# STATE OF MICHIGAN

# COURT OF APPEALS

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JOYCE ELLA NEWTON,

Plaintiff-Appellant,

v

REYNALDO G. CASTILLO, M.D., and
REYNALDO G. CASTILLO, M.D., P.C.,

Defendants-Appellees.

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UNPUBLISHED
March 27, 1998

Nos. 195034; 196650
Kent Circuit Court
LC Nos. 96-000162-NH;
96-005223-NO

Before: Smolenski, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right in these consolidated appeals. In docket no. 195034, plaintiff appeals as of right from a May 1, 1996 order granting summary disposition in defendants' favor in a case involving a claim of medical malpractice. In docket no. 196650, plaintiff appeals as of right from a July 5, 1996 order granting summary disposition in defendants' favor in a case involving claims of misrepresentation. We reverse and remand for further proceedings in docket no. 195034 and affirm in docket no. 196650.

These appeals essentially involve a claim of medical malpractice. Plaintiff underwent a neurosurgical procedure on her cervical spine on July 8, 1993, and her symptoms did not improve after the procedure. Plaintiff filed her first complaint alleging medical malpractice on July 7, 1995, within the two-year statute of limitations period. A notice of intent to file a claim was also served on July 7, 1995. On September 21, 1995, an affidavit of merit was filed, and on September 29, 1995, defendant were served with the summons, complaint, and affidavit of merit.

In lieu of answering the complaint, defendants moved for summary disposition, claiming that the complaint had to be dismissed for failure to give 182 days' notice as required by MCL 600.2912b; MSA 27A.2912(2) and because the affidavit of merit was not timely filed pursuant to MCL 600.2912d; MSA 27A.2912(4). The motion for summary disposition was heard on December 1, 1995. The trial court granted defendants' motion and dismissed the complaint without prejudice. The trial court dismissed the complaint, ruling that the affidavit of merit was not timely filed.

Plaintiff then refiled her suit in lower court no. 96-000162-NH on January 5, 1996, 182 days after serving defendants with the notice of intent. Defendants moved for summary disposition, arguing that plaintiff's suit was barred by the two-year period of limitations. The trial court agreed and granted the motion in an order dated May 1, 1996. Plaintiff appeals from that order in docket no. 195034.

On April 29, 1996, plaintiff filed another complaint against defendants, alleging claims of misrepresentation. Again, in lieu of answering the complaint, defendants moved for summary disposition arguing that plaintiff's claim was barred by res judicata and by the statute of limitations. The trial court, in an order dated July 5, 1996, granted summary disposition in favor of defendants. The trial court found that plaintiff's claims were actually medical malpractice claims, and that the two-year statute of limitations barred the claims. Alternatively, the trial court ruled that even if the misrepresentation claims were distinct claims, plaintiff was required to join the misrepresentation claims with the original medical malpractice action under MCR 2.203(A). Plaintiff now appeals as of right from the trial court's order of July 5, 1996 in docket no. 196650.

**Docket No. 195034**

This is another in a series of cases presenting problems from the changes made to the Revised Judicature Act. See 1993 PA 78. 1993 PA 78 became effective on April 1, 1994. Plaintiff's cause of action arose on July 8, 1993, and pursuant to the two-year statute of limitations for medical malpractice actions, MCL 600.5805(4); MSA 27A.5805(4), she had until on or before July 8, 1995 to timely file her action. However, pursuant to MCL 600.2912b; MSA 27A.2912(2), which became effective on April 1, 1994, plaintiff was required to give 182 days' notice to defendants before filing her complaint. Under MCL 600.5856(d); MSA 27A.5856(d), if a cause of action is time-barred because of the 182-day notice provision, the limitation period is tolled for 182 days after notice is given. However, the tolling provision of MCL 600.5856(d); MSA 27A.5856(d) does not apply to plaintiff because her cause of action arose before October 1, 1993. 1993 PA 78, § 4(1).

We believe that this case is controlled by this Court's decision in *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996). *Morrison* similarly involved a case where the plaintiff's cause of action arose before October 1, 1993 (on May 21, 1992), her complaint was filed within the two-year limitation period on May 19, 1994, but her notice of intent was not filed 182 days before the filing of the complaint because the notice of intent was filed on April 28, 1994. Importantly, this Court held that 1993 PA 78, § 4(1), providing that the tolling provision did not apply to causes of action arising before October 1, 1993, could not be enforced in the plaintiff's case because such enforcement "would result in the abrogation of a vested cause of action under the guise of a procedural amendment of the pertinent statute of limitations." *Morrison, supra,* p 318. This Court further noted that our Supreme Court has made clear that such retrospective application is offensive to the constitutional guarantee that no person shall be deprived of property without due process of law. "Therefore, 1993 PA 78, § 4(1) may not be enforced in cases such as the present matter where enforcement would vitiate an accrued medical malpractice claim without providing the potential plaintiff the benefit of the 182-day tolling provision." *Morrison, supra,* p 318.

Specifically, in *Morrison, supra,* p 318, this Court held:

> Additionally, we would note that extant case law and this Court's interpretation of the 182-day tolling provision serve to preserve the causes of action of all plaintiffs situated similarly to the present plaintiffs. The tolling statute, MCL 600.5856; MSA 27A.5856, applies to prior suits that have not been adjudicated on the merits. *Buscaino v Rhodes*, 385 Mich 474, 482; 189 NW2d 202 (1971). "A dismissal without prejudice is not considered to be an adjudication on the merits, and therefore the tolling statute applies." *Federal Kemper Ins Co v Isaacson*, 145 Mich App 179, 183; 377 NW2d 379 (1985). Thus, the present plaintiffs, as well as the many plaintiffs who find themselves in the identical situation, enjoy the balance of the 182-day tolling period remaining after suit was filed. Further, a limitation period is tolled during the pendency of an appeal. *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1981). Therefore, all plaintiffs finding themselves in the present plaintiffs' situation will be free to timely refile their suits following dismissal of their actions.

Because plaintiff in the present case timely filed suit within the two-year statute of limitations, but would have lost the right to file her suit because the tolling statute does not apply, we find *Morrison* to be controlling and hold that 1993 PA 78, § 4(1) cannot be applied because plaintiff's medical malpractice claim would be abrogated.

We cannot agree with defendants' contention that plaintiff in this case is not similarly situated to the plaintiffs in *Morrison*. Defendants contend that because 1993 PA 78 became effective on April 1, 1994 and the two-year period of limitation would run in this case on July 8, 1995, then plaintiff had a fourteen-month period of limitation, which defendants contend is ample time to bring the suit. We decline to accept defendants' position because doing so reduces the limitations period to a class of plaintiffs who are similarly situated to those plaintiffs whose cause of action arose after October 1, 1993. As noted in *Morrison, supra*, p 316, a statute of limitation may not be construed to impliedly abrogate a cause of action. Thus, retrospective application of a law is improper where the law takes away or impairs a vested right acquired under existing laws. *Id.*, p 317. Moreover, we believe that reducing the statute of limitations would create serious equal protection problems. Because it is clear that this Court in *Morrison* applied the tolling period so as to eliminate any equal protection violations, we likewise apply the rule of *Morrison* to this case and simply hold that 1993 PA 78, § 4(1) does not apply.

Accordingly, the trial court did not err when it initially dismissed plaintiff's action *without prejudice* for failing to comply with the 182-day notice period. However, because plaintiff filed the notice on July 7, 1995, and refiled her complaint on January 5, 1996, it was within the 182-day period, accounting for the fact that the tolling period must be applied. Therefore, we remand this case to the trial court and order that the complaint filed on January 5, 1996 must be reinstated. See *Morrison, supra*, p 319; *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 723; ___ NW2d ___ (1997).

**Docket No. 196650**

This appeal involves plaintiff's complaint alleging various misrepresentation claims. Presumably, in an effort to maintain her medical malpractice claim and avoid the statute of limitations, plaintiff filed a new complaint alleging claims of misrepresentation on April 29, 1996. The trial court dismissed the complaint, finding that the misrepresentation claims made in the course of professional practice implicates medical malpractice concerns and that the statutes relating to medical malpractice applied.

We agree with the trial court that, in this case, plaintiff's claims of misrepresentation are nothing more than a medical malpractice claim for the reasons set forth by the trial court. Therefore, the two-year statute of limitations would apply and plaintiff's claim is outside the limitations period because it was filed after July 8, 1995. Summary disposition pursuant to MCR 2.116(C)(7) was proper. The trial court's order granting summary disposition in favor of defendants in docket no. 196650 is affirmed.

In summary, we reverse the order granting summary disposition in favor of defendants in docket no. 195034 and remand for reinstatement of plaintiff's complaint. We affirm the order granting summary disposition in docket no. 196650. No taxable costs on appeal pursuant to MCR 7.219, none of the parties having prevailed in full. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Kathleen Jansen
/s/ Jane E. Markey