STATE OF MICHIGAN

COURT OF APPEALS

COLLENE E. WALTZ, Personal Representative of the Estate of JERRITH WALTZ, Deceased,

Plaintiff-Appellant,

v

CAROL WYSE, D.O., and HILLS & DALES COMMUNITY GENERAL HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
October 1, 2002

No. 231324
Tuscola Circuit Court
LC No. 99-017990-NH

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this medical malpractice action arising from the death of an infant, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants. We affirm.

Plaintiff first argues, in essence, that the trial court erred in granting summary disposition in favor of defendants on the basis that the statute of limitations barred plaintiff's claims. Specifically, plaintiff claims that her complaint "was timely filed under the wrongful death statute of limitations, MCL 600.5852, and the tolling provisions of MCL 600.5856, as extended by the notice requirement of MCL 600.2912b and *Omelenchuk* [*v Warren*, 461 Mich 567; 609 NW2d 177 (2000)]." We disagree. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Resolution of the present matter involves statutory interpretation, which is a question of law that also is reviewed de novo. *Miller v Mercy Memorial Hosp*, 466 Mich 196, 201; 644 NW2d 730 (2002).

Summary disposition under MCR 2.116(C)(7) is proper when the claim is barred because of a statute of limitations. A motion under this subsection may be supported by affidavits, depositions, admissions, or other documentary evidence, the substance or content of which must be admissible in evidence, and when submitted, that material must be considered. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), citing MCR 2.116(G)(5). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.* With respect to statutory interpretation, we begin by looking to the language of the statute, and if that language is clear, "no further analysis is necessary or allowed to expand what the Legislature clearly intended to cover." *Miller*, *supra*.

In general, the statute of limitations for a wrongful death action is the statute of limitations for the underlying theory of liability, *Eggleston v Bio-Medical Applications of Detroit, Inc*, 248 Mich App 640, 646; 645 NW2d 279 (2001), which is two years for medical malpractice, *id.*, MCL 600.5805(5); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997). However, a wrongful death savings provision applies if the deceased died either before or within thirty days after the period of limitations ended. MCL 600.5852; *McNeil v Quines*, 195 Mich App 199, 202; 489 NW2d 180 (1992). Under the savings provision, the personal representative of an estate may begin a lawsuit within two years after letters of authority are issued, as long as the lawsuit is brought within three years after the two-year general period of limitations ended. MCL 600.5852; *McNeil*, *supra* at 202. This creates a maximum time of five years for filing suit, unless the six-month discovery rule in MCL 600.5838(2) applies.

Here, plaintiff failed to file her complaint within five years after her son's death. However, she argues that the five-year period was tolled for 182 days when her attorney sent both defendants notices of intent before filing suit, as required when a person alleges medical malpractice, MCL 600.2912b(1). See also *Rheaume v Vandenberg*, 232 Mich App 417, 421; 591 NW2d 331 (1998). Generally, the potential plaintiff must wait at least 182 days after giving notice before filing a complaint, MCL 600.2912b(1); however, this period is reduced to 154 days if, as in this case, there was no written response to the notice, MCL 600.2912b(8). See also *Omelenchuk, supra* at 572-573. When the interval when a potential plaintiff is not allowed to commence an action would end after the expiration of the limitations period, then MCL 600.5856(d) applies and the period of limitations is tolled for 182 days, *Omelenchuk*, *supra* at 574-575, if the notice meets the substantive requirements set forth in MCL 600.2912b, *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 59, 67, 70-71; 642 NW2d 663 (2002).

Here, the parties do not dispute that the wrongful death savings statute applied, and thus plaintiff could file suit within five years of the infant's death, which plaintiff did not do. However, plaintiff claims that the notices of intent given to defendants tolled the extended five-year limit set forth in the savings statute, MCL 600.5852. We disagree. We need look no further than the language of the tolling statute to resolve this issue. MCL 600.5856(d) expressly tolls the "statute of limitations."[1] The Supreme Court has said recently that MCL 600.5852 is not a statute of limitations, but rather a savings statute. *Miller, supra.* Therefore, by its express language, MCL 600.5856(d) tolls the statute of limitations, not the extended limit in MCL

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[1] MCL 600.5856 provides in relevant part:

> The statute of limitations or repose are tolled . . .
>
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the *statute of limitations or repose*, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b. [Emphasis supplied.]

600.5852. Consequently, the trial court did not err because the statute of limitations barred plaintiff's claim.[2]

Because the trial court correctly concluded that the statute of limitations barred plaintiff's claim, we need not address plaintiff's other issues on appeal.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[2] To the extent that plaintiff relies on *Omelenchuk, supra* at 577, we find that case distinguishable. In that case, the Supreme Court added the 182-day tolling period to the two-year limitation period that started when the personal representative was appointed, not the five-year maximum at issue here. Plaintiff also cites *Chernoff v Sinai Hospital of Greater Detroit*, unpublished per curiam opinion of the Court of Appeals, entered March 22, 2002 (Docket No. 228014), in which this Court applied notice tolling to the two-year period after appointment of a personal representative. However, we are not bound by an unpublished opinion, MCR 7.215(C)(1), and, further, that decision also did not address the five-year maximum.