

STATE OF MICHIGAN
COURT OF APPEALS

GERALD T. LABELLE and WENDY A.
LABELLE,

UNPUBLISHED
February 27, 2001

Plaintiffs-Appellants,

v

WILLIAM BEAUMONT HOSPITAL,

No. 218953
Oakland Circuit Court
LC No. 98-009810-NH

Defendant-Appellant.

Before: Markey, P.J., and McDonald and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order granting summary disposition in favor of defendant hospital pursuant to MCR 2.116(C)(7), based on the court's conclusion that plaintiffs' cause of action for medical malpractice is barred by the applicable statute of limitations, MCL 600.5805(4); MSA 27A.3805(4). We affirm.

On September 23, 1996, defendant treated plaintiff Gerald Labelle for injuries that he received that day. Plaintiffs alleged that defendant committed malpractice in its treatment of Gerald Labelle that resulted in LaBelle suffering phlebothrombosis and phlebitis of the basilic vein of the left arm due to improper placement of IV lines. On November 13, 1997, plaintiffs served upon defendant a notice of intent¹ to file a claim for medical malpractice. Plaintiffs filed their medical malpractice complaint against defendant on October 15, 1998.

On February 4, 1999, defendant moved for summary disposition under MCR 2.116(C)(7), asserting that plaintiffs' cause of action was barred by MCL 600.5805(4); MSA 27A.5805(4), because plaintiffs did not file their claim within two years from the date upon which plaintiff's cause of action accrued.² In response, plaintiffs contended that the statute of limitations was

¹ MCL 600.2912(b); MSA 27A.2912(b).

² Defendant also asserted that plaintiffs had not brought their claim within six months of their discovery of a possible cause of action (pursuant to MCL 600.5838(2); MSA 27A.5838(2)); however, plaintiffs agreed below that they were not alleging a cause of action under the six-month discovery rule, and they agreed that their alleged cause of action accrued on September 23, 1996.

tolled during the 182-day notice of intent period so that once the 182-day notice of intent period expired on May 13, 1998,³ plaintiffs were left with the same number of days [which they asserted to be 314] that were left on their limitations period before the notice of intent period started. Plaintiffs argued that their complaint was timely because it was filed within that remaining 314-day time period.

The trial court held that the tolling provision in MCL 600.5856(d); MSA 27A.5856(d) only applies if a claim would be barred by the statute of limitations during the applicable notice period, which the court determined to be November 13, 1997 to May 13, 1998. The court determined that, because plaintiffs' claim would not be barred by the statute of limitations⁴ until September 23, 1998, the tolling provision did not apply to the instant case because plaintiffs' claim was not barred during the applicable notice period. The court concluded that plaintiffs' claim expired on September 23, 1998, and that the complaint filed on October 15, 1998 was therefore time barred.

Plaintiffs now assert, for the first time, that the tolling provision of MCL 600.5856(d); MSA 27A.5856(d) is unconstitutional because it purportedly burdened their right of access to the courts and violated their rights to due process and equal protection. Generally, a party must challenge the constitutionality of a statute in the trial court to preserve the issue for appellate review, although we may still consider an important constitutional question absent a challenge below. *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993). However, we find it unnecessary to reach plaintiffs' constitutional issue and decline to decide it because, as correctly determined by the trial court, the tolling provision challenged here by plaintiffs is inapplicable where plaintiffs' 182-day notice period ended before the limitation period ended. See *Omelenchuk v City of Warren*, 461 Mich 567, 573-574; 609 NW2d 177 (2000). Our consideration of plaintiffs' constitutional challenge to the tolling provision would be inappropriate. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Lewis v Krogol*, 229 Mich App 483, 490-491; 582 NW2d 524 (1998); *People v Mell*, 227 Mich App 508, 509-510; 576 NW2d 428 (1998), rev'd on other grounds 459 Mich 881 (1998); *Auto Club Ins Ass'n v Farmington Hills*, 220 Mich App 92, 100-101; 559 NW2d 314 (1996).

We agree with the trial court that plaintiffs' cause of action is barred by the two-year statute of limitations for medical malpractice actions, MCL 600.5805(5); MSA 27A.5805(5), and summary disposition in favor of defendants was properly granted.

Affirmed.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ Kirsten Frank Kelly

³ May 13, 1998 is 182 days from the date plaintiffs filed their complaint on November 13, 1997.

⁴ MCL 600.5805(5); MSA 27A.5805(5).