

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT KOSS, Personal Representative of the
Estate of JOYCE KOSS,

UNPUBLISHED
February 21, 2013

Plaintiff-Appellant,

v

No. 306884
Macomb Circuit Court
LC No. 2011-002677-NH

MOUNT CLEMENS REGIONAL MEDICAL
CENTER, DANIEL COZADD, D.O., RICHARD
REIDY, D.O., TREVOR KLIEBERT, D.O., JOHN
DOE I, and JANE DOE I,

Defendants-Appellees.

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order granting summary disposition to defendants. For the reasons set forth below, we affirm.

The statute of limitations for a medical malpractice wrongful death claim is two years, and that time begins to run when the alleged act or omission occurs. MCL 600.5805(6); MCL 600.5838a(1); *Lipman v William Beaumont Hospital*, 256 Mich App 483, 489-490; 664 NW2d 245 (2003). However, pursuant to MCL 600.5852, an action "may be commenced by the personal representative of a deceased person at any time within 2 years after letters of authority are issued," as long as it is commenced "within 3 years after the period of limitations has run."

Here, the personal representative filed the complaint more than two years after the letters of authority were issued and, therefore, he did not timely commence the action. However, the personal representative argues that the two-year period should have been tolled when he served defendants with his notice of intent to file a claim. Plaintiffs must give health professionals and facilities 182 days notice before filing a medical malpractice lawsuit, MCL 600.5838a(1), and the statute of limitations is tolled during that notice period, MCL 600.5856(c). However, in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), our Supreme Court held that MCL 600.5856 expressly tolls only the applicable "statute of limitations or repose" and, because MCL 600.5852 is a savings provision rather than a statute of limitations, it is not tolled by a notice of intent. This applies to the two-year period after the letters of authority are issued. See *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 574-575; 703 NW2d 115

(2005). Plaintiff argues that *Waltz* was wrongly decided, but a Supreme Court opinion is binding on this Court. *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987). Accordingly, we decline to rule contrary to *Waltz*.

Plaintiff contends that the trial court should have granted his motion to amend the complaint to add a claim of fraudulent concealment. This would have tolled the statute of limitations until two years after he discovered or should have discovered the claim or the identity of a person liable, MCL 600.5855. Motions to amend should be granted when justice requires. MCL 2.118(A)(2). Fraudulent concealment requires an affirmative act or misrepresentation intended to prevent discovery. *Phinney v Perlmutter*, 222 Mich App 513, 562-563; 564 NW2d 532 (1997). Destroying or altering medical records with the intent to hide malpractice, cause of death, or the identity of liable medical personnel could constitute a sufficient fraudulent act. See *id.*

However, a cause of action is not fraudulently concealed if the plaintiff knew all of the essential elements of the potential cause of action. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 644, 646; 692 NW2d 369 (2004). Here, plaintiff did not allege that he received any new information that was unavailable earlier. Rather, he alleged that he identified the cause of action when a physician reviewed the medical records, with no explanation about why they were not reviewed sooner. The documents plaintiff received appear to identify all medical personnel involved in the decedent's care, including the emergency physicians, the trauma surgeon, a nurse who administered morphine, and the persons who prepared the records. Plaintiff has not shown that defendant concealed any identities and that this prevented him from filing a claim, nor has he identified anyone who is liable for malpractice but was excluded from the medical records. Simply stated, plaintiff did not sufficiently allege that defendants committed fraudulent concealment that prevented him from discovering the existence of the claim or identities of persons liable. MCL 600.5855. Therefore, the trial court did not err when it denied plaintiff's motion to amend the complaint and correctly ruled that the cause of action is barred by the statute of limitations.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad