

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD MILLER, Personal Representative of
the ESTATE OF MORRISON MILLER,
Deceased,

Plaintiff-Appellant,

v

MERCY MEMORIAL HOSPITAL, MANOO
BOONSIRI, M.D., MANOO BOONSIRI, M.D.,
P.C., and NORMA A. FLORES, M.D.,

Defendants-Appellees,

and

AKBAR ATTARY, M.D.,

Defendant.

UNPUBLISHED
January 30, 2001

No. 217500
Monroe Circuit Court
LC No. 97-007152-NH

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from orders of the trial court granting summary disposition under MCR 2.116(C)(7) in favor of defendants Norma Flores, M.D., and Manoo Boonsiri, M.D. Plaintiff also appeals from a subsequent order of the court granting defendant Mercy Memorial Hospital's motion for summary disposition because plaintiff's theory of liability against the hospital was one of vicarious liability for the acts and omissions of defendants Boonsiri and Flores. We affirm.

Decedent went to see his internist, Dr. Attary, in 1993 because he had a chronic cough and had been spitting up blood (hemoptysis). Dr. Attary referred decedent to Dr. Boonsiri, who performed a bronchoscopy on decedent's right lung on August 23, 1993. The biopsy results from the procedure were interpreted as showing no malignancy. Decedent then underwent a CAT scan on August 27, 1993. Plaintiff alleged that Dr. Flores misinterpreted the CAT scan, failing to identify a suspicious mass in decedent's upper hemithorax.

Plaintiff alleged that decedent's cough and hemoptysis continued after August 1993. Another CAT scan was performed at Mercy Memorial Hospital in December 1995. This scan revealed the presence of a mass in decedent's right lung that was noted to be suspicious for carcinoma. A needle biopsy of the lung was performed in January 1996 at St. Vincent's Hospital, and decedent was diagnosed with lung cancer on January 10, 1996. Decedent died on January 24, 1996. Plaintiff was appointed personal representative and letters of authority were issued on February 22, 1996. Plaintiff filed his wrongful death claim on October 23, 1997.

Whether a cause of action is barred by the statute of limitations is a question that this Court reviews de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997). "[I]n the absence of disputed facts, the question whether a plaintiff's cause of action is barred by the statute of limitations is a question of law to be determined by the trial judge." *Solowy v Oakwood Hospital*, 454 Mich 214, 230, 233; 561 NW2d 843 (1997), quoting *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993). "Statutes of limitation will be construed to advance the policy that they are designed to promote." *Poffenbarger v Kaplan*, 224 Mich App 1, 9; 568 NW2d 131 (1997).

Plaintiff does not dispute that the action was untimely under the general two-year limitation period, MCL 600.5805(4); MSA 27A.5805(4), applicable to malpractice actions. Further, plaintiff does not dispute that the action was not commenced within the six-month discovery period prescribed in MCL 600.5838a(2); MSA 27A.5838(1)(2). Rather, plaintiff argues that his wrongful death action was timely under MCL 600.5852; MSA 27A.5852, which 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.

Plaintiff's argument is based on an interplay between the savings provision of subsection 5852 and the statutory six-month discovery rule in subsection 5838a(2), which reads in pertinent part:

Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. [Footnotes omitted.]

Plaintiff argues that because decedent died within six-months following the discovery of the existence of the claim, the personal representative had two years after the letters of authority were issued to file his wrongful death claim. Plaintiff asserts that this means that he had until February 22, 1998 to file. Because he filed on October 23, 1997, plaintiff asserts his suit was timely.

The problem with this argument is that it runs counter to this Court's decision in *Poffenbarger*. Focusing on the plain language of these same statutes, as well as the public policy goals of statutes of limitation, the *Poffenbarger* Court specifically stated "that the wrongful death savings provision does not incorporate the six-month statutory discovery rule for medical malpractice claims." *Poffenbarger, supra* at 10. Accordingly, the Court observed that under the plain language of the statutory six-month discovery rule, plaintiffs have "three time frames" in which to bring a wrongful death claim. First, plaintiffs can "file[] within the two-year general malpractice period of limitation stated in" subsection 5805(4); second, under subsection 5852, plaintiffs can file "within two years after being appointed personal representative as long as the suit was commenced within three years after the expiration of *the two-year malpractice period of limitation*" set forth in subsection 5805(4); third, plaintiff can file "within the statutory six-month discovery period." *Id.* at 11 (emphasis added).

Plaintiff attempts to get around the dictates of *Poffenbarger* by drawing a distinction between the first and second sentences of subsection 5852. Plaintiff argues that because the *Poffenbarger* Court was dealing with the second sentence, its holding is inapplicable here, where the issue turns on the meaning of the first sentence. In essence, plaintiff is arguing that the *Poffenbarger* Court's identification of "the period of limitations" in the second sentence as being the two-year period found in subsection 5805(4) does not limit the interpretation of what is meant by "the period of limitations" in the first sentence. We disagree.

The *Poffenbarger* Court's decision cannot be read as narrowly as plaintiff suggests. While it is true that the decedent in *Poffenbarger* died before the running of the two-year statute of limitations, this fact is not dispositive. The *Poffenbarger* Court did not reject the argument that the plaintiff had three years from the expiration of the statutory six-month discovery rule in which to file because the plaintiff fell within the ambit of the savings provision by virtue of subsection 5805(4).

Rather, the Court's analysis was based on a straightforward application of the rules of statutory interpretation. In so doing, the *Poffenbarger* Court made clear that it was not limiting its analysis to the second sentence of subsection 5852. The Court stated in unequivocal language that the subsection 5852, not isolated pieces of it, "does not incorporate the six-month statutory discovery rule for medical malpractice claims." *Id.* at 10. In any event, absent any indication to the contrary, we believe it is unreasonable to conclude that the Legislature intended that within the same statutory subsection, the phrase "the period of limitations" should have a different meaning in one sentence than it does in another. To do so would be to interject unnecessary confusion into a coherent, undivided statutory provision. In both instances, "the period of limitations referred to is the two-year period set forth in subsection 5805(4).

Therefore, because it is undisputed that the decedent died more than thirty days after the expiration of the general two-year period of limitation prescribed by subsection 5805(4), the savings provision is not applicable to suspend the running of that statutory limitations period.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy