

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS AND
CIRCUIT COURT FOR THE COUNTY OF MACOMB

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

Plaintiff-Appellee,

v

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

Defendants-Appellants.

S.C. No.:

C.A. No.: 251144

Lower Court No.: 03-2446-NH
Hon. Deborah A. Servitto

LACEY & JONES

BY: Michael T. Reinholm P40060
Attorneys for Plaintiff-Appellee
600 S. Adams Road, Suite 300
Birmingham, MI 48009
(248) 433-1414

COLLINS, EINHORN, FARRELL & ULANOFF, P.C.

BY: Regina T. Delmastro P55419
Attorneys for Defendants-Appellants
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141

128864
PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANTS-APPELLANTS' APPLICATION
FOR LEAVE TO APPEAL

SUBMITTED BY:

LACEY & JONES

BY: Michael T. Reinholm P40060
Attorneys for Plaintiff-Appellee
600 S. Adams Road, Suite 300
Birmingham, MI 48009
(248) 433-1414

FILED

JUL 18 2005

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

	<u>PAGE</u>
INDEX TO AUTHORITIES.....	ii
ISSUE	iii
STATEMENT OF FACTS.....	1
ARGUMENT	
When a person dies before the statute of limitations on his or her personal injury claim has expired, an action may subsequently be commenced by the personal representative of the person’s estate within two years of the issuance of letters of authority. In a medical malpractice action, the statute of limitations is the later of two years after the claim accrues or six months after the plaintiff discovers or should have discovered the existence of the claim. So, if when plaintiff died she had not discovered, and should not have discovered, her claim, the period of limitations had not yet run on her claim. As a result, her personal representative had two years after receiving her letters of authority to institute an action, which she did. The Court of Appeals must be affirmed.	3
RELIEF	11

INDEX OF AUTHORITIES

PAGE

Cases

Allstate Insurance Company v Muszynski, 253 Mich App 138; 655 NW2d 260 (2002)..... 6, 7
Catanese v Heggen, 115 Mich 301; 320 NW2d 351 (1982)..... 6, 7
Cruz v State Farm Mutual Automobile Insurance Company,
466 Mich 588; 648 NW2d 591 (2002)..... 3
DiBenedetto v West Shore Hospital, 461 Mich 394; 605 NW2d 300 (2000) 3, 4
Gore v Rains & Block, 189 Mich App 729; 473 NW2d 813 (1991) 5
Kassab v Michigan Basic Property Insurance Association,
185 Mich App 206; 460 NW2d 300 (1990) 3
Kermizian v Sumcad, 188 Mich App 690; 470 NW2d 500 (1991) 5
Miller v Mercy Memorial Hospital, 466 Mich 196; 644 NW2d 730 (2002) 7, 8, 9, 10
Murphy v Michigan Bell Telephone Co, 447 Mich 93; 523 NW2d 310 (1994)..... 3
Poffenbarger v Kaplan, 224 Mich App 1; 568 NW2d 131 (1991),
overruled in part on other grounds *Miller v Mercy Memorial Hospital*,
466 Mich 196; 644 NW2d 730 (2002)..... 10
Robertson v DaimlerChrysler Corp, 465 Mich 732; 641 NW2d 567 (2002) 3
Toth v Goree, 65 Mich App 296; 237 NW2d 297 (1975)..... 6
Tryc v Michigan Veterans' Facility, 451 Mich 129; 545 NW2d 642 (1996)..... 4
Witherspoon v Guilford, 203 Mich App 240; 511 NW2d 720 (1994)..... 3

Statutes

MCL 600.2921b..... 1
MCL 600.5805(6) 4, 5
MCL 600.5838a(1) 7
MCL 600.5838a(2) 4, 7, 8
MCL 600.5852..... 4, 5, 7, 8

ISSUE

The plaintiff in this action is Florinda Pappas in the form of the estate of Florinda Pappas. For purposes of its motion here, defendants agreed that plaintiff was in “a condition of mental derangement such as to prevent [her] from comprehending rights” she was otherwise bound to know at all relevant times. Plaintiff died in this mental state. The statute of limitations for medical malpractice actions allow for a claim to be brought any time within six months after the plaintiff discovers or should have discovered the claim. The wrongful death savings statute states that if a person dies before the statute of limitations had run on a claim, the personal representative has 2 years after letters of authority have been issued to bring a claim. Because of plaintiff’s mental condition, she had not discovered, and could not, her claim before she died. So, the period of limitation had not run when she died. Thus, her personal representative had 2 years to bring her claim after letters of authority were issued. Letters of Authority were issued on July 16, 2002. The complaint, therefore, could have been file anytime before July 16, 2004. The complaint was filed on June 3, 2003. Did the trial court err by granting defendants’ motion for summary disposition on the basis that plaintiff’s claim was untimely?

STATEMENT OF FACTS

This case is before this Court on plaintiff's appeal from the Court of Appeals' decision reversing the trial court's decision granting defendants' motion for summary disposition pursuant to the statute of limitations.

Plaintiff commenced this case by complaint filed on June 2, 2003. On about October 8, 2002, plaintiff had provided defendants with notice of her intent to file a claim pursuant to MCL 600.2921b.

Plaintiff's decedent became a resident of defendants' facility on about April 1, 1996, after suffering a series of strokes. Before then the decedent had a history of dementia. (Complaint [Appendix 1], ¶ 8). During her stay there decedent sustained a number of documented falls. *Id.* at ¶ 9.

In February and March of 1997 decedent experienced episodes of agitation that required an increase in her medication and the continued use of Ativan. *Id.* at ¶ 10. Decedent, on March 26, 1997, experienced increased agitation again and was given an injection of Ativan, and also evaluated by a staff psychiatrist. *Id.* at ¶ 11.

Early on March 27, 1997, decedent was discovered by staff personnel exiting her bed and entering the rooms of other patients. At about 7:30 a.m. defendants' personnel discovered decedent on the floor in a confused state. By about 10:30 a.m. decedent was incoherent, lethargic, and could neither sit nor stand without assistance. At about that point decedent was taken to Bi-County Hospital, where she underwent surgery for a subdural hematoma. *Id.* at ¶ 12.

Decedent was released from Bi-County Hospital and returned to defendants' facility. She remained there in a state of increased diminished capacity and abilities until her death on July 13, 2001.

Further, plaintiff alleged that defendants owed her decedent certain professional duties and obligations, that those duties and obligations were breached, and that decedent's death was a direct and proximate cause of the breach of those duties.

Letters of authority were issued to Patricia Pappas as the personal representative of the estate of Florinda Pappas on July 16, 2002 (Appendix 2). The complaint was filed on June 3, 2003.

On about June 17, 2003, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7). Defendants argued that the applicable statute of limitations had expired, it was not tolled, and plaintiff's claim was untimely. Oral argument on that motion was heard on July 14, 2003. The trial court issued an opinion on July 21, 2003, indicating that defendants' motion should be granted. On about July 31, 2003, plaintiff filed a motion for reconsideration. The trial court entered an opinion and order denying that motion on August 14, 2003. A final order of dismissal was entered on September 10, 2003.

Plaintiff filed a timely claim of appeal with the Court of Appeals on September 24, 2003. That Court issued a *per curiam* opinion reversing the trial court. Defendants' motion for reconsideration was denied, and defendants have filed an application for leave to appeal with this Court. The following arguments ensue in support of the Court of Appeals' decision.

ARGUMENT

When a person dies before the statute of limitations on his or her personal injury claim has expired, an action may subsequently be commenced by the personal representative of the person's estate within two years of the issuance of letters of authority. In a medical malpractice action, the statute of limitations is the later of two years after the claim accrues or six months after the plaintiff discovers or should have discovered the existence of the claim. So, if when plaintiff died she had not discovered, and should not have discovered, her claim, the period of limitations had not yet run on her claim. As a result, her personal representative had two years after receiving her letters of authority to institute an action, which she did. The Court of Appeals must be affirmed.

Standard of Review: Defendants moved for summary disposition under MCR 2.116(C)(7). When this Court reviews such a motion, it accepts the allegations in a well-pled complaint as true and construes them in the plaintiff's favor. *Witherspoon v Guilford*, 203 Mich App 240, 243; 511 NW2d 720 (1994); *Kassab v Michigan Basic Property Insurance Association*, 185 Mich App 206, 201; 460 NW2d 300 (1990). Additionally, this Court reviews questions of law under the *de novo* standard. *Cruz v State Farm Mutual Automobile Insurance Company*, 466 Mich 588, 594; 648 NW2d 591 (2002).

The question in this case is whether plaintiff's medical malpractice complaint was timely. It is defendants' position that the general statute of limitations for malpractice claims, two years, expired here before decedent died and bars plaintiff's claim. Defendants also argue that no tolling or savings provision preserved plaintiff's claim.

Several statutory provisions, and their interrelationship, are relevant here. When construing a statute, the purpose is to discern and give effect to the Legislature's intent. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002); *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). The first criterion in determining intent is the specific language of the statute. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605

NW2d 300 (2000). The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written. *Id.* Where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed--no further judicial construction is required or permitted, and the statute must be enforced as written. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996).

Defendants' argument, however, ignored the statute particularly applicable to medical malpractice claims. Application of the six month discovery provision stated in MCL 600.5838a(2), combined with the savings provision in MCL 600.5852, in fact makes plaintiff's claim timely. In granting defendants' motion, the trial court had made two errors. One, the court erred by resolving factual questions regarding whether plaintiff's claim could have been discovered before it was were for a jury to resolve. Two, the court did not appreciate who "the plaintiff" is here. The court treated Patricia Pappas as the plaintiff when in fact it is Florinda Pappas. The trial court's decision need to be reversed. And the Court of Appeals did.

Defendants' motion for summary disposition cited MCL 600.5805 as the applicable statute of limitations. Defendants' motion did not cite MCL 600.5838a(2), the **discovery provision**. Section 5805(6) applies to "malpractice" actions; § 5838a(2) also applies to "a claim based on medical malpractice". In fact § 5838a(2) both incorporates § 5805(6), but also adds to it. For medical malpractice claims, an action "may be commenced at any time within the applicable period prescribed in section 5805 *or* sections 5851 to 5856, *or* within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5838a(2) (emphasis added). Of the cross-referenced provisions, two are of interest in this case.

The first, § 5805(6), states that “[e]xcept as otherwise provided in this chapter, the period of limitations is two years for an action charging malpractice.” MCL 600.5805(6) (emphasis added). This is the **general provision**. The second, § 5852, states that “[i]f 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 three years after the period of limitations has run.” MCL 600.5852. This is the **savings provision**.

Returning to § 5838a(2), a claim may be brought at any time up to six months after the plaintiff discovered or should have discovered the existence of the claim. When the plaintiff discovered or should have discovered the claim is a question of fact to be resolved by a jury. *Gore v Rains & Block*, 189 Mich App 729, 736; 473 NW2d 813 (1991); *Kermizian v Sumcad*, 188 Mich App 690, 692-693; 470 NW2d 500 (1991). In the case at bar, there was a factual dispute as to whether decedent was able to discover her claim in her lifetime. If anything, the evidence suggests she could not.

However, the trial court erroneously resolved this factual dispute. It found as fact that plaintiff should have discovered the claim before the limitations period expired. “The Court is not convinced that Plaintiff could not have discovered her Decedent’s claim at least 6 months before the expiration of the 2-year limitations period, especially since her Decedent had been hospitalized. MCL 600.5838a(2). Plaintiff’s claims are therefore time-barred.” (July 21, 2003, opinion and order, p 4). This led the trial court to conclude that the period of limitations was the two year period set forth in § 5805(6), that it had run, and that the claim was untimely. The

Court of Appeals concluded that this was incorrect. “Accepting as true the allegations in Patricia Pappas’s complaints about Florinda Pappas’s cognitive limitations, including her alleged acute dementia, neither party was entitled to summary disposition because a dispute factual question existed with regard to whether a reasonable person with Florinda Pappas’s condition would have become aware of her injury and its possible cause. (Slip op at p 4; footnote omitted).

The second, and primary, error the trial court made was in determining who “the plaintiff” is here. The court found that “*Plaintiff* could not have discovered *her Decedent’s* claim”. (Emphasis added). Patricia Pappas is the personal representative of the estate of Florinda Pappas. Legally, the decedent, Florinda Pappas, is the plaintiff because a wrongful death action, while brought by the personal representative of the decedent’s estate, is a derivative action and belongs to the decedent. “The suit is brought on behalf of the deceased. The cause of action belongs to the deceased.” *Allstate Insurance Company v Muszynski*, 253 Mich App 138, 142; 655 NW2d 260 (2002); *Catanese v Heggen*, 115 Mich 301, 303; 320 NW2d 351 (1982); *Toth v Goree*, 65 Mich App 296, 298; 237 NW2d 297 (1975). So, “the plaintiff” in this action is Florinda Pappas, not Patricia Pappas.

The trial court, however, in resolving the discovery question treated Patricia Pappas as the plaintiff. “The Court is not convinced that Plaintiff could not have discovered *her Decedent’s* claim at least 6 months before the expiration of the 2-year limitations period, especially since her Decedent had been hospitalized.” (July 21, 2003, opinion and order, p 4) (emphasis added). The plaintiff is not Patricia Pappas, the personal representative of the Estate of Florinda Pappas, the plaintiff is Florinda Pappas. And “the plaintiff” was in no position to discover her claim during her lifetime.

The Court of Appeals recognized and corrected this error. “As a matter of law, a wrongful death action brought by a personal representative belongs to the decedent. Hence, Patricia Pappas stood in the shoes of Florinda Pappas for purposes of determining whether Florinda Pappas discovered or should have discovered her malpractice claim before her death.” (Slip op at p 2; footnote omitted). This result follows from the plain language of the applicable statutes.

The medical malpractice discovery statute applies to “the plaintiff”. A “claim based on the medical malpractice . . . accrues at the time of the act or omission that is the basis of the claim of medical malpractice, regardless of the time *the plaintiff* discovers . . . the claim.” MCL 600.5838a(1) (emphasis added). The discovery rule allows an action to be brought “within 6 months after *the plaintiff* discovers or should have discovered the existence of the claim”. MCL 600.5838a(2) (emphasis added). The discovery rule applies to “the plaintiff”. “The plaintiff” here is Florinda Pappas. *Allstate, supra; Catanese, supra.*

The last piece of the puzzle is found in *Miller v Mercy Memorial Hospital*, 466 Mich 196; 644 NW2d 730 (2002). Here this Court stated the issue as whether “the six-month discovery provision in MCL 600.5838a(2), applicable to medical malpractice claims, is incorporated in the wrongful death savings statute as a ‘period of limitation.’ MCL 600.5852”. *Id.* at 197. The Court concluded that it *is*. Again, the savings statute states that if “a person dies before the period of limitations has run”, an action may nonetheless be brought under certain circumstances. MCL 600.5852. Section 5838a(2)’s six month discovery period “is a distinct period of limitation. It is a statutory provision that requires a person who has a cause of action to bring suit within a specified time. As an alternative to the other periods of limitation, it is itself a period of limitation.” *Miller*, 466 Mich at 202 (footnote omitted). In other words, the reference

in § 5852 to the person dying “before the period of limitations has run” encompasses § 5838a(2)’s six month discovery period. *Id.* at 202-203.

Now that we have looked at each puzzle piece individually, we can put it together. A medical malpractice action may be commenced up to 6 months after the plaintiff discovered or should have discovered the existence of the claim. MCL 600.5838a(2). This six month period is a distinct period of limitation. “The plaintiff” here is Florinda Pappas, not Patricia Pappas. It is a question of fact as to whether Florinda Pappas discovered or should have discovered her claim as of the time of her death. If the answer is no to each question, “the plaintiff” is a “person” who died “before the period of limitations” had run. As a result, an action could be commenced by her personal representative “anytime within 2 years after letters of authority were issued”. Letters of authority were issued on July 16, 2002 (Appendix 2). The action was commenced on June 3, 2003, less than one year after the letters of authority were issued. Finally the last sentence of § 5852 is a limitation on the 2 year letter of authority exception – “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.” Even if the period of limitations ran with decedent’s death, and it could run not sooner, the claim was valid as long as commenced before July 13, 2004, and it was.

And so the Court of Appeals held:

Consequently, we find merit to Patricia Pappas’s claim that the trial court erred by failing to apply the discovery rule to Florinda Pappas. Although this Court indicated that the discovery rule can be applied to a personal representative’s discovery of a potential claim,⁵ this Court did not preclude application of the discovery rule to a decedent. Indeed, the Michigan Supreme Court specifically applied the discovery rule to a decedent in *Miller v Mercy Memorial Hosp.* Although this case is

distinguishable from *Miller* in that the decedent in *Miller* discovered a possible malpractice claim before his death, a decedent's discovery of a possible cause of action is not a prerequisite to applying MCL 600.5838a(2). As a matter of law, a wrongful death action brought by a personal representative belongs to the decedent. Hence, Patricia Pappas stood in the shoes of Florinda Pappas for purposes of determining whether Florinda Pappas discovered or should have discovered her malpractice claim before her death.

⁵ See *Poffenbarger v Kaplan*, 224 Mich App 1, 11-13; 568 NW2d 131 (1997), overruled in part by *Miller*, *supra* at 200-201 n 3. (Slip op at p 2; footnotes omitted).

Because this Court held in *Miller*, the six-month discovery period is a “period of limitations” within the savings statute. So,

By its terms, MCL 600.5852 only operates within the context of the separate limitation periods that would otherwise bar an action. Thus, if Florinda Pappas did not discover or should not have discovered a possible malpractice claim before her death, then the six-month discovery period would not have run before her death. As such, Patricia Pappas, as personal representative of Florinda Pappas's estate, was entitled to bring an action within two years after her appointment as personal representative, but no later than three years after the period of limitations has run. (Slip op at p 3; footnote omitted).

Defendants argue that this Court overruled *Poffenbarger v Kaplan*, 224 Mich App 1; 568 NW2d 131 (1991), yet the Court of Appeals here relied on it. In fact, this Court overruled *Poffenbarger* in part, on a point of law not relevant here. It was overruled “to the extent that it states that the six-month discovery period contemplated by § 5838a(2) is not a ‘period of limitation’ within the meaning of § 5852, the saving statute.” 466 Mich at 200-201 n 3. In fact,

Poffenbarger was not overruled on the relevant point – the Court *did* apply the discovery rule to the personal representative. 224 Mich App at 11-13.

Defendants argue that in *Miller* this Court applied the discovery provision to the decedent, not the personal representative, and that the Court of Appeals' *per curiam* opinion here represents an unwarranted expansion of *Miller*. This Court stated that it was not addressing whether the discovery rule could be employed by the personal representative because the facts in that case, unlike in *Poffenbarger*, did not present the issue. 466 Mich at 200-201 n 3. The statutory language dictates that the answer is: of course the discovery rule applies to decedents and personal representatives because it applies to “the plaintiff”, the plaintiff is the decedent, and the decedent acts through the personal representative.

To conclude, the Court of Appeals properly read these statutes. If a decedent had not, or could not, have discovered her claim before her death, the savings statute gives a personal representative up to two years after letters of authority are issued to bring an action on the estate's behalf. Here letters of authority were issued on July 16, 2002, and the action was commenced on June 3, 2003, less than one year later. And so the matter is remanded to determine if “the plaintiff” had or should have discovered her claim before her death.

RELIEF

WHEREFORE, plaintiff-appellee, Patricia A. Pappas, Personal Representative of the Estate of Florinda C. Pappas, Deceased, requests that this Court enter an order denying defendants' application for leave to appeal and remand the case to the trial court for further proceedings.

Respectfully submitted,

LACEY & JONES

BY: 

MICHAEL T. REINHOLM P40060

Attorneys for Plaintiff-Appellee

600 S. Adams Road, Suite 300

Birmingham, MI 48009-6827

(248) 433-1414

Dated: July 15, 2005