

STATE OF MICHIGAN
COURT OF APPEALS

ROSIA MITCHELL-CRENSHAW, Successor
Personal Representative of the Estate of FLOYD
L. MITCHELL, Deceased,

UNPUBLISHED
February 7, 2006

Plaintiff-Appellant,

v

LONNIE JOE, JR., M.D., BERNARD KOLE,
M.D., and PROVIDENCE HOSPITAL &
MEDICAL CENTER,

No. 263057
Oakland Circuit Court
LC No. 2004-060421-NH

Defendants-Appellees.

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition in favor of defendants on statute of limitations grounds in this wrongful death action alleging medical malpractice, civil rights violations under the Mental Health Code, battery, false imprisonment and intentional infliction of emotional distress. We affirm in part and reverse in part.

The pertinent facts are set forth in the circuit court's opinion and order:

This action arises from decedent's treatment at Defendant Hospital's Psychiatric Unit from December 6, 2000 through January 1, 2001. During his hospitalization, Defendant doctors treated decedent. Decedent died on February 14, 2001. On March 19, 2001, the Wayne County Probate Court issued Letters of Authority appointing Rosa Mitchell as Special Personal Representative Intestate of the Estate. On March 19, 2003, a Notice of Intent was sent to Defendants. On July 3, 2003, the Wayne County Probate Court issued a Memorandum of Administrative Closing, terminating the authority of the personal representative. On February 9, 2004, a Petition to Re-open the Estate was filed and Letters of Authority appointing Rosia Mitchell-Crenshaw as Successor Personal Representative was issued. On February 13, 2004, a second Notice of Intent was sent to Defendants.

Plaintiff Estate brought the instant action on August 13, 2004. The Complaint alleges medical malpractice, battery, false imprisonment and intentional infliction of emotional distress. Plaintiff Estate asserts that decedent's death was the result

of the malpractice and negligence he experienced during his hospitalization. Plaintiff Estate also contends that while hospitalized, decedent was the victim of civil rights violations under the Michigan Mental Health Code. Defendants argue that Plaintiff Estate fails to state a claim and that the action was filed after the statute of limitations had expired.

The circuit court concluded that the second notice of intent did not toll the statute of limitations, and dismissed plaintiff's case as time-barred, noting:

MCL 600.2912b precludes a medical malpractice claimant from commencing suit against a health professional or facility unless written notice is provided before the action is commenced. Under Michigan law, the period of limitations for medical malpractice or wrongful death actions is two years from the date of accrual. Pursuant to MCL 600.5852, if a person dies before 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 two years after the Letters of Authority are issued, although the limitations period has run. MCL 600.5856(d) tolls the statute of limitations during the period of the notice of intent for no longer than the number of days equal to the number of days remaining in the applicable notice period after the date the notice is given. In *Waltz v Wyse*, 469 Mich 642 (2004), the Michigan Supreme Court specifically held that the notice of intent will only toll the statute of limitations, not the savings provision in § 5852. Although a Plaintiff can serve more than one notice of intent, only the first will effectuate tolling of the statute of limitations under MCL 600.5856(d). In *Ashby v Byrnes*, 251 Mich App 537 (2002),^[1] the Court of Appeals held that only the initial notice results in the tolling of the limitation period, irrespective of how many additional notices are subsequently filed.

As an initial matter the Court finds that the allegations contained in the Complaint clearly sound in medical malpractice. All of the allegations arise from the professional relationship between decedent and the medical staff. The allegations raise questions involving medical judgment. Therefore, this lawsuit is subject to the procedural and substantive requirements that govern medical malpractice actions. A personal representative was appointed on March 19, 2001. The first notice of intent is dated March 19, 2003. Under § 5856(d), the statute of

¹ We note that during the pendency of this appeal, the Supreme Court overruled in part *Ashby v Byrnes*, 251 Mich App 537; 651 NW2d 922 (2002), in *Mayberry v General Orthopedics, PC*, 474 Mich 1; 704 NW2d 69 (2005). *Mayberry* held that a second notice of intent to sue for medical malpractice tolls the period of limitations if an earlier notice of intent was sent with more than 182 days remaining in the limitations period. 474 Mich 2, 8-10. Neither *Mayberry* nor *Ashby* are pertinent.

In the instant case, contrary to defendants' assertion, plaintiff does not assert on appeal, and did not assert below, that the second notice of intent tolled the limitations period, rather plaintiff relies on the wrongful death saving provision, MCL 600.5852.

limitations was tolled for 180 days or until September 19, 2003. The instant lawsuit was filed on August 13, 2004. The second notice of intent did not further toll the statute of limitations. Therefore, the Court finds that summary disposition is appropriate because the lawsuit is barred by the statute of limitations.

The circuit court denied plaintiff's motion for reconsideration. This appeal ensued.

I

Plaintiff's principal argument is that she relied below on the wrongful death saving provision, MCL 600.5852, not on the notice tolling provision, and that the circuit court confused the two. Plaintiff asserts that the circuit court erred by failing to apply *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003). Under the circumstances presented here, we agree.

Whether a period of limitation applies in particular circumstances is a legal question this Court reviews de novo. *Detroit v 19675 Hasse*, 258 Mich App 438, 444-445; 671 NW2d 150 (2003). The circuit court's grant of summary disposition under MCR 2.116(C)(7) is also reviewed de novo. *Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004).

The period of limitation applicable to a wrongful death action generally constitutes the period applicable to the underlying theory of liability. *Waltz, supra* at 648. Unless an exception applies, a plaintiff must file a medical malpractice action within two years of when the claim first accrued. MCL 600.5805(1) and (6).

Plaintiff relied below on MCL 600.5852, which is known as the 'wrongful death saving provision.' *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 572; 703 NW2d 115 (2005). MCL 600.5852 provides:

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.

"Under this provision, a personal representative may file a medical malpractice suit on behalf of a deceased person for two years after letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired." *Farley, supra* at 572-573.

The circuit court applied a different exception, MCL 600.5856(d), now MCL 600.5856(c), commonly referred to as the "notice tolling provision." The notice tolling provision "involves the effect of filing a notice of intent to sue, which all plaintiffs alleging medical malpractice are required to do under MCL 600.2912b(1) 'not less than 182 days before the action is commenced.'" *Farley, supra* at 571. Under [MCL 600.5856(d)], filing a notice of intent to sue will toll any period of limitations or repose, if such period of limitations or repose

would otherwise bar the claim, for the time set out in the written notice of intent provision (600.2912b[1]), that is, for a period not longer than 182 days.” *Id.* at 572.

In *Eggleston, supra*, relied on by plaintiff, the Court addressed the issue “whether a **successor** personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute, MCL 600.5852, or whether the two-year period is measured from the appointment of the initial personal representative.” The *Eggleston* Court held that the action was timely where the successor personal representative filed the complaint within two years after letters of authority were issued to him and within three years after the period of limitations had run. 468 Mich at 33. The Supreme Court noted that this Court had misread MCL 600.5852 as permitting a personal representative to bring an action within two years after **the** initial letters of authority were issued, when in fact, the statute has no such limiting language and refers simply to “letters of authority.”

We conclude that the circuit court erred by failing to apply *Eggleston* to the instant case. In the instant case, plaintiff successor personal representative was appointed and issued letters of authority on February 9, 2004. Plaintiff filed the instant complaint on August 13, 2004, which is within two years of the issuance of the second letters of authority, and within three years after the period of limitations had run. MCL 600.5852.

Defendants asserted below that the circuit court could properly decline to apply *Eggleston*, because the facts in the instant case are distinguishable from *Eggleston*. We disagree.

In *Eggleston, supra*, a unanimous Supreme Court decided the case based solely on the statutory language of the wrongful death saving provision. The short decision, which is quoted below almost in its entirety, does not examine the reasons behind the appointment of a successor personal representative, as defendants urge us to do here.

Decedent received kidney dialysis treatment from defendants-appellees on June 21, 1996. She died the next day.

Decedent’s widower was appointed temporary personal representative and issued letters of authority on April 4, 1997. He died on August 20, 1997.

Plaintiff, the son of the decedent and the first personal representative, was appointed successor personal representative, and letters of authority were issued to him on December 8, 1998. Plaintiff filed a complaint alleging medical malpractice on June 9, 1999.

Defendants moved for summary disposition under MCR 2.116(C)(7). Defendants argued that the action is barred by the two-year statute of limitations, MCL 600.5838a(2), which, they claimed, expired on June 21, 1998, two years after decedent’s last treatment. Defendants also argued that the wrongful death saving statute, MCL 600.5852, does not apply because the complaint was not filed within two years after the appointment of the first personal representative on April 4, 1997. Plaintiff responded that another two-year period began when he was appointed as successor personal representative. The circuit court agreed with defendants and granted summary disposition.

On appeals as of right, the Court of Appeals affirmed. The Court characterized plaintiff's argument as one advocating an "expansive reading" of the statute, whereas the law requires that the saving provision be given a "narrow reading," citing this Court's decision in *Lindsey v Harper Hosp*, 455 Mich 56, 65; 564 NW2d 861 (1997). The Court held that that the statute should be construed and applied according to its plain terms.

Furthermore, the plain language of the saving clause refers to one set or "the" letters of authority, not multiple letters of authority. The statute applies to "the" personal representative, not "a" personal representative, which might suggest that any personal representative who receives letters of authority, initially or as a successor, has two years to file a claim. Clearly, if the Legislature had intended that the two-year grace period begin anew each time an appointment is terminated and a new appointment made, it could have easily done so by specifically stating as much. Absent language to that effect, we are bound to construe the saving provision strictly: the two-year limitation period begins when the probate court issues the letters of authority to the personal representative, regardless of whether the court later appoints one or more successor personal representatives. [248 Mich App 649.]

Plaintiff has applied for leave to appeal.

II

We review de novo the interpretation and application of a statute as a question of law. If the language of a statute is clear, no further analysis is necessary or allowed. *Miller v Mercy Mem Hosp*, 466 Mich 196, 201; 644 NW2d 730 (2002).

III

The question presented is of first impression. Although the Court of Appeals purported to construe and apply the plain language of MCL 600.5852, the Court misquoted the statute by inserting "the" before "letters of authority."

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 [the] 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. [*Id.*]

The Court [of Appeals] relied on this misquotation in holding that a personal representative must bring an action within two years after the initial letters of

authority are issued to the first personal representative. This is not, however, what the statute says. The statute simply provides that an action may be commenced by the personal representative “at any time within 2 years after letters of authority are issued although the period of limitations has run.” *Id.* 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.

Plaintiff was “the personal representative” of the estate and filed the complaint “within 2 years after letters of authority [were] issued,” and “within 3 years after the period of limitations ha[d] run.” MCL 600.5852. The action was therefore timely.

Accordingly, we reverse the judgments of the circuit and the Court of Appeals and remand this case to the circuit court for further proceedings. [*Eggleston*, 468 Mich at 30-33.]

Defendant asserts that *Eggleston* is distinguishable because the temporary personal representative died within two years of appointment and the successor was appointed within two years after the first representative was appointed. However, we fail to see the significance of these facts. In *Eggleston*, the successor representative was appointed more than two years after the decedent’s death, and the complaint was filed more than two years after the initial appointment. Defendants’ attempt to distinguish the instant case on the basis that the statute had run by the time the successor representative was appointed ignores that the statute is intended to permit an action even where the representative is appointed after the statute has run. The only constraint is that the action cannot be commenced more than three years after the statute of limitations has run.

Nor does *Ashby*² have application. Plaintiffs do not rely on the tolling provision of MCL 600.5856(d); that is, plaintiff does not assert that her claim is timely based on the notice of intent. Rather, plaintiff asserts that the claim is timely because it was filed within two years of her appointment as successor representative and within three years of the running of the underlying statute. We observe that had no action been taken until plaintiff’s appointment in February of 2004, and no action other than that taken by plaintiff in her capacity as successor personal representative, the claim would be timely under MCL 600.5852. Under *Eggleston*, the claim is still timely even though there was a temporary personal representative appointed in the interim, where the successor personal representative complied with MCL 600.5852 by filing the complaint within two years after letters of authority were issued to her and within three years after the period of limitations had run. 468 Mich at 33. Finally, we reject the argument that MCL 600.5852 does not apply because by the time plaintiff was appointed the statute had run

² *Ashby v Byrnes*, 251 Mich App 537; 651 NW2d 922 (2002), which the circuit court cited in its opinion, quoted *supra*. See n 1, *supra*.

and therefore the cause of action had not “survive[d] by law.” This phrase clearly refers to the action surviving the decedent’s death, and is not addressed to the statute of limitations.

II

Plaintiff also challenges the circuit court’s dismissal of the claims of false imprisonment, battery, intentional infliction of emotional distress, and of civil rights violations under the Mental Health Code (Count IV). The circuit court concluded these claims sounded in medical malpractice. We agree except regarding the allegation that defendants violated MCL 330.1419.

Plaintiff’s complaint asserted that defendants violated the Michigan Mental Health Code MCL 330.1419(2). MCL 330.1419 provides:

Sec. 419 (1) Except as provided in section 420, a formal voluntary patient 18 years of age or over shall not be hospitalized more than 3 days excluding Sundays and holidays, after the patient gives written notice of an intention to terminate his or her hospitalization and leave the hospital.

(2) When the hospital is told of an intention to terminate hospitalization under subsection (1), it shall promptly supply the written form which is required.

In *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 422; 684 NW2d 864 (2004), our Supreme Court stated:

A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only “within the course of a professional relationship.” Second, claims of medical malpractice necessarily “raise questions involving medical judgment.” Claims of ordinary negligence, by contrast, “raise issues that are within the common knowledge and experience of the [fact-finder].” Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern malpractice actions. [citations omitted.]

Under *Bryant, supra*, “[a] professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff.” *Bryant, supra* at 422. Plaintiff’s appellate reply brief acknowledges that all of the allegations raised in this action arise out of the professional relationship between plaintiff’s decedent and defendant doctors and hospital.

The next question is whether the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, or whether "the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts." *Id.* at 423. It is clear that, with the exception of the allegations regarding MCL 330.1419, plaintiff's allegations raise questions of medical management, nutrition, psychiatric management, and the use of psychotropic medication and restraints.

While defendants correctly assert that the question whether decedent was competent to be released involves medical judgment, the question whether decedent was competent to be released is not at issue with respect to the claim under MCL 330.1419. Under the statute, once decedent expressed a desire to be discharged, hospital staff were required to promptly supply him with a written form with which he could request his release. Had decedent submitted the form, the hospital would have been required to release him, or seek a hearing before the court. MCL 330.1420. No medical judgment is involved in the application of the statute.

We affirm the circuit court's determination that all of plaintiff's claims sounded in medical malpractice, with the exception of plaintiff's claim regarding MCL 330.1419, which we conclude does not sound in malpractice. We reverse the circuit court's determination that plaintiff's medical malpractice claims were barred by the statute of limitations. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Kathleen Jansen