

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF JERALD L. CZARNECKI, by
WANETTA CZARNECKI, Personal
Representative,

UNPUBLISHED
April 19, 2012

Plaintiff-Appellant,

v

TINA JOHNSON, R.N., ALLEGAN GENERAL
HOSPITAL, RYAN SEIM, M.D., and
SOUTHWESTERN MICHIGAN EMERGENCY
SERVICES P.C.,

No. 304663
Allegan Circuit Court
LC No. 11-048004-NH

Defendants-Appellees.

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Plaintiff, as personal representative of the estate of decedent Jerald L. Czarnecki, appeals as of right a trial court order denying her motion for voluntary dismissal and granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

On April 20, 2008, decedent was admitted to Allegan General Hospital after complaining of shortness of breath. He died shortly thereafter. On August 13, 2008, letters of authority were issued to plaintiff establishing her as personal representative of decedent's estate. Two years later, on August 13, 2010, plaintiff sent defendants a notice of intent to sue (NOI) in accord with MCL 600.2912b, and on February 11, 2010, plaintiff filed a complaint and commenced this medical malpractice action.

Shortly thereafter, plaintiff moved for voluntary dismissal under MCR 2.504 on grounds that she needed to be replaced as personal representative. Defendants moved for summary disposition and claimed that plaintiff's complaint was time-barred and that her NOI failed to toll the wrongful death savings provision. The trial denied plaintiff's motion for dismissal and granted defendants' motions for summary disposition.

We review 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). We review a trial court's decision whether to grant or deny a motion for voluntary dismissal

under MCR 2.504 for an abuse of discretion. *McKelvie v City of Mt Clemens*, 193 Mich App 81, 86; 483 NW2d 442 (1992).

MCR 2.116(C)(7) provides that summary disposition is appropriate where a plaintiff's claim is barred by the applicable statute of limitations. Generally, in a medical malpractice action, a plaintiff has two years from the time the claim accrues to file a complaint. MCL 600.5838a(2); *Driver v Naini*, 490 Mich 239, 249; 802 NW2d 311 (2011). However, under the wrongful death savings provision, where a person dies before the statute of limitations has run, a personal representative of the deceased may commence a malpractice action within two years after letters of authority were issued. MCL 600.5852. When a plaintiff submits a NOI with time remaining on the statute of limitations, that NOI tolls the limitations period for up to 182 days. *Driver*, 490 Mich at 249; MCL 600.5856(c). However, a NOI does not toll the wrongful death savings provision. *Waltz v Wyse*, 469 Mich 642, 648-650; 677 NW2d 813 (2004).

In this case, plaintiff's claim accrued on April 20, 2008. The statute of limitations expired on April 20, 2010. MCL 600.5838a(2). However, this case involves a wrongful death claim and letters of authority were issued on August 13, 2008. Thus, under the wrongful death savings provision, plaintiff had until August 13, 2010 to commence this action. MCL 600.5852. Plaintiff failed to do so. Instead, plaintiff submitted a NOI to defendants on August 13, 2010. The NOI did not toll the wrongful death savings provision, *Waltz*, 469 Mich at 648-650, and plaintiff's complaint was time-barred when she eventually filed it on February 11, 2011. Therefore, the trial court did not err in granting summary disposition under MCR 2.116(C)(7).

Given that plaintiff's claim was time-barred, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for voluntary dismissal under MCR 2.504. While the court stated that it did not believe that the issue of exercise of discretion was implicated in this case, the court also stated that the absence of unusual circumstances warranting the appointment of a new personal representative was a reason to not grant dismissal without prejudice. By implication, the court was analyzing the circumstances of this particular case and thus exercising discretion. While the court's reasoning was less than complete, the court reached the legally correct result. As noted in *Eggleston v Bio-Med Applications of Detroit, Inc.*, 468 Mich 29; 658 NW2d 139 (2003), the court should not grant a dismissal without prejudice where the opposing party is legally prejudiced. Since the savings clause expired prior to the motion, defendants would have suffered a clear legal prejudice since a successor personal representative would have re-filed the time-barred cause of action. See *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972) (generally, a trial court should grant a motion for voluntary dismissal unless the defendant "will be legally prejudiced as a result").¹

¹ Plaintiff's argument that dismissal was appropriate under *Eggleston* is misplaced. In that case, our Supreme Court held that the wrongful death savings provision was properly calculated from the time a successor-personal representative was appointed. *Id.* at 33. However, in *Eggleston*, the initial personal representative died 11 months after being appointed, *id.* at 31, and unlike the initial personal representative in *Eggleston* who did not commence an action, in this case, plaintiff brought suit and then sought a dismissal so that a successor representative could revive

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

her claim. *Eggleston* does not support the proposition that a plaintiff can revive a barred claim by appointing a successor-personnel representative.