STATE OF MICHIGAN

COURT OF APPEALS

ALLEN M. HARTMAN, Personal Representative of the Estate of MARY LOU HARTMAN,

Plaintiff-Appellant,

v

PORT HURON HOSPITAL, FORREST BRYAN FERNANDEZ, M.D., and JALAL UD-DIN AKBAR, M.D.,

Defendants-Appellees.

UNPUBLISHED
September 6, 2007

No. 257536
St. Clair Circuit Court
LC No. 02-000445-NH

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff Allen M. Hartman,[1] acting as personal representative of the estate of his wife Mary Lou Hartman, appeals as of right the trial court order granting summary disposition in favor of defendants under MCR 2.116(C)(7). We affirm.

Plaintiff brought this action on February 19, 2002, alleging that defendants breached the required standard of care in treating his wife following her admission to Port Huron Hospital on January 25, 1999. Specifically, plaintiff asserts that if the defendant physicians had properly interpreted certain diagnostic tests performed at defendant hospital and taken other appropriate diagnostic measures in light of his wife's prior history, a proper diagnosis would have been made at an earlier date and his wife would not have suffered a subsequent stroke that lead to her death.

Generally, malpractice actions must be brought within two years of the date of accrual to be timely. MCL 600.5805(6);[2] *Omelenchuk v Warren*, 461 Mich 567, 569; 609 NW2d 177

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[1] Allen Hartman died during the pendency of this action in the trial court. As will be discussed further herein, a substitution of plaintiffs was sought, but the trial court denied that motion.

[2] MCL 600.5805 was amended by 2002 PA 715, which redesignated subsection (5) as subsection (6).

(2000), overruled on other grounds by *Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004). Notwithstanding that limitation, for wrongful death actions such as this one, MCL 600.5852 allows a personal representative two years from the issuance of letters of authority to file a medical malpractice claim, so long as the claim is not filed more than three years after the statute of limitations has run. Further, the running of the controlling statute of limitations or repose will be tolled for 182 days if the plaintiff serves a notice of intent to file suit on the prospective defendants within 182 days of the time that the statute of limitations or repose would otherwise expire. MCL 600.2912b(1); MCL 600.5856(c); *Omelenchuk*, *supra* at 575.

In this case, plaintiff's claim accrued no later than February 16, 1999, when his wife was transferred from defendant hospital to Henry Ford Hospital. See MCL 600.5838a(1). Accordingly, under the basic statute of limitations, plaintiff's claim had to be filed by February 16, 2001. MCL 600.5805(6). However, because the decedent died on July 13, 1999, before the basic period of limitations had run, her personal representative had two years from the date letters of authority were issued to him on August 31, 1999 to file suit on behalf of the estate. MCL 600.5852. While plaintiff served defendants with a notice of intent within two years, on August 21, 2001, plaintiff did not file a complaint until February 19, 2002.

Defendants moved for summary disposition asserting that plaintiff's claims were time-barred under our Supreme Court's holding in *Waltz* that because the notice tolling provision "tolls only the applicable 'statute of limitations or repose,"' it did not serve to toll the running of the wrongful death saving provision. *Waltz*, *supra* at 650-651, quoting MCL 600.5856(d) (now subsection [c]).[3] The trial court agreed that the claim was time-barred under *Waltz* and accordingly granted summary disposition in favor of defendants under MCR 2.116(C)(7).

On appeal, plaintiff first contends that the trial court erred by applying *Waltz* retroactively. Our Court has squarely rejected this argument. *Mullins v St Joseph Mercy Hosp,* 271 Mich App 503, 507-510; 722 NW2d 666 (2006). *Waltz* applies here and the notice tolling provision did not toll the running of the wrongful death saving provision.

Plaintiff also attempts to distinguish *Waltz* on the basis that, in *Waltz*, more than five years had elapsed from the accrual of the plaintiffs' claims before suit was filed. Plaintiff's argument is predicated on a misconception of how the two- and three-year periods mentioned in the wrongful death saving provision operate.

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which 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. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run. [MCL 600.5852.]

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[3] MCL 600.5856 was amended by 2004 PA 87, which redesignated subsection (d) as subsection (c).

Contrary to plaintiff's assertion, the periods referred to in this statute are not aggregated to create a five-year period. As this Court has explained, the wrongful death saving provision

> does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can shorten the two-year window during which a personal representative may file suit, it cannot lengthen it. [*Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 573 n 16; 703 NW2d 115 (2005).]

Here, plaintiff's claim accrued no later than February 16, 1999. The decedent's husband was appointed personal representative on August 31, 1999. The two-year saving period of the wrongful death saving provision expired on August 31, 2001. The three-year ceiling does not change that result. Accordingly, because the complaint was filed on February 19, 2002, it was time-barred.

Plaintiff also cites *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004) for the proposition that this Court should consider the equities of this case and use its power under MCR 7.216(A)(7) to allow this case to proceed. Again, we disagree; this argument has been squarely rejected in *Ward v Siano*, 272 Mich App 715, 719-720; 730 NW2d 1 (2006), lv pending (2007).

Plaintiff next asserts that the trial court erred by denying his motion for substitution of plaintiffs following Allen Hartman's death on February 15, 2004, about two years after the untimely complaint was filed. He asserts that had the trial court properly granted this motion and appointed a successor personal representative, the complaint would have been timely under *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003).[4]

However, at the time the motion was made, the previously filed complaint was properly subject to summary disposition, as discussed above. Even had the trial court allowed plaintiff to substitute into the untimely action, such substitution could not transform the previous personal representative's untimely complaint into a timely one. *Mullins v St Joseph Hosp,* 269 Mich App 586, 591; 711 NW2d 448, aff'd in part 271 Mich App 503 (2006); *McMiddleton v Bolling,* 267 Mich App 667, 671-674; 705 NW2d 720 (2005). The trial court's order granting defendants summary disposition constitutes an adjudication on the merits of plaintiff's claims, and res judicata bars any further action on behalf of the estate against defendants. *Washington v Sinai Hosp of Greater Detroit,* 478 Mich 412; 733 NW2d 755 (2007). Thus, plaintiff would have received no benefit from any substitution of a successor personal representative into the case and suffered no prejudice from the trial court's denial of the motion.

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[4] To the extent that this argument is predicated on the asserted five-year window in which to file, plaintiff's argument fails for the reasons set out in *Farley, supra* at 273 n 16.

We affirm.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood