

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DARREN FINDLING, personal representative of  
estate of FRANK E. EARLY, deceased,

UNPUBLISHED  
September 16, 2010

Plaintiff-Appellee,

v

No. 291567  
Oakland Circuit Court  
LC No. 08-096920-NH

JEFFREY PARKER, M.D.,

Defendant-Appellant.

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Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right the denial of his motion for summary disposition. We reverse and remand.

Plaintiff's decedent, Frank Early, died of heart disease during a scuba dive on August 31, 2002. Defendant, a physician, examined Early in 2000, before he began scuba diving, and found that he was physically fit enough to scuba dive. Plaintiff alleged that as late as August 20, 2002, defendant was aware of Early's physical condition and should have advised him not to scuba dive, but failed to. Based on these allegations, plaintiff filed three medical malpractice suits against defendant, of which this is the third.

**The first lawsuit**

Shortly after Early's death, his sister, Charlene Early Powell, was appointed personal representative of his estate. On July 27, 2004, Powell filed a notice of intent (NOI) to bring a claim of medical malpractice against defendant, pursuant to MCL 600.2912b. Powell never filed suit. On February 21, 2005, plaintiff was appointed successor representative of Early's estate. On February 28, 2005, plaintiff filed the first lawsuit against defendant on behalf of Early's estate, bringing one count of medical malpractice and one count of assault and battery. Plaintiff failed, however, to attach an affidavit of merit to the complaint, as required by MCL 600.2912d. Defendant moved for dismissal based on the lack of an affidavit of merit, and also argued that the statute of limitations had run. The trial court agreed with defendant on both arguments, and dismissed the complaint with prejudice.

Plaintiff appealed, and this Court affirmed the dismissal, but reversed the finding that the statute of limitations had run, and ordered that the dismissal be without prejudice. *Findling v*

*Parker*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2006 (Docket No. 267519), at 1. Plaintiff sought leave to appeal to our Supreme Court, which held the application in abeyance pending the resolution of *Braverman v Garden City Hospital*, 480 Mich 1159; 746 NW2d 612 (2008). *Findling v Parker*, order of the Supreme Court, entered May 27, 2008 (Docket No. 132417). After the Supreme Court decided *Braverman*, it denied defendant's application for leave to appeal. *Id.* On June 10, 2008, the trial court amended the original order so that the first action was dismissed without prejudice.

### **The second lawsuit**

On February 2, 2007 (while the application for leave to appeal was before the Supreme Court), almost four and a half years after Early's death, and just less than 2 years after plaintiff's appointment as personal representative, plaintiff filed a second complaint. The second complaint was substantially identical to the first complaint. On June 10, 2008, the same day the circuit court amended the order dismissing the first action, the parties entered into a stipulation to dismiss the second complaint, without prejudice and without costs.

### **The third lawsuit**

On December 22, 2008, more than 6 years after Early's death, and almost four years after plaintiff's appointment as Early's personal representative, plaintiff filed the instant action. The third complaint raised substantially the same allegations as the first two, but brought only one count of medical malpractice, and no claim of assault and battery. Defendant moved to dismiss on the grounds that the complaint was time-barred. The trial court denied the motion, and held that "the lawsuit was/is timely in light of the periods of time appeals were pending in the related lawsuits." Defendant sought and was granted leave to appeal to this Court.

### **The time limit was not tolled during the pendency of the appeal of the first suit.**

Defendant argues that this suit is barred because of the period of limitations found in the wrongful death savings provision, MCL 600.5852. Plaintiff argues that that period should have been equitably tolled during the pendency of the first suit's appeal.

In general, a claim for medical malpractice must be brought within two years of the accrual of the claim. MCL 600.5805(6). A medical malpractice claim must be preceded by the filing of a valid notice of intent (NOI). MCL 600.2912b. With certain exceptions, the NOI must precede the filing of the complaint by at least 182 days, *id.*, and the filing of the NOI tolls the statute of limitations by 182 days, MCL 600.5856. When, as is alleged here, a person dies before the period of limitations has run, the personal representative may commence an action within two years of the issuance of letters of authority, but must bring the action within three years after the original two-year limitation has run. MCL 600.5852.

The question defendant asks us to answer on appeal is whether this three-year limitation on actions allowed by § 5852 is tolled during the pendency of appeals. If, as defendant argues, the three-year limitation is never tolled under any circumstances, and operates as an absolute bar to any actions, then the instant complaint is not timely, and the trial court erred in failing to dismiss it. If, as plaintiff argues, the three-year limitation may be tolled under some

circumstances, then we must determine under what circumstances, and whether this claim is timely.

If the original complaint had been filed within the two-year statute of limitations, that limitation period would have been tolled during the pendency of the action. MCL 600.5856. Because the original complaint was not filed during the two-year period, it was timely only under the wrongful death savings provision. Our Supreme Court has held that the savings provision is not a statute of limitations or repose, and is not tolled by § 5856. *Waltz v Wyse*, 469 Mich 642, 650-651; 677 NW2d 813 (2004). If the savings period was tolled, then, it was tolled by some other means.

Plaintiff first argues that it is a “general rule of law” that periods of limitation are tolled during the pendency of appellate proceedings. There is authority that tolling may, under some circumstances, *extend* during the pendency of appellate proceedings. See *Yeo v State Farm Fire & Casualty Ins Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000). But in this case, the limitations period had not been tolled before the appeal was commenced, and could not be “extended” during the pendency of appeals. More to the point, under *Waltz*, the wrongful death savings period is not a statute of limitations, so even if statutes of limitations are tolled during the pendency of appeals, the savings period, not being a statute of limitations, is unaffected.

Plaintiff next argues that equity should toll the time limit in this case. Defendant argues that our Supreme Court has deprecated the use of equity for judicial tolling, and that it is not appropriate in this case. In *Devillers v Auto Club Ins Ass’n*, 473 Mich 562; 702 NW2d 539 (2005), our Supreme Court overruled *Lewis v Detroit Auto Inter-Ins Exchange*, 426 Mich 93; 393 NW2d 167 (1986), and severely limited the doctrine of judicial tolling. 473 Mich at 581-586. The *Devillers* Court addressed the tolling of the “one-year-back rule,” which provides that a claimant of insurance benefits “may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.” MCL 500.3145(1). Under *Lewis*, the one-year period was tolled between the time a claimant submitted a claim to the insurer and the time the insurer denied the claim. 426 Mich at 101. The *Devillers* Court held that *Lewis* was wrongly decided, and that the one-year-back rule must be enforced as written, with no room for equity to interfere. 473 Mich at 586.

Plaintiff is correct in pointing out that *Devillers* did not foreclose the possibility of equity in all cases. The Court noted that equitable relief may be appropriate in some circumstances, and reaffirmed its holding in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432-433; 684 NW2d 864 (2004), in which it approved the use of equity to allow the plaintiff’s claim to proceed. *Devillers*, 473 Mich at 590-591 n 65. The Court drew two important distinctions between *Devillers* and *Bryant*, however. First, the Court pointed out that there were unusual circumstances present in *Bryant* that compelled the use of equity that were absent in *Devillers*. *Id.* at 590 n 65. Second, the Court held that the presence of a statute plainly controlling the issue removed the Court’s equitable authority. *Id.* at 591 n 65. The Court contrasted this with *Bryant*, in which “there was no controlling statute *negating the application of equity.*” *Id.* (emphasis added).

Here, there are clearly unusual circumstances that went beyond plaintiff’s control that call out for equity. The trial court’s erroneous dismissal of the first action with prejudice

resulted in an appeals process of nearly three years. Following *Devillers*, however, a statute clearly controls: § 5852 provides that “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. While *Devillers* did not eliminate the equitable power of Michigan courts, it did overrule the use of equity to supersede a limitation plainly expressed by the Legislature in a statute. For these reasons, we hold that judicial tolling may not be employed to allow plaintiff’s claim.

**Defendant may be estopped from interposing a timeliness defense.**

Finally, plaintiff argues that equitable estoppel should operate to estop defendant from using the statute of limitations as a defense. Plaintiff alleges that, while the first case was still pending before the Supreme Court, the parties and the court met in status conference to discuss the progress of the case. Plaintiff alleges that both parties and the trial court agreed that the filing deadlines were tolled during the pendency of the appeal, and that plaintiff would be able to refile this case. Plaintiff claims that he only stipulated to the dismissal of the second action because of these representations on the part of defendant and the trial court.

The record before us does not reflect whether plaintiff’s allegations are true. The trial court, in the hearing on the motion to dismiss, made no findings of fact to support or rebut these assertions. The right of the defendant to interpose an affirmative defense based on the running of a period of limitation “may be waived by failure to plead it, *by express agreement not to assert it, or by conduct which estops the defendant from interposing it.*” *Lothian v City of Detroit*, 414 Mich 160, 167; 324 NW2d 9 (1982) (emphasis added). If plaintiff’s allegations are true, defendant induced plaintiff to stipulate to the dismissal of the second action by representing that he would not assert a timeliness defense when plaintiff refiled the action. Because plaintiff may be entitled to estop defendant from asserting that the action is time-barred based on defendant’s conduct, and because we lack sufficient information on the record to decide the issue, we remand to the trial court to determine whether the conduct by the defendant in this case estops him from asserting this defense.

**Conclusion**

In sum, the trial court erred in holding that judicial tolling operated to extend the limitation period. If defendant invokes the period of limitations, it will bar plaintiff’s claim as untimely. Plaintiff has raised serious allegations, however, regarding conduct by the defendant that may estop him from interposing this defense. Because we do not have sufficient information on the record before us to evaluate the merit of these allegations, we remand to the trial court to determine whether defendant is estopped from raising a timeliness defense.

Reversed and remanded for proceedings consistent with this opinion. No costs, neither party having prevailed entirely. We do not retain jurisdiction.

/s/ Donald S. Owens  
/s/ William C. Whitbeck  
/s/ Karen M. Fort Hood