

STATE OF MICHIGAN
COURT OF APPEALS

KATHY D. DALLAIRE, Individually & as
Personal Representative of the Estate of GREGG
ALAN DALLAIRE,

Plaintiff-Appellant,

v

TREATMENT WORKS, INC. d/b/a MICHIGAN
TREATMENT (TX) WORKS, INC. a/k/a
MICHIGAN ACCESS CENTER, INC., NDUBISI
EZE IZIMA, KAREN M. MOORE, VERONA
MORTON, IMOGENE RUFFIN, and
ALEKSANDRA JASINSKI,

Defendants-Appellees.

UNPUBLISHED
December 18, 2012

No. 308028
Ingham Circuit Court
LC No. 11-000720-NH

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition under MCR 2.116(C)(7) and (C)(8) on the ground that her action was barred by the statute of limitations and the doctrine of res judicata. We affirm.

This action arises from the July 6, 2006 death of plaintiff's decedent who allegedly died of a Methadone overdose while an outpatient in a substance abuse treatment program at Treatment Works. Plaintiff was appointed the personal representative of the decedent's estate on November 28, 2006, and filed her notice of intent to file a claim on September 11, 2008. An initial complaint, filed on November 14, 2008, was summarily dismissed because plaintiff failed to wait the statutorily required 182 days after serving the notice of intent before filing her complaint. Subsequently, on March 18, 2009, plaintiff filed an amended complaint asserting claims of "ordinary negligence," as well as medical malpractice. These claims were also summarily dismissed by the trial court on the ground that they were all medical malpractice claims and were barred by the statute of limitations. Plaintiff appealed the dismissal, and this Court agreed with the trial court that plaintiff's "allegations sound exclusively in medical malpractice and not ordinary negligence." *Estate of Dallaire v Treatment Works, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 292971), slip op at 6. Further, this Court held that "all of the alleged medical malpractice claims

expired on November 28, 2008;” thus, the trial court properly held that plaintiff’s action was barred by the statute of limitations. *Id.*, slip op at 7. Thereafter, our Supreme Court denied plaintiff’s application for leave to appeal. *Dallaire v Treatment Works, Inc*, 489 Mich 973; 798 NW2d 778 (2011).

On July 5, 2011, plaintiff filed another complaint which is the subject of this appeal. Count I was a “common law negligence (wrongful death)” claim premised on the decedent’s death from an overdose of Methadone. Count II was a “Drug Dealer Liability Act” claim premised on defendants’ alleged “illegal marketing” of Methadone. Count III was a claim alleging violations of the Michigan Consumer Protection Act and asserted that defendants engaged “in the unlawful, improper, and unlicensed dispensation of Methadone that killed the Decedent.” Count IV asserted a breach of warranties claim and alleged that the “Methadone and/or the dispensation service in quality and/or quantity did not perform as warranted and represented in that it killed the Decedent.” Counts V and VI were fraudulent and innocent misrepresentation claims premised on the dispensing of Methadone. Counts VII and VIII were “concert of action” and “civil conspiracy” claims premised on the dispensing of Methadone to the decedent. Count IX was a medical malpractice claim related to the dispensing of Methadone to the decedent.

Defendants responded to plaintiff’s complaint with a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). Defendants argued that the gravamen of plaintiff’s most recent complaint sounded exclusively in medical malpractice because the claims were premised on the professional relationship the decedent had as a patient in defendants’ substance abuse program which resulted in the Methadone treatment that purportedly caused his death. Thus, as this Court and our Supreme Court held, the claims were time-barred. That is, the claims accrued on July 6, 2006, when the decedent died. Under the wrongful death saving provision, the personal representative, who was appointed on November 28, 2006, had until November 28, 2008, to file a medical malpractice lawsuit. Because this medical malpractice lawsuit was filed after that date, it was barred by the statute of limitations. Further, defendants argued, to the extent that any of plaintiff’s “new” claims were not medical malpractice claims, those claims were barred by the doctrine of res judicata because they could have been raised in the previously dismissed lawsuit.

On December 22, 2011, the trial court rendered its well-reasoned opinion and order dismissing plaintiff’s complaint pursuant to MCR 2.116(C)(7) and (C)(8). First, the trial court held that all of plaintiff’s claims sounded exclusively in medical malpractice because they were premised on the “appropriate use of Methadone in an outpatient facility.” Second, the trial court noted that the cause of action accrued on July 6, 2006, but plaintiff received letters of authority on November 28, 2006; thus, pursuant to the wrongful death saving provision, plaintiff had until November 28, 2008 to file the lawsuit on behalf of the decedent’s estate. Because plaintiff failed to file a complaint within the required time, the action was time-barred. Further, the trial court held that the doctrine of res judicata operated to bar plaintiff from commencing this action. The court noted that “when this Court dismissed Plaintiffs’ action pursuant to (C)(7) and (C)(8), it made a final decision on the merits,” privity existed between the parties, and all of the theories of liability brought in this action could have been brought in the previous lawsuit because they derived from the same transaction. Thus, plaintiff’s complaint was also barred by res judicata. This appeal followed.

Plaintiff first argues that her lawsuit is not barred by the statute of limitations because the wrongful death saving provision, MCL 600.5852, did not require that she commence this action within two years after letters of authority were issued; the statute provides that such action “may be commenced” within two years after letters of authority were issued. We disagree.

We review de novo a trial court’s decision on a motion for summary disposition premised on the statute of limitations, as well as issues of statutory interpretation. *Farley v Advanced Cardiovascular Health Specialists PC*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005).

The wrongful death saving provision, MCL 600.5852, provides:

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.

Plaintiff argues that “she was neither obligated nor required to file an action within two years of her appointment as Personal Representative.” Plaintiff is correct in the sense that the wrongful death saving provision does not require a personal representative to file a legal action that survived by law on behalf of the deceased’s estate. However, it does provide that, if the personal representative chooses to file such action, that action must be filed within two years of the appointment “as long as that suit is commenced within three years after the two-year malpractice limitations period expired.” *Farley*, 266 Mich App at 572-573. This Court in *Farley* further explained:

We note that the three-year ceiling in this 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*, 266 Mich App at 573 n 16.]

In this case, the cause of action accrued on July 6, 2006, when the decedent died. Under the wrongful death saving provision, plaintiff, who was appointed personal representative on November 28, 2006, had until November 28, 2008, to file a medical malpractice lawsuit. As we held in our previous opinion on this matter, “all of the alleged medical malpractice claims expired on November 28, 2008.” *Estate of Dallaire*, slip op at 7. Plaintiff filed this lawsuit on July 5, 2011; thus, it was untimely. Plaintiff argues that the *Farley* decision was “wrongly decided.” We do not agree that *Farley* was wrongly decided and we are bound to follow precedent. MCR 7.215(C)(2). Accordingly, the trial court properly dismissed plaintiff’s lawsuit as time-barred by the statute of limitations.

Plaintiff next argues that the trial court improperly applied the doctrine of res judicata to bar claims that were not raised in her previous lawsuit. We disagree. The application of the doctrine of res judicata is a question of law that we review de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

Our Supreme Court has explained the doctrine of res judicata as follows:

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004) (citations omitted).]

To the extent that any of plaintiff's "new" claims are legally viable and are not medical malpractice claims, the prerequisites for the application of res judicata have been met. As discussed above, plaintiff's previous lawsuit was summarily dismissed as untimely and this Court affirmed the dismissal. This dismissal operated as an adjudication on the merits. See MCR 2.504(B)(3); *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 414; 733 NW2d 755 (2007); *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co*, 223 Mich App 559, 563; 567 NW2d 456 (1997). Both actions involved the same parties or their privies. Further, the claims raised in this case arise from the same transaction and could have been raised and resolved in the previous case. Accordingly, the trial court properly dismissed plaintiff's purportedly "new claims" as barred by the doctrine of res judicata.

Affirmed. Defendants are entitled to costs as the prevailing parties. MCR 7.219(F).

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio