

STATE OF MICHIGAN
COURT OF APPEALS

CARIE HENSON, Personal Representative of the
Estate of JAMEE MARIE NEWBURN, Deceased,

UNPUBLISHED
April 25, 2000

Plaintiff-Appellee,

v

LAWRENCE FLAHERTY, M.D., and HARPER
HOSPITAL,

No. 213109
Wayne Circuit Court
LC No. 97-705997 NH

Defendants-Appellants.

Before: Zahra, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff, as personal representative of her deceased mother's estate, brought this wrongful death action on behalf of the decedent. Plaintiff alleged that defendants were negligent in their medical treatment of the decedent. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that the applicable period of limitation had expired. Plaintiff replied that the period of limitation had been tolled since plaintiff filed her initial claim in this matter on March 28, 1996, which claim was subsequently dismissed without prejudice. The trial court denied defendants' motion, agreeing with plaintiff that the period of limitation was tolled when plaintiff previously filed an unsuccessful complaint against defendants. This Court denied defendants' application for leave to appeal, but the Supreme Court subsequently remanded the case for this Court's consideration of defendants' appeal. After reviewing the appeal as on leave granted, we reverse.

Defendants challenge the trial court's denial of summary disposition pursuant to MCR 2.116(C)(7), arguing that the court incorrectly determined that plaintiff's filing of a prior complaint involving the instant claims tolled the period of limitation. We review de novo the trial court's ruling with respect to summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We also review de novo the question of law whether a claim is within the period of limitation. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

Plaintiff's wrongful death action alleges medical malpractice. A medical malpractice claim generally must be filed within two years of the occurrence of the allegedly negligent act or omission, MCL 600.5805(4), 600.5838a(1); MSA 27A.5805(4), 27A.5838(1)(1), unless a statutory exception exists to this period of limitation. MCL 600.5851-5856; MSA 27A.5851-5856; *Poffenbarger v Kaplan*, 224 Mich App 1, 7; 568 NW2d 131 (1997). When a victim of medical malpractice dies within the period of limitation, the decedent's personal representative must commence a wrongful death action based on medical malpractice within two years of the issuance of letters of authority. MCL 600.5852; MSA 27A.5852; *Poffenbarger, supra* at 7-8.

Under certain circumstances, however, including where the plaintiff has filed a previously dismissed action involving the same allegations, the period of limitation may be tolled. The determination whether a prior lawsuit between the parties, which has been dismissed without an adjudication on the merits, serves to toll the period of limitation is governed by the tolling statute, MCL 600.5856; MSA 27A.5856; *Dorsey v Kasyonan*, 193 Mich App 711, 713-714; 484 NW2d 415 (1992). The tolling statute provides, in relevant part, that the "statutes of limitations or repose are tolled . . . [a]t the time the complaint is filed and a copy of the summons and complaint are served on the defendant." MCL 600.5856(a); MSA 27A.5856(a).

In this case, MCL 600.5852; MSA 27A.5852 applies because the decedent died within the two-year period of limitation. *Poffenbarger, supra* at 8. Plaintiff was appointed personal representative of decedent's estate, and letters of authority were issued, on October 3, 1994. Therefore, plaintiff had two years to initiate the instant cause of action, until October 3, 1996. Plaintiff's initial filing of the claim occurred on March 28, 1996, well within the statutory period. Plaintiff did not, however, serve process on defendants until October 16, 1996, beyond the October 3, 1996 expiration of the period of limitation. After plaintiff's first claim was dismissed without prejudice on February 5, 1997, plaintiff filed the instant action on February 26, 1997.

Defendants contend that because they were not served with a copy of the initial summons and complaint until October 16, 1996, the period of limitation was not tolled and plaintiff's claim is barred. We observe that contrary to plaintiff's argument on appeal, when a prior action between the parties has been dismissed without prejudice, the period of limitation is not tolled merely on the filing of the initial complaint. The clear and unambiguous language of MCL 600.5856(a); MSA 27A.5856(a) provides that an applicable period of limitation will not be tolled unless the plaintiff (1) has filed a complaint *and* (2) served on the defendant the summons and complaint. *Dorsey, supra* at 714; *Lausman v Benton Twp*, 169 Mich App 625, 630; 426 NW2d 729 (1988). Plaintiff thus failed to invoke the tolling statute because, while plaintiff filed an initial complaint before the expiration of the two-year statutory period of limitation prescribed by MCL 600.5852; 27A.5852, plaintiff failed to serve defendants until October 16, 1996, after the period of limitation already had expired. See *Lausman, supra* at 629 (Exceptions to periods of limitation generally are strictly construed.), 630 (Under the tolling statute, the date of commencement of the prior action is immaterial.). Because plaintiff failed to invoke the tolling statute, the termination date of the applicable period of limitation remained October 3, 1996, two years after plaintiff's appointment as personal representative of the decedent's estate. MCL 600.5852; MSA

27A.5852. Plaintiff's February 26, 1997 filing of the instant suit outside the period of limitation entitled defendant to summary disposition pursuant to MCR 2.116(C)(7).

We reject plaintiff's argument that the requirements of the tolling statute should not apply to wrongful death actions. Plaintiff cites no authority supporting this proposition, and the otherwise clear language of MCL 600.5856; MSA 27A.5856 adopts no special exception from its tolling requirements that applies to wrongful death actions. We further reject plaintiff's suggestion that the equities in this case justify an exception to the clear language of MCL 600.5856; MSA 27A.5856. We note that plaintiff had the opportunity to preserve her claim in the event of dismissal by accomplishing service of her initial summons and complaint on defendant sometime between March 28, 1996 and October 3, 1996. Plaintiff's own inaction or delay in this respect has precluded invocation of the tolling statute.

Reversed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Hilda R. Gage