STATE OF MICHIGAN

COURT OF APPEALS

SAMMIE R. WILSON, Personal Representative of the Estate of ANN LOUISE WILSON, deceased,

Plaintiff-Appellant,

v

DIANE PLYLER, M.D. and MT. HOPE FAMILY PRACTICE,

Defendants-Appellees.

UNPUBLISHED
March 22, 2007

No. 268577
Ingham Circuit Court
LC No. 05-001059-NH

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In this medical malpractice action for loss of opportunity to survive, plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition under MCR 2.116(C)(7). In the complaint, plaintiff alleged that defendants failed to adequately investigate and pursue treatment for a mass in the decedent's lung between December 1999 and May 25, 2000, the date that the decedent received a lung cancer diagnosis. Because the trial court correctly concluded that plaintiff's suit was untimely, we affirm.

Plaintiff first contends that the circuit court erred when it determined that the decedent's claim for a lost opportunity to survive accrued on the date of defendants' negligent conduct, rather than the date of the decedent's death. We disagree.

This Court reviews de novo a trial court's decisions concerning summary disposition motions. *Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004). Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. *Id.* "In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court 'consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.'" *Id.* at 647-648 (citations omitted). Further, because the Michigan Legislature has defined when various claims accrue, this issue involves a question of statutory construction, which this Court considers de novo. *Bloomfield Twp v Oakland Co Clerk*, 253 Mich App 1, 9; 654 NW2d 610 (2002).

The period of limitation applicable to a wrongful death claim brought under MCL 600.2922 is the same as the period of limitation applicable to the underlying theory of liability.

Lipman v William Beaumont Hosp, 256 Mich App 483, 489-490; 664 NW2d 245 (2003). In the present case, the underlying theory of liability is medical malpractice. A medical malpractice plaintiff has two years from the date the cause of action accrued in which to file suit. MCL 600.5805(6).[1] Further, actions brought under MCL 600.2922 "accrue as provided by the statutory provisions governing the underlying liability theory and not at the date of death." *Hawkins v Regional Med Labs, PC*, 415 Mich 420, 437; 329 NW2d 729 (1982), overruling *Coury v General Motors Corp*, 376 Mich 248; 137 NW2d 134 (1965) (holding that a claim under the wrongful death act accrues on the date of the decedent's death); see also *Jenkins v Patel*, 471 Mich 158, 164-165; 684 NW2d 346 (2004). MCL 600.5838a(1) governs the accrual of medical malpractice claims.

> For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, . . . *accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim*.[2] [*Id.* (emphasis added).]

"Because the accrual date depends on the basis of [a] plaintiff's malpractice allegations, [a court] must examine [the] plaintiff's complaint" to determine when the alleged acts or omissions occurred. *McKiney v Clayman*, 237 Mich App 198, 202; 602 NW2d 612 (1999). In this case, the complaint asserts that the underlying medical malpractice—specifically defendants' failure to properly examine the decedent, failure to refer her to appropriate specialists and failure to timely urge her to obtain follow up body scans—took place between December 1999, when the decedent began complaining of respiratory discomfort, and May 25, 2000, when the decedent obtained the diagnosis that she had lung cancer. Given that these acts and omissions occurred between December 1999 and May 25, 2000, the malpractice claims accrued at some point within this same period. Accordingly, the last potential accrual date of the medical malpractice claim alleged in the complaint is May 25, 2000.

Because the claim accrued no later than May 25, 2000, the decedent had until May 25, 2002 to file her complaint. MCL 600.5805(6). However, because the decedent died within the period of limitations applicable to her claim, her personal representative could timely assert her claim within 2 years after his letters of authority were issued, but not more than 3 years after the original period of limitations had run. MCL 600.5852. The decedents personal representative was appointed in September 2003. Therefore, the personal representative had until May 25, 2005, which was three years from the date on which plaintiff's original period of limitations

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[1] At the time the decedent's cause of action accrued, subsection (6) was codified as subsection (5). However, in this opinion, we shall refer to the current numbering.

[2] Although MCL 600.5838a(2) gives a medical malpractice plaintiff until "6 months after the plaintiff discovers or should have discovered the existence of the claim" to file suit, the discovery rule is not at issue in this case.

expired, to sue. *Id.* However, plaintiff did not file suit until August 2005. Therefore, the suit was untimely.

On appeal, plaintiff contends that an action based on a loss of opportunity to survive, as opposed to an ordinary medical malpractice claim, does not accrue until the date of the decedent's death. In support of this contention, plaintiff cites *Wickens v Oakwood Healthcare System*, 465 Mich 53; 631 NW2d 686 (2001). We cannot agree.

In *Wickens*, our Supreme Court considered a case where a living plaintiff sued to recover for "the reduction in her chances of survival caused by the delayed diagnosis as a claim for loss of an opportunity to survive under [MCL 600.2912a(2)]." *Id.* at 59. In deciding the issue, our Supreme Court did not address the date the medical malpractice injury accrued, but rather determined that, under the language of MCL 600.2912a(2), "a loss of an opportunity to survive claim only encompasses injuries already suffered, which clearly limits recovery to situations where death has already occurred." *Id.* at 61. Because the plaintiff in *Wickens* was still living, she could not sue for a loss of opportunity to survive. *Id.*

We acknowledge that the holdings in *Wickens* and *Hawkins* appear to be incongruous. Under *Wickens*, a plaintiff has no cause of action for a loss of opportunity to survive until he or she dies. However, under *Hawkins*, a plaintiff's loss of opportunity to survive claim accrues on the date of the act or omission that resulted in the lost opportunity. This leads to the rather odd result that a plaintiff who has the good fortune—or misfortune, depending on one's point of view—to survive more than 2 years and thirty days after an act or omission that significantly reduces his or her chances of long term survival will be barred from suing a medical malpractice tortfeasor before he or she even has an enforceable claim. See MCL 600.5852.[3] Nevertheless, our Supreme Court's opinion in *Wickens* did not alter the rule stated in *Hawkins* concerning the accrual date of wrongful death actions based on medical malpractice. Therefore, we are bound by that precedent.[4]

The trial court did not err when it determined that plaintiff's wrongful death claim was untimely.

Plaintiff next argues that the circuit court erred by rejecting his claim that defendants engaged in fraudulent concealment or otherwise inequitable conduct when they failed to produce the decedent's medical records between 2003 and 2005. We disagree.

"Under the fraudulent concealment statute, the limitation period is tolled when a party conceals the fact that the plaintiff has a cause of action." *Phinney v Perlmutter*, 222 Mich App 513, 562; 564 NW2d 532 (1997). Under MCL 600.5855,

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[3] This assumes that the plaintiff would be unable to avail himself or herself of the discovery rule.

[4] Although only two justices agreed with the opinion written by Justice Ryan in *Hawkins*, because this constituted a majority of the participating justices, it is binding precedent. *Negri v Slotkin*, 397 Mich 105, 109-110; 244 NW2d 98 (1976).

> [i]f a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

In *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632; 692 NW2d 398 (2004), this Court examined MCL 600.5855.

> "'Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent.'" *Tonegatto v Budak*, 112 Mich App 575, 583; 316 NW2d 262 (1982), quoting *DeHaan v Winter*, 258 Mich 293, 296; 241 NW 923 (1932). . . . Thus, "[t]he plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery." *Id*. "[T]here must be concealment by the defendant of the existence of a claim or the identity of a potential defendant," *McCluskey v Womack*, 188 Mich App 465, 472; 470 NW2d 443 (1991), and the "plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Sills*[*v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).] "'If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute, and in this behalf a party will be held to know what he ought to know.'" *Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935) (citation omitted). [*Id.* at 642-643.]

In addition to relying on MCL 600.5855, plaintiff asserts that the doctrine of equitable estoppel precludes defendants from seeking summary disposition on the basis that the period of limitation expired. This Court has described the circumstances in which equitable estoppel may prevent the assertion of a period of limitation defense, as follows:

> Equitable estoppel arises where one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position. Although the doctrine can operate to bar use of the statute of limitations as a defense . . . , our Supreme Court has been "reluctant to recognize an estoppel in the absence of conduct clearly designed to induce the plaintiff to refrain from bringing action within the period fixed by statute." [*Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998), quoting *Lothian v Detroit*, 414 Mich 160, 177; 324 NW2d 9 (1982) (citations omitted).]

In the present case, the trial court found that defendants had not engaged in affirmative and fraudulent conduct that prevented plaintiff from ascertaining the potential existence of a malpractice claim against them. Plaintiff attached to his response opposing summary disposition an affidavit by his counsel's paralegal and several letters, all of which addressed plaintiff's

unsuccessful efforts between 2003 and 2005 to obtain defendants' medical records, but this documentation does not allege or even hint that defendants took some specific affirmative action toward suppression of the decedent's medical records, or that defendants ever knowingly concealed the records or otherwise acted with the intent to prevent plaintiff from discovering or pursuing the present cause of action. *Doe*, *supra* at 642-643; *Adams*, *supra* at 708. Because the documentary evidence failed to support a finding that defendants engaged in fraudulent concealment or conduct warranting the application of equitable estoppel, we cannot conclude that the trial court erred in refusing to apply these doctrines to preserve plaintiff's claims.

Finally, plaintiff asserts that the circuit court erred by rejecting the equitable tolling doctrine as an alternate basis for denying defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). We disagree.

Before a plaintiff may commence a medical malpractice action, he must "give[] the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b(1). Under MCL 600.5856(c), "[t]he statutes of limitations or repose are tolled . . . . [a]t 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 . . . ."

In *Waltz*, *supra* at 648-651, 655, the Michigan Supreme Court held that under MCL 600.5856 the filing of a notice of intent to sue tolls the period of limitations provided by MCL 600.5805(6), but does not toll the period provided by MCL 600.5852, which constitutes a wrongful death saving provision and not a period of limitation. In *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), a special conflict panel held that the Supreme Court's decision in *Waltz* applies retroactively. More recently, in *Ward v Siano*, 272 Mich App 715; ___ NW2d ___ (2006), another special conflict panel rejected the proposition that "a wrongful death plaintiff may rely on equitable tolling to escape the retroactive effect of our Supreme Court's decision in *Waltz* . . . ." *Id.* at 717.

The decedent's claims accrued, at the latest, by May 25, 2000, the date of her lung cancer diagnosis. Thus the two-year period of limitation in MCL 600.5805(6) extended through May 25, 2002. However, after the appointment of plaintiff as personal representative on September 3, 2003, the three-year ceiling provided by the wrongful death saving period gave plaintiff until May 25, 2005, to timely commence this action. MCL 600.5852. Plaintiff gave notice of his intent to sue defendants on December 8, 2004, but the provision of notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). See *Waltz*, *supra* at 648-651, 655. Consequently, plaintiff's filing of this action on August 31, 2005, occurred more than three months after the wrongful death saving period expired.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder