

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY KING, Personal Representative of the
ESTATE OF ANDREW BAKER,

UNPUBLISHED
July 12, 2005

Plaintiff-Appellee,

v

Nos. 259136 and 259229
Livingston Circuit Court
LC No. 04-020535-NH

MICHEAL BRIGGS, D.O., MERLE HUNTER,
M.D., EMERGENCY PHYSICIANS MEDICAL
GROUP, P.C., and MCPHERSON HOSPITAL,
a/k/a TRINITY HEALTH-MICHIGAN,

Defendants-Appellants.

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion for summary disposition. The motion had been brought on the ground that the statute of limitations in this medical malpractice action had expired. We reverse.

The first issue on appeal is whether the saving provision in MCL 600.5852, giving the personal representative two years from the issuances of letters of authority to file a malpractice claim, is tolled during the 182-day mandatory notice period required by MCL 600.2912b(1) before suit can be filed in a medical malpractice action.

Recently, the Michigan Supreme Court stated that MCL 600.5852 is a

saving provision designed “to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.” *Lindsey [v Harper Hosp]*, 455 Mich 56, 60-61, 65; 564 NW2d 861 (1997)]. It is not a “statute of limitations” or a “statute of repose.” Thus, the notice tolling provision, [MCL 600.] 5856(d)^[1] – which explicitly applies only to “the statute of limitations or repose” – does not operate to toll the additional period permitted

^[1] The applicable notice provision was renumbered by 2004 PA 87 to MCL 600.5856(c).

under [MCL 600.]5852 for filing wrongful death actions. [*Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004).]

Hence, MCL 600.5852 is a saving statute that is not tolled during the 182-day notice period. In the present case, the statute of limitations began running on September 6, 2001, the date of the alleged malpractice. Letters of authority were issued on September 26, 2001. Notice of intent was sent on September 5, 2003, tolling the period of limitations with one day remaining. The period of limitations recommenced running after March 5, 2004. One day was added for the tolled period of limitations; because March 6, 2004 was a Saturday, the limitation period expired on March 8, 2004. MCR 1.108(1). The two-year saving provision pursuant to MCL 600.5852 expired on September 26, 2003, and could not be tolled. Therefore, the complaint filed on March 11, 2004, was not timely.

The second issue on appeal is whether a successor personal representative of the estate would have an additional two years from the date of his letters of authority to file suit under MCL 600.5852, which would result in a timely filed complaint. Under the circumstances of this case, the successor personal representative was not entitled to an additional two years.

Recently, in *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), our Supreme Court examined a similar issue. In *Eggleston*, a temporary personal representative was appointed, but he died a short time after. *Id.* at 31. A successor personal representative was appointed, and he filed a malpractice claim. *Id.* The claim was brought within two years of the successor's appointment, but not within two years of the appointment of the temporary representative. *Id.* Our Supreme Court stated,

The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative. [*Id.* at 33.]

However, the present case is distinguishable. Notably in *Eggleston*, the temporary personal representative never filed suit, while the predecessor personal representative in the instant case did. Thus, our Supreme Court did not have the occasion to address the issue facing this Court, which essentially is whether a personal representative who fails to diligently pursue a malpractice cause of action on behalf of an estate within the allotted time may nonetheless save the action from dismissal by substituting another personal representative. MCL 700.3613 states that a successor personal representative "must be substituted in all actions and proceedings in which the former personal representative was a party." The successor representative here must be substituted in the action already commenced and does not have an additional two years under MCL 600.5852 to pursue the malpractice claim.

The trial court improperly denied defendants' motion for summary disposition because the claim was not timely filed.

Reversed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff