

STATE OF MICHIGAN
IN THE SUPREME COURT

PATRICIA A. PAPPAS,
Personal Representative of the Estate
of Florinda C. Pappas, Deceased,

Docket No. 128864

Court of Appeals No. 251144

Macomb County Circuit Court
Case No. 03-2446-NH

Plaintiff-Appellee,

VS

BORTZ HEALTH CARE FACILITIES, INC. and
WARREN GERIATRIC VILLAGE, INC. d/b/a
BORTZ HEALTH CARE OF WARREN,

Defendants-Appellants.

**DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL
IN RESPONSE TO THIS COURT'S ORDER OF OCTOBER 12, 2007**

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ARGUMENT

I.

MCL 600.5851 provides a specific mechanism for determining how long a cause of action may be asserted on behalf of a person who was disabled by insanity until death. Assuming that Florinda Pappas was insane until her death, and assuming, as held by the Court of Appeals, that her insanity warranted the application of the discovery rule in MCL 600.5838a(2), does MCL 600.5851 provide controlling authority because it is the statute most specifically relevant to the circumstances of this case?

This case involves a simple question: what rule governs the determination of the limitations period for plaintiff's cause of action, asserted on behalf of her decedent, Florinda Pappas. This question arises at the intersection of several apparently overlapping rules that prescribe limitations periods and exceptions to the application of those periods. Arriving at the answer requires a determination of the priority among those rules, especially MCL 600.5838a(2) and MCL 600.5851(1).

MCL 600.5851(1) controls here, even if one assumes the so-called "discovery rule" of MCL 600.5838a(2) applies here because Florinda Pappas was insane from the time her claim accrued on March 27, 1997 until her death, more than four years later, on July 13, 2001, and therefore never discovered or could have discovered her claim. MCL 600.5852 provides a specific rule for determining how to define a limitations period for a claim held by a person who was disabled by insanity until death. Because this rule is more specifically tailored to the circumstances of this case than the more general rule in MCL 600.5838a(2), it controls.

This Court's decision in *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007), provides an analytic framework which explains why MCL 600.5851 is the controlling authority here. In *Trentadue*, this Court considered the question whether an extrastatutory discovery rule, which was grounded in the common law, could trump

a statutory rule that directly applied to the specific circumstances of the case. *Id* at 390-391. To answer this question, this Court applied fundamental principles regarding the method for determining the priority of apparently overlapping legal rules. *Id*.

The most fundamental principle regarding the priority among overlapping rules is that the specific always controls over the general. It is axiomatic that, when a circumstance is covered – or appears to be covered – by both a general and specific rule, the specific rule is always controlling. *See Craig v Detroit Pub Schs Chief Executive Officer*, 265 Mich App 572, 575; 697 NW2d 529 (2005) (“[w]hen two statutes conflict, the one that is more specific to the subject matter prevails over the more general statute”); *Livonia Hotel, LLC v Livonia*, 259 Mich App 116, 131; 673 NW2d 763 (2003).

This axiom has been applied to establish a priority among statutes of limitation when it appears that more than one limitations period might apply in a particular case. In *Gebhardt v O’Rourke*, 444 Mich 535; 510 NW2d 900 (1994) this Court considered the application of two different statutory limitations periods. In determining that the more specific statute of limitations was controlling, this Court reasoned that, “where a statute contains a general provision and a specific provision, the specific provision controls.” *Id* at 542; *see also Hawkins v Regional Medical Laboratories, PC*, 111 Mich App 651, 655; 314 NW2d 450 (1979) (“It is well settled that special statutes relating to particular issues and questions control over general law even though, absent the special statute, the general law would be controlling. . . . We hold this rule applies equally in the area of limitations of actions”) (citations omitted), *aff’d* 415 Mich 420; 329 NW2d 729 (1982).

In *Trentadue*, this Court applied these principles about the priority of overlapping legal rules when it considered an apparent overlap between a specific statute and a more general

common law rule. It began its analysis of the relationship between these two rules by pointing out that:

“where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.”

Id at 390 (quoting *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) and *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987)).

Thus, the priority of specific statutes is even more important when the specific statute is part of a comprehensive legislative scheme. When the Legislature decides to create such a scheme, it unequivocally manifests its intent that the scheme should dominate the field. In addition, it manifests its intent that the specifically tailored statutes within the scheme should always control in cases involving the circumstances for which they are tailored.

The *Trentadue* opinion then considered whether the statutes governing the limitations of actions in the Revised Judicature Act constitute this kind of comprehensive, legislative scheme. The answer was clear. This Court pointed out that the relevant sections of the Revised Judicature Act “comprehensively establish limitations periods, times of accrual, and tolling for civil cases.” *Trentadue*, 479 Mich at 390. It also noted that the structure of this statutory scheme demonstrated “that the Legislature intended the scheme to be comprehensive and exclusive.” *Id* at 391.

The comprehensiveness of the statutory scheme is essential to understanding how it must be applied to determine which limitations period should apply in a particular case:

Because the statutory scheme here is comprehensive, the Legislature has undertaken the necessary task of balancing plaintiffs' and defendants' interests and has allowed for tolling only where it sees fit. This is a power the Legislature has because such a statute of limitations bears a reasonable relationship to the

permissible legislative objective of protecting defendants from stale or fraudulent claims.

Id at 392-393 (footnote omitted) (citing *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003)). Given this purpose, wherever one statute applies more specifically to a particular case than another statute or other legal rule, the more specific statute better reflects the Legislature intent and must be controlling. The more specific statute also better promotes the fundamental purpose of statutes of limitation, which is to “afford[] the opposing party a fair opportunity to defend, relieve[] the court system from dealing with ‘stale’ claims, and protect[] potential defendants from protracted fear of litigation.” *Gebhardt*, 444 Mich at 546.

On the basis of this understanding of the nature of the statutes governing the limitation of actions, and on the basis of the general principle about the primacy of specifically applicable statutes, *Trentadue* concluded that a common-law discovery rule could not control the determination of a limitations period when there was a specifically relevant statute. *Trentadue*, 479 Mich at 391. If the common-law rule were given priority over the specifically relevant statute, the result would be to “render [the statute] effectively meaningless.” *Id*. Of course, such a result is contrary to fundamental principles of statutory construction. “It is this Court's duty to read the statutes together to avoid rendering any provision meaningless.” *Nelson v Transamerica Ins Servs*, 441 Mich 508, 513-514; 495 NW2d 370 (1992) (citing *Girard v Wagenmaker*, 437 Mich 231, 238; 470 NW2d 372 (1991)).

Unlike *Trentadue*, this case does not involve an intersection between a general common-law rule and a more specifically applicable statute. Nevertheless, it does involve a similar overlap between two different provisions of the Revised Judicature Act. The principles

that governed the analysis in *Trentadue* are equally applicable here. Under those principles, MCL 600.5851 must have priority over MCL 600.5838a(2).

MCL 600.5838a creates a rule of general application for determining the accrual and limitation of medical malpractice claims. It provides that:

Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805, or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. . . . A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.

MCL 600.5838a(2) (footnotes omitted).

This statutory language recognizes that the primary limitations period for medical malpractice actions is two years from the time that the action accrued, as provided by MCL 600.5805. It also recognizes, however, that this limitations period may be extended by the savings or tolling provisions that are set forth in MCL 600.5851 through MCL 600.5856. Each of these savings or tolling provisions addresses a specific factual circumstance in which there is some modification of the ordinary operation of the statutes of limitation. Finally, it creates a statutory discovery rule, which constitutes a separate limitations period when some circumstance prevents the plaintiff from discovering the existence of his or her claim. *See Miller v Mercy Mem Hosp Corp*, 466 Mich 196, 202; 644 NW2d 730 (2002) (explaining the difference between savings and tolling provisions).

MCL 600.5851 provides that:

Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make entry or bring the action although the period of limitations has run.

MCL 600.5851(1).¹ Through this language, the statute contemplates that insanity may prevent a person from asserting a cause of action and that such insanity might persist from the time that the cause of action accrues until the time of the person's death. In this particular circumstance, a party who may assert the deceased person's rights can bring a claim for one year after the time of death.

In theory, MCL 600.5838a and MCL 600.5851 may overlap when a case involves a plaintiff who was insane from the time her claim accrued until her death. If insanity is understood as one of the circumstances that may prevent a plaintiff from discovering the existence of her claim, and if insanity only ends with plaintiff's death, there is a question whether the six-month discovery rule applies to preserve her claim at the time of her death or whether the disability exception of MCL 600.5851 is the instrument for extending the time in which someone can assert a cause of action on the plaintiff's behalf.

The principles that were decisive in *Trentadue* prescribe that MCL 600.5851 must control over MCL 600.5838a(2). The latter statute prescribes a general rule, covering a variety of circumstances in which a plaintiff may not be able to recognize the existence of a cause of action. MCL 600.5851 is a more *specific* statute, covering situations in which the plaintiff cannot recognize the existence of a cause of action because he or she was *insane at the time of accrual and remained insane until death*. Although Florinda Pappas could be described generally as a plaintiff who was unable to discover her cause of action, she is more specifically described as the kind of person covered in MCL 600.5851. She was disabled from asserting a claim because she was "insane at the time the claim accrues," and her "disability [was] removed through death" MCL 600.5851(1). Because the more specific rule must trump

¹ Subsections (7) and (8) deal with medical malpractice claims for persons who are under the age of eight or under the age of thirteen when their causes of action accrue.

the more general one, MCL 600.5851(1) provides the rule for determining the period in which her claims may be asserted, and that period is one year from the time of her death.

If MCL 600.5838a(2) furnishes the controlling rule, crucial language in MCL 600.5851(1) will be rendered meaningless. When MCL 600.5838a(2) controls, the plaintiff's death is the event that ends the period in which the plaintiff was unable to discover the existence of her claim, and the six-month limitations period begins to run from the time of death. The problem with interpreting and applying MCL 600.5838a(2) in this fashion is that it creates an unnecessary conflict with MCL 600.5851(1), which specifically identifies the death of an insane person as the event which renews the viability of a claim for a limited time. In short, if MCL 600.5838a(2) is controlling when insanity prevents a plaintiff from discovering her cause of action between accrual and her death, then there is no need for MCL 600.5851(1) to refer to the removal of the disability of insanity "through death or otherwise." Section 5851(1) would never apply in cases where the discovery of a claim was prevented by insanity that continued from the time of accrual to the time of death. Because "[i]t is this Court's duty to read the statutes together to avoid rendering any provision meaningless," MCL 600.5838a(2) cannot be interpreted to apply to circumstances such as those presented in this case, and MCL 600.5851 must be controlling. *See Nelson*, 441 Mich at 513-514.

As Defendants noted in their previous supplemental brief to this Court, this Court's recent decision in *Vega v Lakeland Hosps*, 479 Mich 243; 736 NW2d 561 (2007) provides additional support for the proposition that MCL 600.5851(1) should be controlling here. In *Vega*, this Court held that this statute could apply in medical malpractice cases. *Id* at 245. In light of this application, there is no reason to expand the scope of MCL 600.5838a(2) to cover a class of cases that are already covered by MCL 600.5851(1).

II.

MCL 600.5852 establishes an exception to the application of statutes of limitation in cases where a plaintiff dies while her claim is still viable or within thirty days after the expiration of that claim. The limitations period for Florinda Pappas' medical malpractice claim expired more than two years before her death, and there is no applicable tolling provision that extends that limitations period to Florinda Pappas' death. Does MCL 600.5852 apply here?

The Revised Judicature Act creates a savings provision for circumstances in which a plaintiff dies while his or her claim is still viable, or shortly thereafter.

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.

The analysis in *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007) is also important to help explain why MCL 600.5852 cannot apply here. MCL 600.5852 is an exception designed to apply to a situation that is materially different from the one presented here. MCL 600.5852 applies by its clear and unambiguous terms only to situations in which the plaintiff dies before the end of the limitations period or within thirty days after that period ends. Here, the limitations period on Florinda Pappas' medical malpractice action ended on March 27, 2001, two years after her death and more than two years before plaintiff filed her claim here. By its plain terms, the statutory savings provision in MCL 600.5852 simply does not apply here.

As Defendants have previously argued, the plain language of MCL 600.5852 shows why it cannot apply in this case. Florinda Pappas was injured on March 27, 1997 when she fell

from her bed. Under MCL 600.5805, her claim accrued at that point, and the limitations period expired on March 27, 1999. Ms. Pappas died on July 13, 2001. The limitations period for her claim ran long before her death.

As discussed above, there are no rules that could extend the limitations period to the time of Ms. Pappas' death. The only conceivably applicable rule is MCL 600.5838a(2), which establishes a six-month limitations period. *See Miller v Mem Hosp Corp*, 466 Mich 196, 202; 644 NW2d 730 (2002) ("the six-month discovery rule is a distinct period of limitation"). For all of the reasons noted above, it cannot apply here, however. Consequently, for the purposes of MCL 600.5852, the relevant limitations period is the one prescribed by MCL 600.5805.

A consideration of the nature of MCL 600.5852 also explains why it cannot apply here. The statute preserves a plaintiff's claim, but not because it tolls the application of a statute of limitations. Rather, it is a savings provision that preserves the plaintiff's claim beyond the end of the limitations period. Understanding the difference between tolling and savings provision is essential to understanding why MCL 600.5852 cannot apply here.

This Court has often explained this difference. A tolling provision is a legal rule that pauses the running of a limitations period. A savings provision is a legal rule that is an exception to a statute of limitations. It saves a claim, despite the running of the limitations period. *See Waltz v Wyse*, 469 Mich 642, 649-650; 677 NW2d 813 (2004); *Miller* 466 Mich at 202; *Lindsay v Harper Hosp*, 455 Mich 56, 64-65; 564 NW2d 861 (1997).

A savings provision can only apply according to its specific terms. In other words, the statute that establishes a savings provision defines the circumstances under which that savings provision will apply. *Waltz*, 469 Mich at 649-650. "As an exception to the statute of

limitations, the saving provision should be strictly construed.” *Lindsay*, 455 Mich at 64 (citing *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984)).

The savings provision created by MCL 600.5852 only applies to claims that belong to a decedent who has died before the running of the applicable limitations period or within thirty days of the running of the applicable limitations period. *Miller*, 466 Mich at 202-203. In this respect, MCL 600.5852 establishes a savings provision that attaches to a limitations period that is currently running or recently expired, furnishing an additional two years in which the decedent’s personal representative can assert a claim. *Id.*

Applying MCL 600.5852 in this case would require an impermissible departure from the express conditions for its application. Because the two-year limitations period from MCL 600.5805 applies, the limitations period for Florinda Pappas’ claim expired in 1999, two years before her death. The end of the limitations period is simply too remote from Florinda Pappas’ death to permit the application of MCL 600.5852

In addition, apart from any consideration of the textual limitations on applying MCL 600.5852, there is an additional reason to conclude that it cannot apply here. Like MCL 600.5852, MCL 600.5851 is also savings provision. *Vega v Lakeland Hosps*, 479 Mich 243, 247; 736 NW2d 531 (2007). If MCL 600.5852 can apply here, this case will stand for the proposition that, when there are two savings provisions that might apply to a case, the plaintiff can choose the one that saves his or her claim for a longer period. In light of this Court’s decision in *Trentadue*, a plaintiff may not be given this choice when there is a savings provision that is specifically applicable to his or her case. And, as noted above, MCL 600.5851(1) provides the savings provision that is most specifically applicable to this case.

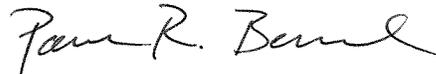
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CONCLUSION

This case implicates three rules that govern the length of the limitations period for plaintiff's medical malpractice claim: MCL 600.5838a(2), MCL 600.5851(1), and MCL 600.5852. The Court of Appeals erred because it concluded that MCL 600.5852 might apply to save plaintiff's claim, if there was a factual basis for concluding that the discovery rule in MCL 600.5838a(2) might apply because Florinda Pappas' insanity prevented her from discovering her claim before her death. This ruling would prompt a factual inquiry into an exceptionally elusive question about Florinda Pappas' state of mind between 1997 and 2001. A clear reading of all three statutory texts reveals that this inquiry is entirely unnecessary because there is only one statute that applies to the specific circumstances of that case – MCL 600.5851(1). Because plaintiff's complaint was not timely filed under that statute, the circuit court correctly ruled that her case should be dismissed.

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