STATE OF MICHIGAN

COURT OF APPEALS

DENISE VON ARX, Next Friend of ALLISON VON ARX, Minor,

Plaintiff-Appellee,

v

LIVONIA FAMILY PHYSICIANS, P.C., THOMAS I. SELZNICK, D.O., TONI TRATE, D.O., J. ADAM KELLMAN, D.O., HAROLD M. FRIEDMAN, D.O., PAUL D. JACKSON, D.O., STUART NATHAN, P.A., TIFFANY POTTS, P.A., BARBARA BERGESKI, P.A., and MARY JANE GREGORY, P.A.,

Defendant-Appellants.

UNPUBLISHED
June 3, 2008

No. 268516
Wayne Circuit Court
LC No. 04-402910-NH

Before: Wilder, P.J., and Cavanagh and Hood, JJ.

PER CURIAM.

Defendants appeal by delayed leave granted from the trial court's order denying their motion for summary disposition in this medical malpractice case. We affirm.

I

The minor plaintiff, Allison Von Arx (Allison), was born on October 5, 1993. Between 1994 and 2001, Allison received pediatric care from defendants. Allison failed to grow normally and exhibited behavioral problems and development delays. On May 29, 2001 Allison's recorded height was 45". On September 22, 2001, Allison's height was recorded at 45 ¼". Following this office visit, tests were ordered which ultimately led to the diagnosis of hypothyroidism.

Allison turned eight years old in October 2001. In August 2003, plaintiff filed a notice of intent to sue defendants pursuant to MCL 600.2919b. In October 2003, Allison turned ten years old. In February 2004, plaintiff commenced this action.

Defendants moved for summary disposition below under MCR 2.116(C)(7) and (10), arguing that plaintiff's claims were barred by the two-year limitations period, and that the notice of intent could not and did not toll the by-the-tenth-birthday period under MCL 600.5851(7). The trial court denied the motion, concluding that the by-the-tenth-birthday period in § 5851(7)

is a limitations period that can be tolled by statutory notice tolling, and that even if there were no statutory tolling, there were "certainly understandable confusion and reliance on prior case law and the statute itself[,] such that equitable tolling would be applicable in this matter[,] as well as prospective application."

II

A

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). Similarly, this Court reviews de novo the legal question concerning whether the applicable statute of limitations bars a claim. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

Subrule (C)(7) permits summary disposition where the claim is barred because of any one of several occurrences, including where the applicable statute of limitations has run. In reviewing a motion under subrule (C)(7), the Court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties to determine whether a genuine issue of material fact exists. *Id.* However, these materials are considered only to the extent that they are admissible in evidence. *In re Miltenberger Estate*, 275 Mich App 47, 51; 737 NW2d 513 (2007).

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *McManamon v Redford Charter Twp*, 256 Mich App 603, 610; 671 NW2d 56 (2003). A motion filed under subrule (C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Issues of statutory interpretation are questions of law that this Court reviews de novo. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

B

1

Defendant claims on appeal that plaintiff's claim is barred by the two year statute of limitations for medical malpractice actions, MCL 600.5805(6), and that neither the notice tolling

provision of MCL 600.5856(d) nor the provisions of MCL 600.5851(7) are sufficient to "save" plaintiff's claim. We disagree.

A medical malpractice claimant must give defendants notice of her intent to sue at least 182 days before filing a complaint. MCL 600.2912b(1). A claimant can toll the limitations period by providing, before the limitations period expires, notice of her intent to sue. MCL 600.5856(c). MCL 600.5856 provides:

> The statutes of limitations or repose are tolled in any of the following circumstances:
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> * * *
>
> (c) *At 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; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.* [Emphasis added.]

Thus, the limitations period is tolled if the plaintiff provides a valid notice of intent *before* the limitations period expires. MCL 600.5856(c); see also *Waltz v Wyse*, 469 Mich 642, 646; 677 NW2d 813 (2004)..

Plaintiff filed her notices of intent in August 2003 and her complaint in February 2004, and defendants argue that plaintiff's action was untimely because the notices of intent were not filed before the expiration of the limitations period under MCL 600.5805(6).

MCL 600.5805[1] provides a two-year limitations period for medical malpractice actions:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued . . . the action is commenced within the periods prescribed by this section.
>
> ***
>
> (6) . . . the period of limitations is 2 years for an action charging malpractice. . . .

This two-year period depends upon when "the claim first accrued . . . ." MCL 600.5805(6). MCL 600.5838a(1) defines when a medical malpractice claim accrues:

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[1] MCL 600.5805(5) was renumbered as MCL 600.5805(6) by 2002 PA 715, effective March 31, 2003. *Ousley v McLaren Hosp*, 264 Mich App 486, 490 n 3; 691 NW2d 817 (2004). We will refer to subsection (6).

> For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment . . . *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. (Emphasis added.)

Defendants contend that the claim accrued, at the latest, on the last date on which defendants saw Allison without diagnosing her condition, i.e., May 2001. On appeal, plaintiff does not present any alternative accrual date, nor did plaintiff present any alternative accrual date below. Therefore, if the defendants have correctly argued that the two-year limitations period of MCL 600.5805(6) applies, plaintiff's action would indeed be barred and not tolled by the notices of intent filed in August of 2003.

However, plaintiff argued below, and the trial court agreed, that the by-the-tenth-birthday period of MCL 600.5851(7) is a limitations period that can also be tolled by notice tolling. Given the binding precedent of this Court, we also agree.

MCL 600.5851(7) provides:

> Except as otherwise provided in subsection (8), *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.]

In *Vanslembrouck v Halperin*, 277 Mich App 558; 747 NW2d 311 (2008), this Court held that the by-the-tenth-birthday period of MCL 600.5851(7) is a limitations period (that can be tolled), not a grace period (that cannot be tolled). Because notices of intent to sue were mailed to defendants on August 8, 2003, approximately two months before Allison's tenth birthday, under *Vanslembrouck* and the facts of this case, the trial court correctly denied defendants' motion for summary disposition.

2

Given our conclusion that the notice of intent tolled the statute of limitations in MCL 600.5851(7), the question whether our holding today applies retroactively or prospectively is moot. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

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Similarly, the question whether equitable tolling applies under these facts is also moot. *Ewing, supra* at 95.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood