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STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF KINZIE RENEE CARLSEN.

MINDY CARLSEN and ALLEN CARLSEN, Co-Personal Representatives of the ESTATE OF KINZIE RENEE CARLSEN,

Appellants,

v

SOUTHWEST MICHIGAN EMERGENCY SERVICES, PC,

Appellee.

FOR PUBLICATION
December 16, 2021
9:00 a.m.

No. 352026
Van Buren Probate Court
LC No. 2012-001118-DE

Before: K. F. KELLY, P.J., and JANSEN and RICK, JJ.

JANSEN, J.

Petitioners, as co-personal representatives of the estate of their daughter, appeal by leave granted[1] the probate court order denying their petition to strike the notice of contingent claim filed by respondent Southwestern Michigan Emergency Services, PC (SWMES). The contingent claim was for prevailing party costs and fees requested, which respondent requested under MCR 2.625(A)(1), after a jury in an underlying medical malpractice action rendered a verdict of no cause of action in respondent's favor. The sole issue on appeal is whether respondent presented its contingent claim within four months after it arose, as required by MCL 700.3803(2)(b). We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises from the Kalamazoo Circuit Court's award of taxable costs to respondent after it prevailed in a medical malpractice case based on the death of seven-month-old Kinzie

[1] *In re Carlsen Estate*, 955 NW2d 896 (2021).

Renee Carlsen, petitioners' daughter. Kinzie died at Bronson Methodist Hospital of staphylococcal sepsis and meningitis. Petitioners, as co-personal representatives of Kinzie's estate, filed a medical malpractice complaint against several defendants involved in Kinzie's medical treatment, including respondent.[2] By the time the case reached trial, the only remaining defendant was respondent. On June 4, 2019, a jury returned a verdict of no cause of action in respondent's favor.[3]

As the prevailing party in the medical malpractice case, respondent moved in the trial court for costs and fees under MCR 2.625(A)(1), and filed a notice of contingent claim in the probate court. Petitioners petitioned the probate court to strike respondent's notice of contingent claim, arguing that MCL 700.3803(2)(b) barred respondent's claim because it had not been filed within four months after it arose. Petitioners initially argued that respondent's contingent claim arose after the September 4, 2012 publication of notice to the estate's creditors. Ultimately, petitioners contended that respondent's contingent claim arose on January 25, 2013, when respondent had been served the estate's notice of intent to sue, and knew that it might have a claim for costs and fees. Accordingly, the four-month period during which respondent was required to present a contingent claim expired on May 25, 2013. In addition, petitioners argued that respondent knew or should have known that it had a contingent claim by July 25, 2013, when the estate filed its medical malpractice complaint, or at the latest, September 10, 2013, when respondent answered the complaint, and requested costs and fees.

Respondent's position was that it did not have a valid contingent claim until it won the medical malpractice suit, and the circuit court entered judgment of no cause of action. Respondent presented its notice of contingent claim to the probate court. After the Kalamazoo Circuit Court granted its motion for prevailing party costs and ordered the estate to pay in excess of $166,000, the contingency disappeared, and respondent presented a notice of claim to the court a week after entry of the costs award.

Alternatively, respondent noted that the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., provides that written notices of claims may be presented to the personal representative of the estate or filed with the probate court. If filing the medical malpractice complaint gave rise to a contingent claim, then respondent's answer, indicating that it thought the claim was frivolous and requesting costs and fees, was sufficient to present notice of a contingent claim to the personal representatives.

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[2] SWMES is a corporation that runs Bronson's emergency room. *Estate of Carlsen v Southwestern Mich Emergency Servs, PC*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351159); slip op at 2 n 2.

[3] Petitioners appealed this decision as of right. This Court issued a published decision affirming in part, reversing in part, and remanding for further proceedings. *Estate of Carlsen*, ___ Mich App at ___ (Docket No. 351159). Relevant to the instant appeal, this Court affirmed the trial court's award of taxable costs to SWMES, but reversed the amount of some of the costs awarded and remanded for an evidentiary hearing on others. *Id*. at __; slip op at 16.

The probate court found that respondent's contingent claim arose when the jury returned its verdict of no cause of action on June 14, 2019, and ruled that respondent's July 1, 2019 notice of contingent claim was timely. The probate court further found that the contingency was removed when the Kalamazoo Circuit Court issued its order granting respondent's request for taxable costs, and that respondent filed a notice of claim within 14 days after that order was entered. The court pronounced itself satisfied that this met the definition of "claim" in MCL 700.1103(g),[4] and issued a corresponding order denying the petition to strike.

Petitioners filed, and the probate court denied, a motion for reconsideration, and petitioners sought leave to appeal in this Court. This Court denied petitioners' application for leave to appeal "for lack of merit in the grounds presented." *In re Carlsen Estate*, unpublished order of the Court of Appeals, entered April 24, 2020 (Docket No. 352026). Petitioners moved for reconsideration of this Court's order, arguing that, on the basis of recent precedent,[5] it was improper to deny an interlocutory appeal "for lack of merit in the grounds presented" because doing so was, in effect, a " 'peremptory affirmance' and operate[d] as an order on the merits." Petitioners' motion for reconsideration was denied. *In re Carlsen Estate*, unpublished order of the Court of Appeals, entered May 28, 2020 (Docket No. 352026). Subsequently, petitioners sought leave to appeal this Court's decision in the Michigan Supreme Court. In lieu of granting leave, the Supreme Court remanded the case to this Court for consideration as on leave granted. *In re Carlsen Estate*, 955 NW2d 896 (2021).

II. ANALYSIS

Respondent's claim arose when the jury rendered a no-cause verdict in favor of respondent in the underlying medical malpractice case. Respondent presented its notice of contingent claim in the probate court less than a month later. Because respondent presented its contingent claim for prevailing party costs within four months after the claim arose, the probate court did not err by denying petitioners' petition to strike.

This Court reviews de novo whether a probate court properly interpreted and applied the relevant statute. See *In re Bibi Guardianship*, 315 Mich App 323, 328; 890 NW2d 387 (2016). In

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[4] Under MCL 700.1103(g), "claim"

> includes, but is not limited to, in respect to a decedent's or protected individual's estate, a liability of the decedent or protected individual, whether arising in contract, tort, or otherwise, and a liability of the estate that arises at or after the decedent's death or after a conservator's appointment, including funeral and burial expenses and costs and expenses of administration. Claim does not include an estate or inheritance tax, or a demand or dispute regarding a decedent's or protected individual's title to specific property alleged to be included in the estate.

[5] *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 144; 946 NW2d 812 (2019) (explaining that, although this Court may dismiss an application for leave to appeal from a final order for "lack of merit on the grounds presented," when it comes to interlocutory applications for leave to appeal, this Court generally does not express an opinion on the merits).

In re Estate of Weber, 257 Mich App 558, 561; 669 NW2d 288 (2003), this Court explained the primary goal of statutory interpretation as follows:

> The primary goal when interpreting statutes is to ascertain and give effect to the intent of the Legislature. Statutory language should be construed reasonably and in accord with the purpose of the statute. If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. If a term is not defined in a statute, a court may consult dictionary definitions. [Quotation marks and citations omitted.]

Upon appointment, a personal representative of an estate must publish notice notifying the creditors of the estate to present their claims against the estate within four months, or be forever barred. MCL 700.3801(1). Generally, a claim against a decedent's estate that arose before the decedent's death is barred unless the creditor gave notice of the claim within four months of the published notice. MCL 700.3803(1)(a). Before this Court is a question of first impression that asks when a contingent claim arises under MCL 700.3803(2). Specifically, the parties dispute whether respondent presented its notice of contingent claim within four months after the claim arose.

Regarding claims against a decedent's estate that arise after the decedent's death, MCL 700.3803(2) provides:

> *A claim against a decedent's estate that arises* at or *after the decedent's death*, including a claim of this state or a subdivision of this state, *whether* due or to become due, *absolute or contingent*, liquidated or unliquidated, or based on contract, tort, or another legal basis, *is barred* against the estate, the personal representative, and the decedent's heirs and devisees, *unless presented within 1 of the following time limits*:
>
> (a) For a claim based on a contract with the personal representative, within 4 months after performance by the personal representative is due.
>
> (b) For a claim to which subdivision (a) does not apply, *within 4 months after the claim arises* or the time specified in subsection (1)(a), whichever is later. [Emphasis added.]

There is no dispute that respondent's claim for costs arose after Kinzie's death, and that claim had to be presented "within 4 months after the claim" arose, or else be barred. *Id.*

Although the EPIC defines "claim" in MCL 700.1103(g), the EPIC does not define "contingent claim" or "arises." The Michigan Supreme Court has defined "contingent claim" as "one where the liability depends upon some future event which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability." *In re Jeffers' Estate*, 272 Mich 127, 136; 261 NW 271 (1935); see also *Black's Law Dictionary* (11th ed) (defining "contingent claim" as "[a] claim that has not yet accrued and is dependent on some future event that may never happen"). As to "arises," *Black's Law Dictionary* (11th ed) lists modern usages of "arise," the root of "arises," as "[t]o originate; to stem (from) <a federal claim arising under the U.S. Constitution>. 2. To result (from) <litigation routinely arises from such accidents>.

3. To emerge in one's consciousness; to come to one's attention <the question of appealability then arose>." See also *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "arise" as 1: "[t]o get up: RISE 2a: to originate from a source b: to come into being or to attention 3: ASCEND ***syn*** see spring"). The parties fundamentally agree on the definitions of "contingency" and "contingent claim," but rely on different definitions for "arise." Petitioners stress the definition, "to emerge in one's consciousness," while respondent relies on the definition quoted by our Supreme Court in *People v Johnson*, 474 Mich 96, 100; 712 NW2d 703 (2006) (quoting the 1997 edition of *Random House Webster's College Dictionary* definition of "arise" as "to result; spring or issue").[6]

Petitioners contend that respondent's contingent claim arose in 2013, when petitioners filed the underlying medical malpractice complaint. As its answer to the complaint shows, that was when respondent first contemplated that it could win the case and that it might be entitled to prevailing party costs. Petitioners contend that the same conclusion results from application of the "fair contemplation" test, a test used in bankruptcy courts to determine whether a creditor's claim arose before the potential debtor filed a bankruptcy petition. Petitioners urge this Court to adopt and apply the fair contemplation test in the present case. We decline to do so. Federal bankruptcy law is not binding on this Court, *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007), and petitioners make no argument that the language of the bankruptcy statutes is similar to the language of the relevant provisions of the EPIC.

Petitioners' position fails to identify a proper factual basis to support its conclusion that respondent's contingent claim arose in 2013. A contingent claim must have a factual basis that is susceptible to proof. See *Clark v Davis*, 32 Mich 154, 159 (1875) (indicating that claimants who cannot prove their claims as a debt owed can present their contingent claims to the probate court, along with the proper proofs). Even application of the "fair contemplation" test requires an underlying act, or factual basis, that gives rise to the "fair contemplation" that one has a claim. See *Sanford v Detroit*, opinion of the United States District Court for the Eastern District of Michigan, issued December 4, 2018 (Case No. 17-13062); slip op at 7 (indicating that the underlying facts giving rise to the plaintiff's claim against the city of Detroit and certain Detroit police officers were his personal knowledge and experience that his confession was falsely obtained). A party's "contemplation" is "fair" because it arises from discernable facts that would

[6] Respondent relies on *Lumley v Bd of Regents for Univ of Mich*, 215 Mich App 125; 544 NW2d 692 (1995), to argue that, in the present case, "arises" is synonymous with "accrues," and, therefore, its claim first "accrued" when the jury returned its verdict. This Court declines to equate "arises" with "accrues" for purposes of MCL 700.3803(2). As this Court observed in *Lumley*, the use of a word in a statute "presents a question of legislative intent." *Lumley*, 215 Mich App at 129. Among the Legislature's purposes for the EPIC is "[t]o promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors." MCL 700.1201(c). In some instances, a contingent claim may arise for purposes of MCL 700.3803 before it accrues to the point that an action can be alleged in a complaint. MCL 700.3810 addresses arrangements that can be made to provide for the future payment of contingent claims, consistent with the goals of the EPIC.

support a claim, even if the claim depends on a future event that might not happen (such as a convicted criminal's exoneration, as in *Sanford*). When arguing that respondent knew or should have known that it had a contingent claim in 2013, petitioners do not point to any discernable, underlying facts to support such a claim, other than respondent's assessment of the medical malpractice complaint. But whatever confidence respondent had that it might prevail and that petitioners' claims were frivolous, these are not facts of the sort that support a contingent claim. It is the jury that provided the factual basis for respondent's claim for prevailing party costs.

Respondent's claim for taxable costs arose under MCR 2.625(A)(1) ("Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action."). The factual basis for respondent's claim against the estate of taxable costs was the June 14, 2019 jury verdict of no cause of action in favor of respondent. Respondent filed its notice of contingent claim approximately two weeks after the jury rendered its verdict, well within the time limit set by MCL 700.3803(2)(b). Respondent's claim was contingent because the trial court had the discretion to award prevailing party costs or to "direct[] otherwise." MCR 2.625(A)(1). Because respondent filed its notice of contingent claim within four months after the claim first arose, the probate court did not err by denying the petition to strike.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Michelle M. Rick