STATE OF MICHIGAN

COURT OF APPEALS

JODIE VEGA, Conservator of the Estate of JEFFREY HURLEY, a Minor,

Plaintiff-Appellant,

v

LAKELAND HOSPITALS AT NILES AND ST. JOSEPH, INC., ST. JOSEPH MEDICAL ASSOCIATION, P.C. and BETH VANDERAH and MICHAEL SPEERS, Co-Personal Representatives of the Estate of DAVID ALAN SPEERS, M.D.,

Defendant-Appellees.

FOR PUBLICATION
July 28, 2005
9:00 a.m.

No. 253739
Berrien County Trial Court-
Civil Division
LC No. 02-003976-NH

Official Reported Version

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent. I would find that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) because MCL 600.5851(7) does not limit the saving provision of MCL 600.5851(1) with regard to an insane medical malpractice claimant whose claim accrued after he reached his eighth birthday. Thus, I would reverse and remand for further proceedings.

The question in the present case is whether an insane person in a medical malpractice action who has reached his or her eighth birthday is excluded from the protection of the insanity saving clause under MCL 600.5851(1). I would find that MCL 600.5851(7) does not act as a limitation on plaintiff 's ability to invoke the general saving provision in the present case.

A medical malpractice claim "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). As a general rule, a medical malpractice action may not be initiated more than two years after accrual of the claim. MCL 600.5805(6).

But plaintiff argues that because Jeffrey Hurley was insane, pursuant to MCL 600.5851(2),[1] there was additional time to bring the claim beyond the two-year limitation. MCL 600.5851(1).

The Revised Judicature Act (RJA) contains a general saving or "grace period" provision at MCL 600.5851(1), which provides:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years old or is insane at the time the claim accrues, the person or those claiming under the person shall have one year after the disability is removed through death or otherwise to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.

An exception to the general saving provisions in subsection 7 provides as follows:

> Except as otherwise provided in subsection (8),[2] if, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday or within the period of limitations set forth in section 5838a, whichever is later. *If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has reached his or her eighth birthday, he or she is subject to the period of limitations set forth in section 5838a.* [Emphasis added.]

It is important to note that MCL 600.5851(1) is *not* necessarily a tolling provision, but allows disabled plaintiffs an additional and separate protection from the various statutes of limitations under the RJA. *Honig v Liddy*, 199 Mich App 1, 4-5; 500 NW2d 745 (1993). Consistently with this characterization, Michigan courts have long held that regardless of whether the statute of limitations period has expired on a claim under the RJA, MCL 600.5851(1) allows for a claim to be filed beyond the limitations period until the disability is removed.[3] Of course, MCL 600.5851(1) is still limited by MCL 600.5851(7). The key

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[1] Whether Hurley was insane for the purposes of the statute is a factual issue that is not in dispute on appeal.

[2] Subsection 8 is not at issue in the present case.

[3] See *Lemmerman v Fealk*, 449 Mich 56, 75; 534 NW2d 695 (1995) (the grace period under MCL 600.5851[1] is available for insane plaintiffs in tort action for sexual abuse, but not when the alleged insanity is based on claim of "repressed memory."); *In re Neagos*, 176 Mich App 406, 412; 439 NW2d 357 (1989) (A person who asserts insanity as a disability has one year after the disability is removed to initiate a proceeding even if the period of limitation has expired. However, the disability must have been in existence at the time the claim occurred.) *Smith v Bordelove*, 63 Mich App 384, 388; 234 NW2d 535 (1975) (An infant plaintiff in a medical malpractice has one year from the time infancy was removed to file a claim for medical malpractice regardless of whether the two-year statute of limitations had expired.).

question is the extent to which MCL 600.5851(7) limits the saving provision found at MCL 600.5158(1).

When interpreting statutory language, the Legislature is presumed to have intended the meaning it plainly expressed. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Courts may not speculate about the probable intent of the Legislature beyond the language expressed in the statute. *Id*. If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

Clearly, the first part of MCL 600.5851(7) sets out a specific time that a person under the age of eight must file his or her claim, i.e., before the tenth birthday if the claim accrued before the age of eight. MCL 600.5851(7). But the second sentence, which is applicable here because plaintiff was over the age of eight at the time of claim accrual, contains no language limiting the application of the saving provision for insanity. MCL 600.5851(7). The second sentence of MCL 600.5851(7) only states what the limitations period will be for those plaintiffs whose claim accrues past the age of eight. In other words, although the standard two-year limitations period applies for those plaintiffs past age eight, it does not simultaneously limit the saving provision of subsection 1, which provides that the period of limitations for an insane plaintiff does not begin to run until, "1 year after the disability is removed . . . *although the period of limitations has run."* MCL 600.5851(1) (emphasis added).

Applying the plain meaning of this sentence, the only limitation is that the period of limitations in MCL 600.5838a applies because that is the language employed in subsection 7. MCL 600.5838a(2) redirects the plaintiff to *either* the period of limitations in § 5805 or § 5851:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or section[] 5851 . . . .

Therefore, I would find that, although MCL 600.5851(7) may limit a claim for malpractice that accrued before the age of eight, its plain language does not limit those plaintiffs whose claims accrued after the age of ten—as in the present case. The only direction the statute gives is to the "period of limitations set forth in section 5838a . . . ." MCL 600.5851(7). This plain language does not simultaneously limit the application of MCL 600.5851(1). It simply directs the reader to the limitations period in MCL 600.5838a. In turn, § 5838a allows a plaintiff to invoke the grace period in section 5851(1), by directly referring to it in the first sentence of § 5838a(2).

For the above reasons, I do not agree with the majority that all medical malpractice applicants are excluded from the disability grace period found at MCL 600.5851(1). I would find that defendants' motion for summary disposition was improperly granted and would reverse and remand for further proceedings.

/s/ Kathleen Jansen