

STATE OF MICHIGAN
COURT OF APPEALS

KATRINA WASHINGTON, Personal
Representative of the Estate of DAVE
WASHINGTON, JR., Deceased,

UNPUBLISHED
October 23, 2007

Plaintiff-Appellant,

V

WILLIAM A. JACKSON, M.D., HUGH
ROLLOCKS, M.D., and LENARD FOUCHE,
M.D.,

No. 258691
Wayne Circuit Court
LC No. 03-338177-NH

Defendants,

and

COMMUNITY HEALTH CARE PROVIDERS,
INC., f/k/a UNITED COMMUNITY URGENT
CARE CENTER, INC.,

Defendant-Appellee.

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting motions for summary disposition by William A. Jackson, M.D., and Community Health Care Providers, Inc.¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This medical malpractice action has its roots in a separate action by a former personal representative of the estate, Tolena Washington. The undisputed facts indicate that decedent's cause of action accrued on January 15, 1999, and that decedent died on January 20, 1999. The two-year limitations period, MCL 600.5805(1), (6), therefore expired on January 15, 2001 (two

¹ Plaintiff, in her brief, states that she only contests the trial court's ruling as to Community Health. Therefore, we affirm the summary disposition as to Jackson.

years after accrual, MCL 600.5805(1), (6)). It is undisputed that neither decedent, Tolena nor plaintiff commenced an action before the expiration of the statute of limitations. This action is therefore untimely, unless some other provision of law saves it.

Because of decedent's death, his cause of action survived him and could be filed by a personal representative. MCL 5852.² *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 420; NW2d 755 (2007), slip op, p 4. Tolena received her letters of authority (was appointed personal representative) on August 15, 2001, after the limitations period expired.³ Before filing suit, Tolena was required to give defendant a notice of intent (NOI), and then wait 182 days before commencing an action. MCL 600.2912b(1). On November 20, 2001, Tolena served Jackson with an NOI. On May 20, 2002, the 182 day notice period expired. On October 3, 2002, Tolena filed suit against Jackson only. On August 13 and 14, 2003, Tolena served Fouche, Rollocks, and Community Health with NOIs. On October 10, 2003, Tolena's first complaint was dismissed. On November 12, 2003, Tolena filed a second action against Jackson only. On November 17, 2003, Tolena amended her November 12, 2003, complaint to add Fouche, Rollocks and Community Health as defendants.

Because the tolling provision of MCL 600.5856 does not toll the two-year savings period permitted by § 5852 for commencing wrongful death actions, *Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004), that two-year savings provision expired while Tolena was waiting for the 182 day notice period to elapse. Therefore, Tolena's November 17, 2003, complaint was untimely.

On the same day Tolena filed suit (i.e., November 17, 2003), Tolena apparently resigned as PR; and on that same date, plaintiff was appointed PR and was substituted as such in Tolena's action. On November 18, 2003, plaintiff, as PR, filed another action against the same defendants, based on the same claims. This November 18, 2003, action is the action from which this appeal arises.

On December 4, 2003, plaintiff filed an affidavit of merit by Marvin Werlinsky (executed in October 2002), who opined that Jackson breached the applicable standard of care. On February 17, 2004, plaintiff filed a second affidavit by Werlinsky, who opined that Fouche and Rollocks might have breached the applicable standards of care.

² MCL 600.5852, 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 two 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 limitations period has run.

³ Under the wrongful death savings statute, Tolena could file suit within two years of her appointment, or by August 15, 2003. MCL 600.5852.

In sum:

July 15, 1998	Last date of negligence (accrual of claim).
January 15, 1999	Death of decedent.
August 15, 2001	Tolena's letters of authority.
January 15, 2001	Two-year limitations period expires.
November 20, 2001	Jackson served with notice of intent.
May 20, 2002	182 day notice period expires.
October 3, 2002	Tolena files action against Jackson.
August 15, 2003	Last date to commence action under wrongful death savings statute, MCL 600.5852.
October 10, 2003	Dismissal of first action.
November 12, 2003	Tolena files second action against Jackson.
November 17, 2003	Complaint amended to add Fouche, Rollocks, and Community Health as defendants. Letters of authority issued for plaintiff. Plaintiff substituted as PR.
November 18, 2003	Plaintiff files another complaint against defendants.

Community Health filed a motion to dismiss and for summary disposition under MCR 2.116(C)(7), arguing that Tolena's action was untimely because it was not filed within two years of her appointment as PR, and that while plaintiff filed suit within two years of her appointment as successor PR, her appointment as successor PR violated the principles of *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003). Fouche moved for summary disposition, arguing that plaintiff's complaint was insufficient to commence an action because plaintiff did not file, "*with the complaint*"⁴ (emphasis added), an affidavit of merit; and that the limitations period continued to run and expired in January 2004, a month before plaintiff filed the requisite affidavit of merit as to Fouche. Jackson filed a similar motion.

The trial court found that the claim against Community Health accrued, at the latest, on January 15, 1999, and that the limitations period expired on January 15, 2001. Under MCL 600.5852, Tolena had two years from her appointment to file suit, or until August 15, 2003. Tolena's action was untimely as to Community Health because it was not amended to add Community Health until November 17, 2003. The trial court did not address the timeliness of

⁴ MCL 600.2912d(1) provides: "[T]he plaintiff . . . shall file *with the complaint* an affidavit of merit" (Emphasis added.)

plaintiff's claim, but granted Jackson's motion as to both Tolena's and plaintiff's actions.⁵ On September 28, 2004, the trial court granted Community Health's motion, and dismissed plaintiff's action, although the basis for its ruling is not entirely clear.⁶

We review a trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Whether a cause of action is barred by the statute of limitations is a question of law that is also reviewed de novo on appeal. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

Plaintiff contends that because she filed suit within two years of her appointment and within three years after the limitations period expired, her suit was timely under MCL 600.5852. Therefore, she contends that the trial court erred in dismissing her action against defendant. We disagree.⁷

Although MCL 600.5852 allows a personal representative to bring an action in her own name, the legal right to do so belongs to the estate, and her claim must be brought on behalf of the estate; the personal representative does not have her own legal right to bring a wrongful death claim against a defendant. *Washington, supra* at 420. If the original personal representative fails to file suit on behalf of the estate and a new personal representative is appointed, the two-year savings provision runs from the appointment of the successor personal representative. *Eggleston, supra*. However, if the original personal representative files suit on behalf of the estate but the suit is untimely when filed, the appointment of a successor personal representative does not revive the action, and it remains untimely despite the substitution of the successor after her appointment. *McMiddleton v Bolling*, 267 Mich App 667; 705 NW2d 720 (2005).

Nor can the successor personal representative institute a new action, at least where, as here, the original personal representative had the benefit of the full two-year savings period, but neglected to file suit timely due to an error in determining when the complaint must be filed.

⁵ Although the trial court originally denied Jackson's motion for summary disposition in the suit filed by Tolena, it granted a subsequent motion by Jackson in that case. We affirmed. *Washington v Jackson*, unpublished opinion of the Court of Appeals, issued December 13, 2005 (Docket No. 263108).

⁶ Contrary to plaintiff's assertion, the trial court never ruled that plaintiff's complaint against Community Health was untimely because there was not an affidavit of merit with the complaint. The trial court addressed the issue of the affidavit of merit only in ruling on the motions by Fouche and Jackson.

⁷ Plaintiff neglected to file an affidavit of merit with her complaint as required by MCL 600.2912d(1) "[T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169". MCL 600.2912d(1). We need not address whether the later filed affidavit of merit complied with MCL 600.2912d(3)

McLean v McElhaney, 269 Mich App 196, 201-202; 711 NW2d 775 (2005). Because a wrongful death action may be filed on behalf of the deceased's estate by the personal representative and a successor personal representative must be substituted in any action brought by the original personal representative, MCL 700.3613, the cause of action belongs to the estate, *Washington*, *supra* at 420; it does not transfer over to, or become the right of, the personal representative. *Shenkman v Bragman*, 261 Mich App 412, 415-416; 682 NW2d 516 (2004).

Because a duly appointed personal representative with authority to act filed suit, untimely, on behalf of the estate, plaintiff's later appointment as successor personal representative did not permit her to file a new complaint based upon the same cause of action, because the cause of action did not belong to her. Accordingly, the trial court did not err in granting Community Health's motion.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra