,

UNPUBLISHED
December 12, 2000

Plaintiff-Appellant,

v

EARLE SPOHN, D.O., JAGNESWAR SAHA,
D.O., and DETROIT OSTEOPATHIC
HOSPITAL,

No. 212792
Wayne Circuit Court
LC No. 97-728552-NM

Defendants-Appellees.

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting defendants' motions for summary disposition on the basis that the statute of limitations had expired at the time plaintiff filed her third complaint in this wrongful death/medical malpractice action. We affirm.

In May 1992, decedent, Vera Bullock, discovered a lump in her right breast. She sought treatment from defendant Jageswar Saha, D.O., who referred her to defendant Earle Spohn, D.O., for a surgical consultation. On advice of Dr. Spohn, Bullock was hospitalized at defendant Detroit Osteopathic Hospital (DOH) for a mammogram and biopsy. Following these procedures, both Drs. Saha and Spohn told Bullock that no malignancy had been found.

Bullock's condition continued to worsen. She apparently saw both Drs. Saha and Spohn several times thereafter, each time being reassured that she did not have cancer. On March 29, 1993, Bullock went to Saratoga Hospital's emergency room. A biopsy performed at Saratoga revealed the presence of cancer. Bullock then underwent a radical mastectomy on her right breast. On March 29, 1994, cancer was discovered in Bullock's left breast. She died the next day. Plaintiff alleges that decedent died of "possible brain and bone metastasis, carcinoma spread to lymph nodes and advanced carcinoma of the right breast."

According to plaintiff, she was issued letters of authority appointing her the personal representative of the decedent's estate on June 24, 1994. Plaintiff filed her first complaint against defendants on August 12, 1994, alleging that the decedent died as a result of a failure to

diagnose the decedent's breast cancer. Plaintiff's claim was brought under the wrongful death statute, MCL 600.2922; MSA 27A.2922. Plaintiff asserts that this complaint was not preceded by a notice of intent to file a claim, and the action was dismissed without prejudice for this reason on November 2, 1994.

On July 10, 1995, plaintiff served a notice of intent on defendants. She filed a second complaint against defendants on April 23, 1996. Her original affidavit of merit was later found defective, so she filed an amended affidavit of merit on July 16, 1996.

On December 4, 1996, the trial court issued an order dismissing defendants Saha and DOH. That order dismissed the claims against these defendants without prejudice, directing plaintiff to refile her complaint with an affidavit of merit complying with MCL 600.2912d; MSA 27A.2912(4). The order also provided: "For purposes of refiling, the Complaint previously filed herein shall satisfy the required statutory notice." Plaintiff's counsel submitted an affidavit representing that the parties agreed to this provision, intending that the notice period would begin to run with the entry of the order dismissing DOH and Saha. On March 12, 1997, the trial court entered an order dismissing plaintiff's second complaint against Spohn.

Plaintiff filed this complaint on September 9, 1997. Defendants moved for summary disposition, arguing that the complaint was barred by the applicable limitations period. The trial court agreed and entered orders dismissing the defendants.

Plaintiff argues that the trial court erred in granting defendants' motions for summary disposition. She asserts that the trial court erred in interpreting the December 4, 1996 stipulated order as indicating an intent that the notice period would be considered to have commenced on April 23, 1996, the date on which the second complaint was filed. We affirm the trial court's decision, albeit for reasons different than those advanced by plaintiff. See *Hall v McRea Corp*, 238 Mich App 361, 369; 605 NW2d 354 (1999).

A decision on a motion for summary disposition is reviewed de novo. *Singerman v Municipal Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). Reviewing a motion for summary disposition under MCR 2.116(C)(7) on the basis that a claim is barred because the limitations period had expired when the plaintiff filed the claim "requires us to accept all well-pleaded allegations as true and to construe them most favorably to the plaintiff. . . . [T]he court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties." *Simmons v Apex Drug Stores*, 201 Mich App 250, 252; 506 NW2d 562 (1993)(citations omitted). "A motion for summary disposition pursuant to MCR 2.116(C)(7) should not be granted unless no factual development could provide a basis for recovery. *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 449; 487 NW2d 799 (1992).

The question raised in this case requires us to interpret several related statutes. The primary goal in the interpretation of a statute is to ascertain and give effect to the Legislature's intent. *Adrian Sch Dist v Michigan Pub Sch Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). "The first step in discerning intent is to consider the language of the statute in question." *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 611; 566 NW2d 571 (1997). The language is to be read according to its ordinary and generally accepted meaning.

Id. If the language of the statute is clear and unambiguous, judicial construction is not permitted. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

Where an action is brought under the wrongful death statute, “the limitation period is governed by the provision applicable to the liability theory of the underlying wrongful act.” *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 349; 533 NW2d 365 (1995). Where the theory of liability is medical malpractice, the wrongful death action must be commenced within two years of the act or omission that forms the basis of the claim, or within six months after the plaintiff discovers or reasonably should have discovered that she had a claim, whichever is later. MCL 600.5805(4); MSA 27A.5805(4), MCL 600.5838a(2); MSA 27A.5838(1)(2); *Turner, supra* at 349. In a wrongful death action involving medical malpractice, the following savings clause applies:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run. [MCL 600.5852; MSA 27A.5852.]

Plaintiff received her letters of authority on June 24, 1994. Therefore the two-year limitations period was due to expire on June 24, 1996.

On August 12, 1994, plaintiff filed her first complaint, but failed to file the required notice of intent. MCL 600.2912b(1); MSA 27A.2912(2)(1). The parties stipulated to the dismissal of plaintiff’s complaint on November 21, 1994. Because plaintiff failed to file a notice of intent, the limitations period was not tolled. See *Rheaume v Vandenberg*, 232 Mich App 417, 423-424; 591 NW2d 331 (1998).

Plaintiff filed her notice of intent on July 10, 1995. The notice period extended 182 days or until January 8, 1996. During this time, plaintiff could not commence an action against defendants. MCL 600.2912b(1); MSA 27A.2912(2)(1). Moreover, because the limitations period would not have expired during the 182-day notice period, the limitations period was not tolled during the notice period. MCL 600.5856(d); MSA 27A.5856(d); *Omelenchuk v City of Warren*, 461 Mich 567, 574; 609 NW2d 177 (2000).

On April 23, 1996, when plaintiff filed her second complaint and affidavit of merit,¹ there remained fifty-eight days of the limitations period. This action was dismissed as to DOH and

¹ Plaintiff indicates that the affidavit of merit was insufficient and that she filed an amended affidavit of merit on July 16, 1996. In *Scarsella v Pollack*, 461 Mich 547, 548; 607 NW2d 711 (2000), our Supreme Court adopted this Court’s opinion in *Scarsella v Pollack*, 232 Mich App 61; 591 NW2d 257 (1998), in which this Court determined that the limitations period is not tolled where a medical malpractice complaint is filed without an affidavit of merit. *Id.* at 64. However, the Supreme Court limited that decision to cases where no affidavit of merit was filed with the complaint. It specifically declined to address a situation, such as that here, where an

(continued...)

Saha on December 4, 1996. Plaintiff claims that the new notice period began to run with the entry of this order. Were we to agree with plaintiff on this, the notice period would have ended on June 26, 1997. Because the limitations period would have expired within the notice period, however, plaintiff would have had only fifty-eight days after the notice period ended within which to file her complaint. Thus, the limitations period would have expired on August 25, 1997, and plaintiff's September 9, 1997 complaint was therefore untimely. Therefore, the trial court's decision granting defendants summary disposition was proper.

With regard to defendant Earle Spohn, the second complaint was dismissed as to him on March 12, 1997. That order simply dismissed the claim, making no mention of the statutory notice period. When the second action was dismissed, plaintiff had fifty-eight days within which to refile her complaint against Spohn. She failed to do this, instead waiting until September 9, 1997, more than fifty-eight days after the March 12, 1997 dismissal of the second action. Thus, the trial court also properly dismissed the third action against Spohn.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald

(continued...)

affidavit of merit filed with a complaint is later found inadequate. However, because we find that the complaint was untimely, regardless of whether the affidavit of merit was adequate, we need not address the question whether a limitations period is tolled when the affidavit of merit filed with a complaint is inadequate.