STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF PATRICIA MASHIKE, by RICHARD POKERWINSKI, Personal Representative,

Plaintiff-Appellant,

v

RIVERVIEW MEDICAL INVESTORS LIMITED PARTNERSHIP, doing business as RIVERGATE TERRACE, DR. RAMY ALOSACHIE, DR. GHAZWAN ATTO, and GHAZWAN ATTO, M.D., PC, doing business as, DOWNRIVER MEDICAL ASSOCIATES, DMA URGENT CARE, and WYANDOTTE FAMILY PHYSICIANS,

Defendants-Appellees.

UNPUBLISHED
December 21, 2021

No. 354851
Wayne Circuit Court
LC No. 20-000122-NH

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

In this action for wrongful-death medical malpractice, plaintiff, the estate of Patricia Mashike, through Richard Pokerwinski, personal representative, appeals as of right the order granting summary disposition to defendants under MCR 2.116(C)(7). We affirm.

On May 11, 2017, Patricia was admitted to Rivergate Terrace ("Rivergate") after experiencing a variety of ailments including, weakness, fatigue, loss of appetite, and incontinence. During her time at Rivergate, Patricia began experiencing respiratory issues. Patricia was treated by defendants, Dr. Ramy Alosachie and Dr. Ghazwan Atto, along with various nursing staff. Patricia's condition worsened and, on May 25, 2017, Patricia was transferred to the hospital. Soon after, she was placed in hospice care and died on May 30, 2017.

On July 26, 2017, the probate court issued letters of authority appointing Pokerwinski the personal representative of Patricia's estate. Nearly two years later, on July 9, 2019, plaintiff mailed defendants notice of plaintiff's intent to file a medical malpractice claim. Plaintiff filed the claim on January 3, 2020. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing

plaintiff's claim was time-barred under MCL 600.5805(6), the two-year statute of limitations for medical malpractice claims. The trial court agreed the claim was time-barred, and granted summary disposition on this basis. Plaintiff moved for reconsideration, but the trial court denied the motion. This appeal followed.

"Generally, a party must raise an issue before the trial court to preserve it for our review." *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc*, 305 Mich App 460, 482; 853 NW2d 467 (2014). Plaintiff makes a number of arguments asserting the trial court incorrectly granted summary disposition. For the most part, these arguments are preserved because plaintiff raised them in the trial court. However, on appeal plaintiff makes the additional argument that the claim accrued when the letters of authority were issued. Plaintiff did not present this argument to the trial court, therefore that argument is not preserved for our review. *Id*. Nevertheless, "[t]his Court may review an unpreserved issue if it is an issue of law for which all the relevant facts are available." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Because this issue concerns a question of law of which all the relevant facts are available, it is appropriate for this Court to consider this question.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7). *Estate of Dale v Robinson*, 279 Mich App 676, 682; 760 NW2d 557 (2008). In reviewing such a motion, "we accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor. In doing so, we consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties." *Id*. "If no facts are in dispute, whether the claim is statutorily barred is a question for the court as a matter of law." *Adams v Adams*, 276 Mich App 704, 720-721; 742 NW2d 399 (2007) (quotation marks and citation omitted).

"We review de novo questions of statutory interpretation." *Estate of Dale*, 279 Mich App at 682.

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, the words of a statute provide the most reliable evidence of its intent. [*Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012) (quotation marks and citation omitted).]

This case concerns the interplay among: (1) the statute of limitations for medical malpractice claims, MCL 600.5808; (2) the Wrongful Death Savings Provision (the "savings provision"), which allows a longer time period in which a personal representative may bring suit, MCL 600.5852; and (3) the notice tolling provision, allowing tolling of a claim so long as the statute of limitations would have expired during the tolling period, MCL 600.5856(c). MCL 600.5805(1) and (6) articulate the statute of limitations for medical malpractice claims:

> (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 to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> * * *
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> (6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

There is, however, a "savings provision" for medical malpractice claims, which states in pertinent part:

> (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run.
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> (2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate. Except as provided in subsection (3), the issuance of subsequent letters of authority does not enlarge the time within which the action may be commenced.
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> (4) Notwithstanding subsections (1) to (3), an action shall not be commenced under this section later than 3 years after the period of limitations has run. [MCL 600.5852 (1), (2), and (4).]

Michigan also provides a notice tolling period under MCL 600.5856(c), which states:

> The statutes of limitations or repose are tolled in any of the following circumstances:
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> * * *
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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.

Our Supreme Court has previously explained the effect of these statutory provisions, stating:

> In general, the statute of limitations for a wrongful death action is the statute of limitations for the underlying theory of liability . . . which is two years for medical malpractice . . . . MCL 600.5805(5)[1] . . . . However, a wrongful death savings provision applies if the deceased died either before or within thirty days after the period of limitations ended. MCL 600.5852. Under the savings provision, the personal representative of an estate may begin a lawsuit within two years after letters of authority are issued, as long as the lawsuit is brought within three years after the two-year general period of limitations ended. MCL 600.5852 . . . . This creates a maximum time of five years for filing suit, unless the six-month discovery rule in MCL 600.5838(2) applies. [*Waltz v Wyse*, 469 Mich 642, 648-649; 677 NW2d 813 (2004) (citations omitted; footnote added).]

MCL 600.5838a(1) states, in part: "[A] claim based on . . . medical malpractice . . . 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."

Plaintiff's complaint was filed on the basis of a number of allegations contending defendants committed medical malpractice in treating Patricia at Rivergate. The last day defendants treated Patricia before she was transported to the hospital was May 25, 2017. Therefore, the claim accrued on May 25, 2017, because that is the latest day that an "act or omission that is the basis for the claim of medical malpractice" occurred. MCL 600.5838a(1).

Plaintiff,[2] however, asserts that under MCL 600.5805(6), the claim did not accrue until the letters of authority were issued. Under this interpretation, the claim would have accrued on July 26, 2017, when Pokerwinski was appointed personal representative of the estate and the letters of authority were issued. Plaintiff relies upon *Estate of Jesse by Gray v Lakeland Specialty Hosp at Berrien Ctr*, 328 Mich App 142; 936 NW2d 705 (2019) to support its position. The issue for this Court in *Estate of Jesse* was, however, "when letters of authority are 'issued' " for purposes of the savings provision. *Id*. at 144. We concluded "that letters of authority are 'issued' on the date they are signed by the register or the probate judge." *Id*. In addition to this holding, we also stated:

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[1] While *Waltz* refers to MCL 600.5805(5), the statute was later amended by 2002 PA 715. The relevant citation for purposes of this case is MCL 600.5805(6), which articulates the two-year limitation for malpractice claims at the time this claim accrued. However, the most recent version of the statute places the statute of limitations for malpractice claims at MCL 600.5805(8). 2018 PA 183.

[2] Plaintiff incorrectly classifies Patricia as the "plaintiff" in this case. MCL 600.2921 states, in part: "All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section." The next section, MCL 600.2922(2), states: "Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased." In other words, the estate, not the decedent, is the plaintiff in cases involving derivative actions. Accordingly, there is no merit to plaintiff's apparent belief that Patricia is the plaintiff because this action should have been, and was, brought "in the name of" plaintiff, Patricia's *estate*.

> Because a personal representative may not commence an action until he has authority to do so and he receives this authority on the date the probate judge signs letters of authority, it follows that the statutory period of limitations and any saving provisions should begin to run from the date the personal representative has authority to commence an action. [*Id*. at 147-148.]

According to plaintiff, *Estate of Jesse* "reflects that the statute of limitations . . . does not accrue until the personal representative has received letters of authority." Plaintiff's argument conflates the statute of limitations under MCL 600.5805(6) with the "statutory period of limitations" under MCL 600.5852(1). Indeed, the "statutory period of limitations" referenced in *Estate of Jesse* is the two-year period after the letters of authority are issued in which a personal representative may file suit. *Estate of Jesse*, 328 Mich App at 144-145. This is not, as plaintiff suggests, the two-year statute of limitations under MCL 600.5805(6). Again, a claim for medical malpractice "accrues at the time of the act or omission that is the basis for the claim of medical malpractice," and not when the personal representative is appointed. MCL 600.5838a. Thus, plaintiff's reliance on *Estate of Jesse* is misplaced.

Plaintiff's next argument is premised on the contention defendants did not prove "that the July 26, 2017 letters of authority were effective to support their statute of limitations affirmative defenses." However, this argument ignores plaintiff's involvement in presenting the letters of authority to the trial court. Plaintiff's complaint states, "[p]ursuant to court order, Richard Pokerwinski was appointed Personal Representative of the Estate of Patricia Mashike, deceased, on July 26, 2017." In answering the motions for summary disposition, plaintiff attached as "Exhibit A" copies of the letters of authority appointing Pokerwinski the personal representative. Because plaintiff now claims that the letters were not valid proof of plaintiff's appointment as personal representative of Patricia's estate, it seems plaintiff is attempting to avoid its own contribution to the record. "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Plaintiff's attempt to now invalidate the letters of authority is an impermissible appellate parachute, which we reject.

Moreover, plaintiff's argument ignores the requirements of MCR 2.116(C)(7), which, again, mandates a court to accept "the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor." *Estate of Dale*, 279 Mich App at 682. Thus, the trial court was *required* to accept as true plaintiff's statement that Pokerwinski was appointed "Personal Representative of the Estate of Patricia Mashike, deceased, on July 26, 2017." Consequently, there can be no error where the trial court was required to accept this statement as true. Under MCL 600.5805(6), which articulates the two-year statute of limitations for medical malpractice claims, the claim expired on May 25, 2019. Again, plaintiff did not file suit in this case until January 3, 2020. A straightforward application of the statute of limitations shows that plaintiff's claim was not timely because it was filed over six months after the statute of limitations expired.

Yet, a claim may be nonetheless timely if it meets the criteria of the savings provision of MCL 600.5852. As *Waltz* describes, a plaintiff may apply the savings provision of MCL 600.5852 if "the deceased died either before or within thirty days after the period of limitations ended."

Waltz, 469 Mich at 648. Clearly, that provision is applicable in this case because Patricia died on May 30, 2017, five days after the claim accrued. As such, a plaintiff "may begin a lawsuit within two years after letters of authority are issued, as long as the lawsuit is brought within three years after the two-year general period of limitations ended." *Id*. at 648-649. What is problematic for plaintiff is the failure to meet the former requirement, necessitating that the suit is filed "within two years after the letters of authority are issued." *Id*. The letters of authority in this case were issued on July 26, 2017. For the savings provision to apply, plaintiff should have filed the complaint by July 26, 2019. *Id*. But, again, plaintiff did not file suit until January 3, 2020. Consequently, the savings provision does not apply because the date of filing exceeds the provision's two-year extension.

Plaintiff also argued to the trial court that summary disposition was not appropriate because "the permissive two-year filing period of MCL 600.5852(1) should be interpreted as a separate limitations period allowing for tolling in the [notice of intent to file a claim (NOI)] period." It seems plaintiff believed the "separate limitations period" of MCL 600.5852(1), along with tolling under MCL 600.5856(c), makes the claim timely. This argument is fundamentally incorrect.

Our Supreme Court's decision in *Waltz* answers the question of whether "MCL 600.5852(1) presents a separate limitations period," stating:

> The plain language of [MCL 600.]5852 wholly supports our conclusion that it is not itself a "statute of limitations."
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> By its own terms, [section] 5852 is operational only within the context of the separate "period of limitations" that would otherwise bar an action. Section 5852 clearly provides that it is an exception to the limitation period, allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired. [*Waltz*, 469 Mich at 651.]

Under *Waltz*, the savings provision is not a limitations period, and, instead, is considered "an exception to the limitation period." *Id*.

The question then becomes whether the claim may be tolled under MCL 600.5856(c). The statute only permits tolling where "[a]t 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." MCL 600.5856(c). In other words, tolling does not apply if the statute of limitations expired before the end of the notice period. Plaintiff notified defendants of its intent to file suit on July 9, 2019. Once more, the statute of limitations expired on May 25, 2019. Consequently, tolling does not apply to this case because tolling is only permitted where the statute of limitations expired during the notice period. MCL 600.5856(d). Here, the statute of limitations expired on May 25, 2019, some months *before* the notice period began.

Plaintiff's claim that "the NOI tolling period applies" to the savings provision was rejected by *Waltz*, which explains that tolling can only be applied against limitations periods, which the savings provision was not. *Waltz*, 469 Mich at 650. Specifically, the Court stated:

> Section 5856(d),[3] by its express terms, tolls only the applicable "statute of limitations or repose." As we recently stated . . . the wrongful death provision, [section] 5852, "is a saving statute, not a statute of limitations." See also *Lindsey v Harper Hosp*, [455 Mich 56, 64-65; 564 NW2d 861 (1997)], in which we explained that [section] 5852, as "the statute of limitations saving provision" and an "exception to the statute of limitations," operated "to suspend the running of the statute until a personal representative is appointed to represent the interests of the estate." [*Id*. (footnote added).]

In other words, tolling can only apply against statutes of limitations. *Id*. Therefore, tolling cannot apply against the savings provision because the savings provision is not a statute of limitations. *Id*. Consequently, there is no merit to plaintiff's argument on this point.[4]

In sum, neither the savings provision under MCL 600.5852, nor tolling under MCL 600.5856(c) apply to the facts of the case. Consequently, the claim was subject to a straightforward application of the statute of limitations under MCL 600.5805(6), which, as discussed, expired before plaintiff filed the complaint. Therefore, the trial court did not err in granting defendants' motions for summary disposition under MCR 2.116(C)(7) because the claim was time-barred.

Despite the above, plaintiff lastly argues that MCL 600.2301 "applies" in this case and therefore plaintiff should have been able to amend the complaint. Though not explicitly stated, it seems plaintiff made this argument on the basis of the belief that there should be permission to amend the date the complaint was filed. This belief is incorrect.

MCL 600.2301 states:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

Under its plain language, MCL 600.2301 only applies to actions that are "pending." "A proceeding cannot be pending if it was time-barred at the outset." *Driver v Naini*, 490 Mich 239, 254; 802 NW2d 311 (2011). Again, plaintiff's claim was time-barred under the statute of limitations at MCL 600.5805(6) and neither the savings provision nor tolling apply. See discussion, *supra*. Thus, plaintiff's claim was never considered a "pending" action because, as stated in *Driver*, it

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[3] After *Waltz* was decided, the referenced statute, MCL 600.5856(d), was amended and the relevant language is now at MCL 600.5856(c). 2004 PA 87.

[4] Plaintiff's argument on appeal asking this Court to "overrule" Supreme Court precedent contrary to plaintiff's position is an impossible task because "[t]he Court of Appeals is bound to follow decisions by this Court except where those decisions have clearly been overruled or superseded." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016).

was time-barred at the outset. See also *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 92; 869 NW2d 213 (2015) (concluding that MCL 600.2301 may not be used to rescue a case that is barred by the statute of limitations). Therefore, the trial court did not err in declining plaintiff's request to amend the complaint.

The trial court also did not err in denying plaintiff's motion for reconsideration. A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006) (citation omitted).

> Ordinarily, a trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided. But the trial court also has the discretion to give a litigant a "second chance" even if the motion for reconsideration presents nothing new. [*Yoost*, 295 Mich App at 220 (citations omitted).]

Plaintiff argues the trial court incorrectly denied the motion for reconsideration because the trial court did not consider the effects of our Supreme Court's decisions in *Driver*, 490 Mich 239 and *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009). Plaintiff also argues the trial court abused its discretion because it did not analyze its obligations under MCL 600.2301, allowing a party to amend a pending matter. We reject each of these arguments.

Plaintiff's first argues the trial court abused its discretion in denying the motion for reconsideration because *Driver*, 490 Mich 239 and *Bush*, 484 Mich 156, which were decided after *Waltz*, support plaintiff's position that the complaint was timely filed. Plaintiff's motion for reconsideration argued that *Driver* and *Bush* overruled *Waltz*, and that *Driver* and *Bush* stood for the proposition that the two-year savings provision under MCL 600.5852(1) commences when a plaintiff issues a NOI to a defendant. *Driver* and *Bush* did not "overrule" *Waltz* as plaintiff suggests. Further, neither case determined that the two-year provision under MCL 600.5852(1) begins when a NOI is issued.

The question presented before our Supreme Court in *Bush* was whether "a defect in a timely mailed notice of intent (NOI), provided to a medical malpractice defendant pursuant to MCL 600.2912b, precludes the tolling of the statute of limitations on a plaintiff's medical malpractice claim." *Bush*, 484 Mich at 160. In answering this question, our Supreme Court held, "[MCL 600.5856(c)], makes clear that the question whether tolling applies is determined by the timeliness of the NOI. Thus, if an NOI is timely, the statute of limitations is tolled despite the defects therein." *Id*. at 161.

In *Driver*, the Court questioned:

> [W]hether a plaintiff is entitled to amend an original notice of intent (NOI) when adding a nonparty defendant to a pending action pursuant to this Court's holding in *Bush v Shabahang*, [484 Mich at 156], and MCL 600.2301, so that the amended NOI relates back to the original filing for purposes of tolling the statute of limitations. [*Driver*, 490 Mich at 242.]

The Court found "a plaintiff is not entitled to amend an original NOI to add nonparty defendants so that the amended NOI related back to the original filing for purposes of tolling the statute of limitations." *Id*. at 242-243.

The trial court did not abuse its discretion in declining to consider plaintiff's cited cases of *Driver* and *Bush*, because neither case is relevant here. As noted, *Bush* only applies to "a timely mailed notice of intent." *Bush*, 484 Mich at 160. Again, the NOI in this case was not timely because the statute of limitations expired *before* plaintiff filed the notice of intent. See discussion, *supra*. Therefore, *Bush*'s permissive amendment structure does not apply in this case because the NOI in this case was not timely. Similarly, *Driver* is inapplicable to this case because the question in *Driver* was whether the tolling provision of MCL 600.5856(c) applied to the addition of nonparty defendants. *Driver*, 490 Mich at 242-243. The issue in *Driver* is not relevant to this case—indeed, plaintiff makes no argument regarding the tolling provision's applicability to the addition of nonparty defendants.

Further, there is no merit to plaintiff's contention that *Bush* and *Driver* "overruled" *Waltz*—while, *Bush* and *Driver* clarify the analytical structure of derivative medical malpractice claims, neither case overrules *Waltz*. See e.g., *Pohutski v Allen Park*, 465 Mich 675, 695; 641 NW2d 219 (2002) ("This Court has overruled prior precedent many times in the past. In each such instance the Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change."). Instead, *Bush* and *Driver* are properly characterized as contextualizing, rather than overruling, *Waltz*. Because neither *Bush* nor *Driver* is applicable to this case, and because these cases did not "overrule" *Waltz*, the trial court did not abuse its discretion when it declined to consider these cases.

Plaintiff next argues the trial court abused its discretion when it did not address plaintiff's argument that, under MCL 600.2301, the trial court was obligated to allow plaintiff to amend the complaint to an earlier filing date because the amended filing date did not affect defendants' "substantial rights." This argument, too, holds no merit. As discussed, the amendment allowance under MCL 600.2301 only applies to pending actions. "A proceeding cannot be pending if it was time-barred at the outset." *Driver*, 490 Mich at 254. This case was "time-barred at the outset" because the two-year statute of limitations had expired and neither the tolling nor the savings provisions applied. See discussion, *supra*. Therefore, the trial court did not abuse its discretion in rejecting plaintiff's argument regarding the ability to amend the complaint.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly