STATE OF MICHIGAN

COURT OF APPEALS

DEBRA WALNO, Legal Guardian and Conservator of WANDA JUNE LIP EVANS,

Plaintiff-Appellant,

v

WALID M. AZMEH, M.D., OWOSSO SURGICAL ASSOCIATES, P.C., and MEMORIAL HEALTHCARE CENTER, also known as THE MEMORIAL HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
October 5, 2004

No. 248898
Shiawassee Circuit Court
LC No. 01-007061-CZ

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

I. Overview

In this case arising out of plaintiff's medical malpractice claims against defendants stemming from their treatment of her sister Wanda Evans, plaintiff Debra Walno, as legal guardian for Evans, appeals the order granting defendants summary disposition under MCR 2.116(C)(7). We reverse and remand.

II. Basic Facts And Procedural History

The record reflects that in mid-January 1998, Evans arrived at the emergency department of Memorial Hospital complaining of severe abdominal pain and difficulty breathing. She was admitted to Memorial Hospital that same day and subsequently underwent several exploratory surgeries, including surgeries on January 28, 1998 and February 7, 1998. Based on the numerous conditions discovered, Evans had to undergo several more procedures, including a colostomy. She suffered various infections and was admitted to the ICU with a tracheotomy and required mechanical ventilation. She was hospitalized and underwent additional surgeries over the next year.

On September 5, 2001, Walno filed a complaint alleging that as result of defendants' negligence, Evans underwent multiple otherwise unnecessary surgeries and suffered from numerous severe medical complications, including, among other things, brain damage, depression, anxiety, and mental anguish. Defendants answered the complaint, asserting the

affirmative defense that plaintiff's claims were barred by the applicable statute of limitations. Walno submitted a blanket denial of defendants' affirmative defenses.

In mid-February of 2003, defendant Memorial Health Care Center (MHC) moved for summary disposition under MCR 2.116(C)(7), arguing that Walno's claim was barred under the two-year period of limitation applicable to medical malpractice claims. According to MHC, plaintiff's claim accrued on January 20, 1998, the date of Evans' first admission to Memorial Hospital; thus, the period of limitations ran on January 20, 2000. MCH asserted that Walno did not file her notice of intent until March 8, 2001, and did not file her complaint until September 5, 2001; therefore, MHC argued, Walno's claim was time barred. Defendants Dr. Walid Azmeh and Owosso Surgical Associate, P.C. (OSA) joined in the motion but clarified that Walno's claims accrued on January 28, 1998 and February 7, 1998, the dates of Evans' first two surgeries. They argued that the claim was time barred at the latest on February 7, 2000.

Anticipating Walno's response, defendants noted that although Walno was appointed as Evans' legal guardian on March 15, 2000, the disability grace provision[1] did not apply because Evans was not under a disability at the time of the action. According to defendants, Walno's deposition testimony indicated that Evans was not mentally incompetent until some time after her admission to the hospital. In fact, according to defendants, Walno explicitly stated that Evans was not mentally retarded, crazy, insane, or even dumb, but merely forgetful, and her physical disabilities made certain tasks difficult.

Defendants further argued that Evans' deposition testimony demonstrated that she was not insane at the time her claim accrued. They noted that Evans received compensation from the state as sole caregiver for her thirty-eight-year-old mentally retarded daughter. Further, they argued, Evans' was rational enough to first treat her stomach pain with over-the-counter medications and then later decide to go to the hospital when the pain became too severe. Moreover, according to defendants, Evans was able to recall conversations with Dr. Azmeh and other medical personnel who treated her before and after surgery. Defendants also argued that Evans' testimony confirmed that her disability was primarily physical.

Additionally, although recognizing that Walno's appointment as guardian had no bearing on a finding of insanity in this case, defendants pointed out that the psychiatrist who treated Evans for depression after the surgeries stated that there "were no clear reasons indicating the need for a guardianship," although "it would be beneficial for [Evans] to have help with decisions." Lastly, defendants argued that Evans' informed consent forms demonstrated that she was not insane, but was able to read the forms and understand their significance.

Walno responded to the motion, agreeing that her claims accrued between January 1998 and March 1998. According to Walno, applying the discovery rule, her claims were "reasonably

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[1] MCL 600.5851 "does not toll the running of the statute of limitations, but instead exempts certain claims from the bar of the statute." *Honig v Liddy*, 199 Mich App 1, 4; 500 NW2d 745 (1993). "[P]erhaps a more accurate description of § 5851 is found in the statute itself – a year of grace." *Id*. at 3-4.

discoverable certainly within eighteen months"; therefore, she had until March of 2000 to timely file suit. Walno acknowledged that because her claim was not filed until September 2001, defendants' motion was facially valid. But, she argued, the motion should have been denied because there was a question of fact whether Evans was "insane" at the time the action accrued. Walno also agreed that the appointment of a guardian did not affect the statute of limitations.

In support of her position, Walno explained that before Evans' hospitalization Evans was "having a hard time," enduring a lot of pain, and "just not taking care of business" or "concentrating on what [she] was doing." Walno confirmed that even before the first surgery, Evans' mental state was "bad." According to Walno, although Evans spoke with Dr. Azmeh before the first surgery and knew that she needed "something" because she was "hurting so bad," Evans was unable to comprehend her rights because she was on oxygen and in extreme pain when she was brought in by the ambulance. Walno argued that Evans did not remember anything that happened after the first surgery; therefore, because of this it was "patently obvious that Mrs. Evans' mental state . . . had seriously deteriorated before the January 28th surgery." Walno also argued that the disability provision should apply even if "the derangement may not have existed a microsecond before the act of malpractice," because "it was Dr. Azmeh's acts that pushed Mrs. Evans over the edge."

At the late April 2003 hearing on the motion, the trial court made clear that it was aware that the definition of insanity differed in various legal contexts, but concluded that none of those definitional differences were dispositive in this case. After hearing oral arguments on the motion, the trial court acknowledged that "if there are questions of fact, then far be it for any court to substitute its judgment in terms of that of the trier of fact." Nevertheless, the trial court found that, looking objectively at the totality of the evidence, there was no factual issue on the question of disability, and therefore held that Evans was not under any disability at the time the claim accrued. Accordingly, the trial court granted defendants' motion and dismissed the action as to defendants. Walno now appeals.

III. Evans' Mental Incapacity

A. Standard Of Review

Walno argues that the trial court erred in granting defendants summary disposition because although she conceded that her claim was not brought within the applicable two-year period of limitations, MCL 600.5805(6), there was a question of fact regarding whether Evans was insane at the time her medical malpractice claim accrued. Thus, Walno argues it was improper for the trial court to summarily dismiss the case without allowing a trier of fact to assess the merits of her insanity claim. We review de novo a trial court's ruling on a motion for summary disposition and whether a statute of limitation bars a cause of action.[2]

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[2] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *American Commercial Liability Ins Co v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

B. Legal Standards

MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred by the statute of limitations. Neither party is required to file supportive material; however, any documentation that is provided to the court must be admissible evidence.[3] The plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[4]

C. Tolling By Reason Of Insanity

MCL 600.5805(6) states, "Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice." However, if a person is "insane at the time the claim accrues" he shall have one year after the disability is removed to bring the action even though the period of limitations has run. MCL 600.5851(1). The term insane "means a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane."[5]

Walno concedes that the only acts of medical malpractice occurred between January and March 1998, and a reasonable, competent person should have discovered the malpractice within the period of limitations. Therefore, she was required to bring this action before March 2000, unless the insanity grace period applied. All the parties agree that Walno's appointment as Evans' legal guardian is irrelevant.[6] Thus, the crux of this appeal is whether, based on the evidence presented, the trial court erred in granting summary disposition solely on its determination that Evans was not insane at the time that her medical malpractice claim accrued.

D. Walno's Burden

Once the defendant establishes that the cause of action is prima facie barred, it is the plaintiff's burden to present some facts that raise the question of insanity.[7] If such facts are presented, whether a person is insane for purposes of MCL 600.5851 is generally a question of fact "unless it is incontrovertibly established either that the plaintiff did not suffer from insanity

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[3] *Maiden*, *supra* at 119.

[4] MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

[5] MCL 600.5851(2).

[6] MCL 600.5851(2); *Professional Rehabilitation Assoc v State Farm Mut Automobile Ins Co*, 228 Mich App 167, 176; 577 NW2d 909 (1998).

[7] See *Warren Consolidated Schools v W R Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994).

at the time the claim accrued or that he had recovered from any such disability more than one year before he commenced his action."[8]

Applying both of these standards – the general statute of limitations standard stated in *Warren Consolidated Schools* and the § 5851 standard stated in *Makarow* – ensures protection of all the parties' rights. If a plaintiff merely claims the benefit of the insanity tolling provision, that plaintiff is not automatically entitled to a jury trial on the issue. Holding otherwise would allow a plaintiff to raise the issue with any frivolous evidence and require a jury to entertain the claims even where the facts plaintiff presented do not even remotely suggest insanity. But applying the *Warren Consolidated Schools* standard alone would improperly require a plaintiff to incontrovertibly establish his insanity in direct contravention of the standard elucidated in *Makarow*. A plaintiff need only properly *raise* the question of insanity.[9]

As this Court explained:

> [E]ven when the evidence and underlying facts are not in dispute, there may still be a qualitative judgment concerning the significance and meaning of the underlying facts. Such questions or judgmental facts are sometimes called "mixed questions of law and fact" or "ultimate facts." If the qualitative judgment is in dispute, then the ultimate fact is generally a disputed question of fact. For example, even if there is no dispute concerning the underlying historical facts, it is ordinarily for the trier of fact to decide a question requiring an appraisal of the reasonableness or quality of a person's behavior or actions – as in negligence, homicide, and many contract cases. Only when all reasonable men must agree may the court properly, and then only in a civil case, decide the question as one of law. The question here presented also involves a value judgment of the kind we generally entrust to the trier of fact in recognition of our inability to crystalize an omniscient rule that would eliminate the need to make a case-by-case appraisal in applying the general standard to the specific facts at hand.[10]

Here, accepting the evidence as true and construing it in Walno's favor, her deposition and Evans' deposition sufficiently raised the issue whether Evans was unable to comprehend her rights both before and after the first surgery on January 28, 1998, but before the second surgery on February 7, 1998.[11] Therefore, we conclude that Walno met her burden under the general rule expressed in *Warren*. Other than a letter regarding Walno's petition for guardianship, defendants offered no other evidence in support of their contention that Evans was not insane, relying

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[8] *Makarow v Volkswagen of America, Inc*, 157 Mich App 401, 407; 403 NW2d 563 (1987), citing *Hill v Clark Equip Co*, 42 Mich App 405, 412-413; 202 NW2d 530 (1972); see also *Davidson v Baker-Vander Veen Constr Co*, 35 Mich App 293, 301-303; 192 NW2d 312 (1971).

[9] See *Geisland v Csutoras*, 78 Mich App 624, 626-629; 261 NW2d 537 (1977); *Van Buren v B & J Moving & Storage, Inc*, 54 Mich App 266, 268-269; 220 NW2d 746 (1974).

[10] *Davidson, supra* at 305-306.

[11] See *Maiden, supra* at 119; *Gortney, supra* at 538-539; MCR 2.116(G)(5).

primarily on the deposition testimony.[12] Although we agree that Evans' ability to take care of her daughter, to seek treatment for her condition, and to recall several conversations with her doctors strongly suggests that Evans was not insane, defendant failed to "incontrovertibly establish" that Evans was not insane.[13] Therefore, we conclude that the trial court erred in summarily dismissing the case based on its finding that Evans was not insane rather than entrusting the matter to a jury to determine whether inferences or conclusions favorable to Walno could be drawn from the evidence presented.[14]

E. Dr. Azmeh

Walno also argues that the disability provision should apply even if "the derangement may not have existed a microsecond before the act of malpractice" because "it was Dr. Azmeh's acts that pushed Mrs. Evans over the edge." This argument was only briefly mentioned in Walno's answer to defendants' motion and was not raised at all during the motion hearing. Thus, the trial court did not specifically rule on the possibility that the insanity grace provision was invoked because the surgery itself caused Evans' insanity. In light of our disposition of the case, we need not reach this unpreserved issue. We do note, however, that this Court has recognized that "insanity" under MCL 600.5851 "includes traumatic insanity, and specifically insanity which arises at the same time that the plaintiff's claim against the defendant accrues."[15]

IV. Conclusion

We conclude that the trial court erred in granting defendants summary disposition because Walno presented facts that raised a question regarding whether Evans was insane both before and after the first surgery on January 28, 1998, but before the second surgery on February 7, 1998, and defendants failed to present any evidence that incontrovertibly established that Evans was not insane. Thus, the question whether Evans was able to comprehend her rights at the time her claim accrued should have been entrusted to a jury.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad

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[12] See *Hill*, *supra* at 408-409.

[13] See *Makarow*, *supra* at 407; *Davidson*, *supra* at 302-303.

[14] See *Davidson*, *supra* at 306-307.

[15] *Hill*, *supra* at 408. See also *Hogan v Allstate Ins Co*, 124 Mich App 465, 468; 335 NW2d 6 (1983) (holding that sufficient evidence existed from which a trier of fact could determine that plaintiff's medical treatment after an accident caused mental incapacity which interfered with her ability to meaningfully comprehend her legal rights).