

STATE OF MICHIGAN
COURT OF APPEALS

SARAH A LAWSON, Personal Representative of
the Estate of BETTY JEAN BUCHANAN,

UNPUBLISHED
April 21, 2009

Plaintiff-Appellant,

v

No. 284144
Kent Circuit Court
LC No. 07-010490-NM

SPECTRUM HEALTH, SPECTRUM HEALTH
HOSPITALS, BUTTERWORTH HEALTH
CORPORATION d/b/a SPECTRUM MEDICAL
CENTER, SPECTRUM HEALTH HOSPITALS
d/b/a SPECTRUM BUTTERWORTH CAMPUS,
and JIHAD A. MUSTAPHA, M.D.,

Defendants-Appellees.

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted summary disposition to defendants pursuant to MCR 2.117(C)(7). For the reasons set forth below, we affirm.

Plaintiff alleges that, on February 2, 2005, defendants committed medical malpractice through the negligent performance of a cardiac catheterization on plaintiff's decedent, Betty Jean Buchanan. Ms. Buchanan died seven hours after the doctor finished the procedure. Plaintiff was appointed as personal representative of Ms. Buchanan's estate on April 21, 2005. Plaintiff filed her notice of intent to file a medical malpractice claim on March 12, 2007, and filed her complaint on October 5, 2007. On February 7, 2008, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), and argued that plaintiff did not timely file her complaint. The trial court agreed and granted summary disposition to defendants.¹

¹ This Court reviews "de novo a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(7)." *Estate of Dale v Robinson*, 279 Mich App 676, 682; 760 NW2d 557 (2008). As this Court further explained in *Estate of Dale* at 682:

(continued...)

“A plaintiff in a medical-malpractice action has two years from the date the cause of action accrued in which to file suit, MCL 600.5805(6), and a medical-malpractice claim generally ‘accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim,’ MCL 600.5838a(1).” *Estate of Dale v Robinson*, 279 Mich App 676, 683; 760 NW2d 557 (2008). Here, the cause of action accrued on February 2, 2005, when the alleged malpractice occurred. Therefore, under MCL 600.5805(6), plaintiff had to file her medical malpractice action no later than February 2, 2007. Because plaintiff filed her complaint on October 5, 2007, the complaint was not filed within the statute of limitations.

Plaintiff argues that the statute of limitations was tolled pursuant to MCL 600.5856(d). Though plaintiff refers to the applicable statute as MCL 600.5856(d), in 2004, the Legislature rewrote MCL 600.5856, and MCL 600.5856(d) became MCL 600.5856(c). 2004 PA 87, effective April 22, 2004. The statute on which plaintiff relies, MCL 600.5856(c), provides that the statute of limitations is tolled “[a]t the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose” In other words, under this “notice tolling provision,” if a plaintiff files a notice of intent within the statute of limitations period, the limitations period under MCL 600.5805(6) is tolled. Here, plaintiff filed her notice of intent March 12, 2007, more than two years after the alleged malpractice occurred (February 2, 2005). Accordingly, by the time plaintiff filed her notice of intent, there was no limitations period to toll because the statute of limitations had already run.

Plaintiff takes the position that, to come within the tolling statute, MCL 600.5856(c), she had until two years after she was appointed personal representative to file her notice of intent. This reasoning is incorrect. Plaintiff’s appointment as personal representative is not the date of accrual for a medical malpractice action. Rather, again, the statute of limitations for a malpractice action begins to run when the alleged malpractice occurred. See *Waltz v Wyse*, 469 Mich 642, 654; 677 NW2d 813 (2004). Because plaintiff did not file her notice of intent within two years of the date the alleged malpractice occurred, MCL 600.5856(c) did not toll any limitations period. Moreover, because the statute of limitations was not tolled, plaintiff was required to file her complaint within two years of the alleged malpractice, or by February 2,

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In reviewing a motion for summary disposition under subrule C(7), we accept the plaintiff’s well-pleaded allegations as true and construe them in the plaintiff’s favor. In doing so, we consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). “If the pleadings demonstrate that one party is entitled to judgment as a matter of law, or if affidavits and other documentary evidence show that there is no genuine issue of material fact concerning the running of the period of limitations, the trial court must render judgment without delay.” *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 720; 742 NW2d 399 (2007).

This case also involves the interpretation and application of statutes, which this Court also reviews de novo. *Tomecek v Bavas*, 482 Mich 484, 490; 759 NW2d 178 (2008).

2007. Again, plaintiff filed her complaint on October 5, 2007, and this was not timely under MCL 600.5805(6).

Plaintiff denies that the wrongful death saving provision, MCL 600.5852, applies to this case, but her reasoning about the effect of her appointment as personal representative warrants a discussion of this exception to the limitations period. “In wrongful death actions, the Legislature affords personal representatives additional time in which to pursue legal action on behalf of a decedent’s estate.” *Carmichael v Henry Ford Hosp*, 276 Mich App 622, 625; 742 NW2d 387 (2007). To that end, 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 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.

This provision is equally inapplicable to plaintiff’s claims because she did not file her complaint within two years of her appointment as personal representative. Plaintiff received her appointment on April 21, 2005 and, under the wrongful death saving provision, she had until April 21, 2007 to file her malpractice claim. Again, plaintiff did not file her complaint until October 5, 2007 and, therefore, this action is not timely. Moreover, as plaintiff appears to acknowledge, as a matter of law, the notice tolling provision under MCL 600.5856(c) does not extend the two year period for a personal representative to file a claim under the wrongful death saving statute. *Waltz, supra* at 655; *Braverman v Garden City Hosp*, 275 Mich App 705, 711; 740 NW2d 744 (2007). Accordingly, under all of the applicable statutes, plaintiff did not timely file her medical malpractice complaint and the trial court correctly granted summary disposition to defendants.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra