

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN SURNS,

Plaintiff-Appellant/Cross-Appellee,

v

JAMES E. JACQUES, M.D., and ROB S. DALM,
PA-C,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

April 20, 2001

No. 223199

Iosco Circuit Court

LC No. 98-001066-NH

Before: Talbot, P.J., and Sawyer and F. L. Borchard*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. Defendants have filed a claim of cross appeal. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On February 27, 1997, plaintiff mailed a notice of intent (NOI) to sue to defendants. Plaintiff was prohibited from filing suit for 182 days. MCL 600.2912b(1); MSA 27A.2912(2)(1). On that date, forty-two days remained in the limitations period. By application of MCL 600.5856(d); MSA 27A.5856(d), the statute of limitations was tolled for a number of days equal to the number of days in the applicable notice period. On October 2, 1997, plaintiff filed suit alleging that on April 10, 1995, defendants negligently failed to properly diagnose her condition, and that as a result she suffered a stroke.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that because they did not respond to plaintiff's NOI within 154 days after receipt of same, as required by MCL 600.2912b(7); MSA 27A.2912(2)(7), the statute of limitations began running after only 154 days, as opposed to 182 days. Furthermore, defendants argued that even assuming that the limitations period was tolled for 182 days, plaintiff was precluded from claiming that any treatment provided prior to April 10, 1995, was rendered in a negligent manner. The trial court

* Circuit judge, sitting on the Court of Appeals by assignment.

granted the motion, concluding that if a potential defendant does not respond to a NOI, the limitations period is tolled for only 154 days.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

A potential medical malpractice plaintiff must provide a potential defendant with a NOI not less than 182 days before suit is commenced. MCL 600.2912b(1); MSA 27A.2912(2)(1). If the limitations period would expire prior to the end of the notice period, the limitations period is tolled for a number of days equal to the number of days in the applicable notice period. MCL 600.5856(d); MSA 27A.5856(d). The health professional against whom the claim is made must provide a written response within 154 days after receiving the NOI. MCL 600.2912b(7); MSA 27A.2912(2)(7). If the claimant does not receive a written response within the 154-day period, the claimant may commence suit upon the expiration of the 154-day period. MCL 600.2912b(8); MSA 27A.2912(2)(8).

On appeal, plaintiff argues that the trial court erred by granting defendants' motion for summary disposition on the ground that her suit was untimely. We agree, reverse the trial court's decision, and remand for further proceedings consistent with this opinion. In *Omelenchuk v Warren*, 461 Mich 567; 609 NW2d 177 (2000), our Supreme Court noted that MCL 600.2912b; MSA 27A.2912(2) establishes both a notice period of 182 days and an interval period in which one cannot file suit, which can be 182 days, 154 days, or another number of days. The *Omelenchuk* Court held that if a potential plaintiff gives the required 182-day notice during a period in which the limitations period would expire, the limitations period is tolled for 182 days after the NOI is given. This is the case regardless of whether or how the potential defendant responds to the NOI. *Id.*, 573-577.

On cross appeal, defendants acknowledge that *Omelenchuk, supra*, is controlling, but argue that the trial court's grant of summary disposition was correct. *Omelenchuk, supra*, compels the reversal of the trial court's order granting defendants' motion for summary disposition.

In addition, defendants argue that even if plaintiff is afforded a 182-day tolling period, any claims by plaintiff for alleged medical malpractice occurring prior to April 3, 1995, are time barred.¹ Defendants raised this issue in the trial court; however, the trial court did not address it. Because *Omelenchuk, supra*, requires reversal of the trial court's decision and a remand for further proceedings, this issue should be decided by the trial court in the first instance. Our review is limited to issues actually decided by the trial court. *Michigan Mutual Ins Co v American Community Mutual Ins Co*, 165 Mich App 269, 277; 418 NW2d 455 (1987).

¹ Defendants acknowledge that in the trial court, they argued that any claims for alleged malpractice occurring prior to April 10, 1995, were time barred. On appeal, defendants assert that a recalculation of relevant dates led to the change of position.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ David H. Sawyer

/s/ Fred L. Borchard