

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Special Conflict Panel

Murphy, CJ, Markey, O'Connell, Talbot, Meter, Borrello, and Beckering, JJ

SUSAN FURR and WILLIAM FURR,

Supreme Court Docket No. 149344

Plaintiffs-Appellees/Cross-Appellants,

Court of Appeals Docket No. 310652

vs.

MICHAEL McLEOD, M.D., TARA B. MANCL,
M.D., MICHIGAN STATE UNIVERSITY
KALAMAZOO CENTER FOR MEDICAL
STUDIES, INC., and BORGESS MEDICAL
CENTER, Jointly and Severally,

Kalamazoo County Circuit Court
Case No. 10-0551-NH

Defendants-Appellants/Cross-Appellees.

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reply

DEFENDANTS' REPLY BRIEF
IN SUPPORT OF THEIR APPLICATION FOR LEAVE TO APPEAL

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ARGUMENT

I. THE TWO SENTENCES OF MCL 600.2301 MUST BE READ TOGETHER.

The amendment statute Plaintiff relies on reads:

The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms are as just, at any time before judgment rendered therein. The court at every stage of **the** action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

MCL 600.2301 (emphasis supplied). Plaintiff argues that the second sentence can stand independent from the first sentence, resulting in an interpretation that grants courts the power to disregard errors without the requirement in the first sentence that the “action or proceeding” be “pending” in that court. The argument should be rejected.

Under the plain language of the statute, the second sentence is necessarily contingent on the first. The Legislature chose to use the definite article “the” when referring to the “action or proceeding” in the second sentence, and the indefinite pronoun “any” in the first. The “action or proceeding” referred to in the second sentence is the same as the action or proceeding that must be “pending” per the first sentence.

The first sentence is the grant of power to the trial court. That grant of power, however, is contingent on an action or proceeding being “pending” in that court. It can be “any” action or proceeding, as long as it is a “pending” one.

The second sentence imposes an obligation on the trial court in wielding the power granted by the first sentence. In “the” action or proceeding (i.e., the action or proceeding that is pending and triggers the grant of power), the trial court shall disregard errors or defects if the error does not affect the substantial rights of the parties (as the error does here).

Defendants thoroughly explained in their Application why a prematurely filed medical malpractice complaint is not a “pending” action or proceeding. Further, as explained below, the

limitations period was not tolled by the service of the NOI because the plaintiff failed to comply with the notice waiting period. MCL 600.5856(c). Therefore, the limitations period already expired at the time the Complaint was ostensibly filed. Since there was no “pending” proceeding, the amendment statute cannot be applied to ignore the premature filing of the complaint. Allowing the amendment statute to apply to claims to which the limitations period has expired renders nugatory all statutes of limitation.

II. SERVICE OF AN NOI DOES NOT INDEFINITELY TOLL THE LIMITATIONS PERIOD.

Plaintiff’s argument that the NOI being served within the limitations period somehow indefinitely extends that limitations period also should be rejected. Even assuming that the NOI period is part of an “action or proceeding”,¹ allowing a trial court to retroactively wield the power granted by MCL 600.2301, that “action or proceeding” is not “pending” indefinitely.

The statute of limitations is tolled for 182 days – no more. (And here, as explained below, it was not tolled at all because plaintiff failed to wait the full notice period, which is a prerequisite for tolling.) Even assuming plaintiff gets NOI tolling, when the Complaint is prematurely filed, when the 182 days of tolling ceases, the limitations period resumes.

Any complaint filed before the expiration period is a nullity; it is as if nothing the complaint was never filed. So, once the limitations period expires, the “action or proceeding” initiated by the NOI is over. There is no longer a proceeding pending. The prematurely filed complaint has no effect, and therefore, does not continue the proceedings initiated by the NOI. Therefore, once the limitations period expires, there is no “action or proceeding” “pending”, so the trial court cannot invoke the power conditionally granted by MCL 600.2301.

¹ See n 7 to Defendants’ Application: “Appellants disagree that an NOI can be part of a ‘proceeding’ as defined by Black’s Law Dictionary because pursuant to *Burton*, a medical malpractice lawsuit cannot be ‘commenced’, which is the time at which a ‘proceeding’ begins.” This argument was also raised in the Amicus Brief proffered by the Michigan Defense Trial Court. Defendants adopt and incorporate those arguments here.

III. THIS COURT'S DECISION IN *BURTON V REED CITY HOSPITAL* IS NOT AT ODDS WITH MCL 600.5856(a) AND MCL 600.1901.

Next, Plaintiff argues that *Burton v Reed City Hospital Corp.*, 471 Mich 745, 691 NW2d 424 (2005), was incorrectly decided, arguing that the holding conflicts with MCL 600.5856(a) and MCL 600.1901. This is a new argument raised by plaintiff, and fails because (i) the historic interpretation of that statute allows limitations on the application of the statute and (ii) the limitations period already expired at the time the Complaint was filed in this case.

MCL 600.5856 is the tolling statute. The part on which Plaintiff relies reads: "The statutes of limitations or repose are tolled in any of the following circumstances: (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules...." MCL 600.5856(a).

The rule set forth in *Burton* is not contrary to the statute. There are two simple reasons for this result. First, a prematurely filed complaint is a nullity – it is as if the complaint was never filed. Second, when a complaint is prematurely filed, the effect is that providing the NOI to the defendant **never initiated tolling**. At the time the complaint was filed, then, the limitations period was already expired; there was nothing left for the Complaint to toll.

A. The filing of a complaint does not necessarily toll the limitations period.

Taken to its logical end, if Plaintiff's interpretation is correct, then all one must do to toll the limitations period is to file a complaint – there are no additional considerations. This is not correct. Historically, that tolling provision has been limited.

For example, it is limited as to whom the limitations period is tolled. See *Ciotte v Ullrich*, 267 Mich 136, 255 NW 179 (1934) (holding that the filing of a complaint only tolls the limitations period as to the defendant named); *Fazzlare v Desa Industries, Inc.*, 135 Mich App 1, 351 NW2d 886 (1984) (limitations period not tolled by filing of a complaint against unknown "Doe" defendants). It is also

limited as to the claims that are tolled. See *Belden v Barker*, 124 Mich 667, 83 NW 616 (1900) (only those causes of action alleged in the complaint are tolled by the filing of the complaint).

The most similar limitation on § 5856(a) is the requirement that a medical malpractice complaint be accompanied by an affidavit of merit to effectuate tolling. See *Scarsella v Pollak*, 461 Mich 547, 607 NW2d 711 (2000). In *Scarsella*, the plaintiff filed a medical malpractice case before the expiration of the limitations period, but without the affidavit of merit required by MCL 600.2912d. After the limitations period otherwise expired, the defendants filed a motion for summary disposition. The trial court held that the filing of a medical malpractice complaint without the required affidavit rendered the complaint null and void. Because the complaint was a nullity, it did not toll the period of limitation. The Court of Appeals and this Court both agreed. *Id.* at 549. This Court specifically addressed the effect of pre-amendment MCL 600.5856(a)², and adopted the following interpretation:

MCL 600.5856(a); MSA 27A.5856(a) provides that a period of limitation is tolled “[a]t the time the complaint is filed and a copy of the summons and complaint are served on the defendant.” In the present case, the plaintiff did file and serve a complaint within the limitation period. The issue thus arises whether that filing and service tolled the limitation period, so that it still had not expired when the affidavit was filed the following spring.

As explained by the Court of Appeals in the opinion we are adopting today, such an interpretation would undo the Legislature’s clear statement that an affidavit of merit “shall” be filed with the complaint. MCL 600.2912d(1); MSA 27A.2912(4)(1).

Scarsella, supra at 552 (footnotes omitted).

If Plaintiff’s interpretation is adopted, then it would also apply to indefinitely extend the limitations period when a medical malpractice complaint is served without an affidavit of merit. The

² The 2004 amendment narrowed the application of tolling to require the defendant to be served before the expiration of the summons. See *Bush v Shabahang*, 484 Mich 156, 168-169; 772 NW2d 272 (2009).

result would be to nullify the Legislature's substantive tort reform measures requiring plaintiffs to provide notice and to substantiate the merits of their claim with an affidavit.

With Plaintiff's interpretation, not only would this Court be overruling *Burton*, it would be effectively overruling *Scarsella* as well, and any other case that imposed any limitation on the applicability of §5856(a). This is, of course, contrary to the principle of stare decisis.³

B. Plaintiff did not comply with the notice period, and therefore, serving the NOI did not initiate tolling; the limitations period expired before the Complaint was filed.

Moreover, the language of MCL 600.5856(c), when closely examined and plainly interpreted, suggests that NOI tolling is not applied unless the plaintiff waits the requisite waiting period – here, 182 days. That subsection says that the limitations period is tolled:

(c) At the time notice is given **in compliance with the applicable notice period** under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

This subsection of the tolling statute, which was amended in 2004, was considered in *Bush v Shabahang*, 484 Mich 156, 772 NW2d 272 (2009). The Court considered

whether the amendment mandates compliance with the entirety of § 2912b, such that a defective NOI does not get the benefit of tolling, or whether the new language focuses on compliance with only the applicable notice period in § 2912b, such that a defective NOI tolls the statute of limitations as long as it is compliant with the notice period.

Bush, supra at 165.

Bush emphasized that for tolling to apply, there must be “compliance with the ‘applicable notice period’”. *Id.* at 169. “[I]f a plaintiff complies with the applicable notice period before commencing

³ “Stare decisis is generally ‘the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000).

a medical malpractice action, the statute of limitations is tolled.” *Id.* Logically, then, if a plaintiff does not comply with the applicable notice period before commencing a medical malpractice action, the statute of limitations is not tolled.

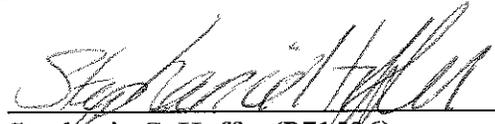
Compliance with the applicable notice period is a prerequisite to the application of the tolling statute. A determination of whether the limitations period was tolled during the notice waiting period cannot be made until the expiration of that waiting period. If a plaintiff has waited the requisite length of time, then the limitations period was tolled during that waiting period. If, however, as here, the plaintiff has not complied with the notice period, then the limitations period was **not** tolled during the waiting period – not for a single day. The limitations period expired two years after the alleged negligence with no tolling.

Therefore, Plaintiff’s reliance on §5856(a) is misplaced because at the time the complaint was filed, there were no days left in the limitations period to toll. The limitations period had already expired. Similarly, MCL 600.1901 is not applicable because a stale claim cannot be “commenced.” And, as explained above, §2301 cannot be used to resurrect a claim that was stale at the time it was filed. Therefore, the holding in *Burton* is not in conflict with the tolling statute.

RELIEF REQUESTED

For the reasons set forth above and in Defendants’ Application, Defendants request that the Court GRANT their Application, reverse the decision of the Court of Appeals and remand with instructions to grant summary disposition in Defendants’ favor.

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