STATE OF MICHIGAN

COURT OF APPEALS

NANCY PITTMAN and JOHN PITTMAN, JR., Plaintiffs-Appellees,	UNPUBLISHED November 1, 2011
v ANTHONY BUTO, D.P.M., Defendant-Appellant.	No. 297348 Washtenaw Circuit Court LC No. 10-000047-NH

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

In this medical malpractice action, defendant appeals by leave granted the trial court's order denying his motion for summary disposition brought pursuant to MCR 2.116(C)(7). We reverse and remand for entry of judgment in favor of defendant.

I. FACTS

On November 22, 2006, defendant performed a bunion osteotomy on plaintiff Nancy Pittman. Ms. Pittman alleged that after the surgery, she developed cellulitis in her left foot, which required several emergency admissions. Plaintiffs alleged that defendant failed to properly diagnose and treat the bunion, and on August 20, 2008, plaintiffs sent defendant a notice of intent (NOI) as a prerequisite to the filing of a medical malpractice claim.

On January 20, 2009, well after the second anniversary of the arising events, but within the tolling period created by the mailing of the NOI, plaintiffs filed their first complaint. Defendant moved for summary disposition, arguing that plaintiffs' NOI was defective. The trial court granted defendant's motion for summary disposition, and on June 12, 2009, the trial court dismissed plaintiffs' complaint without prejudice.

On August 17, 2009, plaintiffs sent defendant an amended NOI and on January 19, 2010, plaintiffs filed the instant complaint. Defendant moved to dismiss this second complaint arguing that it was time barred, MCR 2.116(C)(7). On March 17, 2010, the trial court denied defendant's motion for summary disposition for the reasons stated in plaintiffs' response to defendant's motion. This appeal followed.

II. ANALYSIS

"Appellate review of a motion for summary disposition is de novo." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The evidence is considered in the "light most favorable to the party opposing the motion." *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). "Provided there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, whether a plaintiff's claim is barred by the statute of limitations is a question of law that is reviewed de novo by this Court." *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). "[S]tatutory construction involves questions of law that are reviewed de novo." *Tate*, 249 Mich App at 215.

Medical malpractice claims have a two-year statute of limitations. MCL 600.5805(6). Plaintiffs are required to file a NOI to file a medical malpractice claim and trigger tolling. MCL 600.2912b(1). Plaintiffs mailed defendant the initial NOI on August 20, 2008. Since that NOI was filed within 182 days of the statute of limitations expiration and no complaint was filed within two years of the date of injury, it triggered the one and only tolling period permitted under the statute. *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 10; 704 NW2d 69 (2005) ("Section 2912b(6) prohibits the tacking of successive notice periods to create multiple tolling periods.").[1]

With the filing of plaintiffs' first complaint on January 20, 2009, the limitations period continued to be tolled, MCL 600.5856(a); *Kirkaldy v Rim*, 478 Mich 581, 585; 734 NW2d 201 (2007), but as noted, on June 12, 2009, the trial court dismissed plaintiffs' initial complaint without prejudice. At the time of that dismissal, 94 days remained in the tolling period triggered by the mailing of the NOI and continued by the filing of the initial complaint. Therefore, plaintiffs had until September 14, 2009, to refile their case.

On August 17, 2009, plaintiffs served defendant with an amended NOI, but did not file their second complaint until January 20, 2010, well after expiration of the tolling period on September 14, 2009. Because under *Bush v Shabahang*, 484 Mich 156, 185; 772 NW2d 272 (2009), a defective notice of intent tolls the statute of limitations and a plaintiff may amend the notice without affecting or limiting that initial tolling, plaintiffs could file both their amended NOI and their second complaint prior to September 14, 2009.

Plaintiffs argue that at the time they mailed the amended NOI, the law governing such amendments and their effect on the statute of limitations was unclear and presented a "catch-22." They point out that plaintiffs could not both wait the 182 day notice period from the amended NOI and also file before September 14, 2009. However, as noted, *Bush,* which was decided on July 29, 2009, resolved this issue, holding that the tolling ran from the defective NOI, not the corrective amendment. Moreover, as plaintiffs' first suit would have been untimely without

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[1] This would not be the case if the original complaint had been filed prior to the second anniversary of the arising events since in such a case, the original NOI would not have initiated tolling and a tolling based on the amended NOI would have been the sole tolling. See *Mayberry*, 474 Mich at 7-8 ("[T]he prohibition in § 2912b(6) against tacking only precludes a plaintiff from enjoying the benefit of multiple tolling periods. . . . [I]f the initial notice did not toll the statute of limitations period, there would be no problem of 'successive 182-day periods' that § 2912b(6) prohibits.").

employing the tolling triggered by the initial NOI, plaintiffs had used the sole tolling period afforded to them by the statute. Therefore, the statute of limitations still expired on September 14, 2009, and summary dismissal of plaintiffs' untimely second complaint was proper.

Plaintiffs also cites to Z*wiers v Growney*, 286 Mich App 38, 40; 778 NW2d 81 (2009), to argue that MCL 600.2301 allowed the trial court to "disregard any error or defect in the proceedings if substantial rights are not affected." In *Zwiers*, the plaintiff mistakenly filed the complaint a day early, i.e. still prior to the running of the notice period. *Id*. at 39. Here, plaintiffs' complaint was filed more than four months after the statute of limitations expired. Neither *Bush* nor *Zwiers* held that MCL 600.2301 could bring a time barred claim within the statute of limitations. *Bush*, 484 Mich at 178; *Zwiers*, 286 Mich App at 52. "Statutes regarding periods of limitations are substantive in nature." *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003).

> Statutes of limitation are designed to encourage the rapid recovery of damages, to penalize plaintiffs who have not been assiduous in pursuing their claims, to afford security against stale demands when the circumstances would be unfavorable to a just examination and decision, to relieve defendants of the prolonged threat of litigation, to prevent plaintiffs from asserting fraudulent claims, and to remedy the general inconvenience resulting from delay in asserting a legal right that is practicable to assert. [*Sills v Oakland Gen Hosp*, 220 Mich App 303, 312; 559 NW2d 348 (1996).]

Plaintiffs also argue that MCR 2.118(D) can be used to amend their complaint. However, plaintiffs did not amend a pending complaint, but instead initiated a new suit. Moreover, the rule does not refer to NOI's.

Reversed and remanded for entry of judgment in favor of defendant. Defendant may tax costs, having prevailed in full. MCR 7.219(A). We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray