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STATE OF MICHIGAN

IN THE SUPREME COURT

KERAN ERNEST, Individually and as Personal Representative of the Estate of Maurice Ernest, Deceased,

Plaintiff-Appellant,

v

DR. PAUL W. BROWN JR., ELMAHDI M. SAEED, DR. FAROUK M. BELAL, MCLAREN HEALTH CARE CORPORATION, and CYPRESS CARDIOLOGY PLLC,

Defendants-Appellees.

Supreme Court No. 168462

Court of Appeals No. 368566

Genessee County Circuit Court
Case No. 23-119425-NH
Hon. Celeste D. Bell

_____/

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STATE OF MICHIGAN

COURT OF APPEALS

KERAN ERNEST, Personal Representative of the ESTATE OF MAURICE ERNEST,

Plaintiff-Appellant,

v

PAUL W. BROWN, JR., M.D., ELMAHDI M. SAEED, CYPRESS CARDIOLOGY PLLC, and MCLAREN HEALTH CARE CORPORATION,

Defendants-Appellees,

and

DR. FAROUK M. BELAL,

Defendant.

UNPUBLISHED
March 20, 2025
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No. 368566
Genesee Circuit Court
LC No. 2023-119425-NH

Before: CAMERON, P.J., and GARRETT and MARIANI, JJ.

PER CURIAM.

In this action for wrongful death arising out of medical malpractice, plaintiff appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) (statute of limitations) to defendants because plaintiff's claims were untimely. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's decedent presented to the emergency room on July 16, 2020, complaining of chest pain. After being examined in the emergency room, decedent was moved to the cardiac unit for observation. He died the next day. Relevant to this appeal, on June 7, 2021, the Genesee County Probate Court issued letters of authority appointing Keran Ernest as the personal representative of decedent's estate. Plaintiff sent its notice of intent to defendants on February 10, 2023, and filed suit on August 14, 2023. Defendants moved for summary disposition under

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MCR 2.116(C)(7) (statute of limitations), arguing that plaintiff's complaint was time-barred. The trial court granted the motions and dismissed the case. Plaintiff now appeals.

II. STANDARD OF REVIEW

"This Court reviews de novo both the applicability of a statute of limitations and the trial court's ruling on a motion for summary disposition." *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 21; 896 NW2d 39 (2016) (citations omitted). "Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations." *Dep't of Environmental Quality*, 318 Mich App at 21 (quotation marks and citation omitted). "Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute." *Id.* (quotation marks and citation omitted).

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dep't of Environmental Quality*, 318 Mich App at 21 (quotation marks and citation omitted).]

III. ANALYSIS

The question in this appeal involves the application of three statutes: (1) the statute of limitations for medical malpractice claims, MCL 600.5805(8), (2) the wrongful death savings provision (the "savings provision"), MCL 600.5852, and (3) the notice-tolling provision, MCL 600.5856(c).

Generally, medical malpractice actions are subject to a two-year statute of limitations from the time the claim accrues. MCL 600.5805(8). A claim for medical malpractice accrues "at the time of the act or omission that is the basis for the claim[.]" MCL 600.5838a(1). A plaintiff alleging medical malpractice must give the defendant-provider written notice at least 182 days before filing suit. MCL 600.2912b(1). "At the time notice is given in compliance with the applicable notice period[,]" if the statute of limitations would have expired before the 182-day period elapsed, the limitations period "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." MCL 600.5856(c). In this case, plaintiff's claim accrued when decedent allegedly received negligent medical care on July 16, 2020. Had plaintiff provided its notice of intent within two years of this date, the limitations period for bringing the claim under MCL 600.5805(8) would have been tolled, but plaintiff did not do so. Thus, when considered solely in the context of the original statute of limitations, plaintiff's claim expired on July 16, 2022, and its August 14, 2023 complaint was untimely.

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However, the savings provision provided plaintiff with additional time in which to file suit. Relevant to this appeal, MCL 600.5852 states:

> (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that 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.
>
> (2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate. Except as provided in subsection (3), the issuance of subsequent letters of authority does not enlarge the time within which the action may be commenced.
>
> * * *
>
> (4) Notwithstanding subsections (1) to (3), an action shall not be commenced under this section later than 3 years after the period of limitations has run. [MCL 600.5852(1), (2), and (4).]

Plaintiff's letters of authority were issued on June 7, 2021. Thus, under MCL 600.5852, plaintiff had until June 7, 2023 to file suit, even though the original statute of limitations had already expired. Again, plaintiff did not file its complaint until August 14, 2023. So, plaintiff's complaint was still untimely even when the savings provision is considered.

Plaintiff argues that the notice of intent it provided on February 10, 2023 tolled the period in which it could file suit under the savings provision. According to plaintiff, the notice tolling provision applies to the savings provision, rendering its suit timely. Plaintiff's claim fails because, in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), our Supreme Court expressly rejected the application of the tolling provision in MCL 600.5856 to the savings provision in MCL 600.5852.

Plaintiff acknowledges that its argument is contrary to our Supreme Court's holding in *Waltz*, but asserts *Waltz*'s holding is contrary to the Legislature's intent. In its effort to side step *Waltz*'s holding, plaintiff spins two earlier cases from our Supreme Court to support its claim that the tolling provision in MCL 600.5856(c) applies to the savings provision: *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987), and *Omelenchuk v Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz*, 469 Mich at 642. Plaintiff argues that *Hardy* remains good law because it was not expressly overruled by *Waltz*, and urges this Court to "apply the unambiguous language" of *Omelenchuk* despite it having been overruled by *Waltz*.

In *Waltz*, our Supreme Court held that MCL 600.5856 does not toll the time frame provided in MCL 600.5852. *Waltz*, 469 Mich at 650-651. It reasoned that MCL 600.5856 applies to a "period of limitations[,]" and MCL 600.5852 "clearly provides that it is an *exception* to the limitation period," not a limitation period itself. *Waltz*, 469 Mich at 651. Thus, while MCL 600.5856 may serve to toll the two-year statute of limitations for the underlying medical-malpractice claim, it does not toll the two-year *exception* to the statute of limitations under MCL 600.5852.

Because *Waltz* is binding on this Court, we lack the authority to consider plaintiff's argument regarding legislative intent. See *Assoc Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016) ("The Court of Appeals is bound to follow decisions by [our Supreme] Court except where those decisions have clearly been overruled or superseded") (emphasis omitted). As for plaintiff's argument regarding *Hardy* and *Omelenchuk*, *Waltz* explicitly overruled *Omelenchuk*, see *id.*, and *Hardy* predates *Waltz*, meaning we must follow *Waltz*, see *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 03 NW2d 486 (2005) (explaining that this Court is "obligated to follow the most recent pronouncement of the Supreme Court on a principle of law.").

Affirmed.

/s/ Thomas C. Cameron
/s/ Kristina Robinson Garrett
/s/ Philip P. Mariani

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2022 WL 17368761
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Matthew PONIEWIERSKI, Personal Representative of the Estate of Ashley Poniewierski, Plaintiff-Appellant,
v.
WILLIAM BEAUMONT HOSPITAL ROYAL OAK, Ascension St. John Macomb-Oakland Hospital, Michigan Healthcare Professionals, PC, doing business as Oakland Medical Group, Ronald Rasansky, D.O., Stephen Hoffman, D.O., Zuie C. Wakade, D.O., Tusar Desai, M.D., and Akriti Dewanwala, M.D., Defendants-Appellees.

No. 356925
|
December 1, 2022

Oakland Circuit Court, LC No. 2020-184202-NH

Before: Boonstra, P.J., and Gadola and N.P. Hood, JJ.

Opinion

Per Curiam.

***1** In this wrongful-death medical malpractice action, plaintiff, personal representative of the estate of Ashley Poniewierski (decedent), appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). Because the trial court, citing *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), correctly ruled that plaintiff's service of a notice pursuant to MCL 600.2912b did not toll the two-year wrongful-death saving period under MCL 600.5852, we affirm.

I. BACKGROUND

The relevant facts are not in dispute. At various times between February 17, 2017, and June 3, 2017, decedent was treated by defendants for chronic abdominal pain that she had been suffering for approximately one year. On June 12, 2017, decedent was found unresponsive in her home. An autopsy determined the cause of her death as inflammatory bowel disease and related complications.

Eleven months later, on May 14, 2018, plaintiff was appointed personal representative of decedent's estate under letters of authority issued by the Macomb Probate Court. On April 20, 2020, plaintiff served a notice of intent to file a medical malpractice claim (NOI) on defendants.

On October 23, 2020, plaintiff filed a complaint and affidavit of meritorious claim in the Oakland Circuit Court, alleging claims for medical malpractice and loss of consortium against all defendants. Defendants denied plaintiff's allegations as untrue and asserted, as affirmative defenses, that plaintiff's claims were barred by the applicable statute of limitations.

In three separate motions for summary disposition pursuant to MCR 2.116(C)(7), defendants asserted that the two-year limitations period applicable to medical malpractice actions, MCL 600.5805(8),[1] had expired before plaintiff served the NOI on defendants. Defendants recognized that the wrongful-death saving provision, MCL 600.5852, extended the time for filing a wrongful-death action for two years following the issuance of letters of authority, but, citing *Waltz*, defendants contended that the notice-tolling provision for medical malpractice cases, MCL 600.5856(c), did not apply to the wrongful-death saving provision, MCL 600.5852. Defendants asserted that plaintiff was required to file his complaint in this case not later than August 24 or 25, 2020; because the complaint was not filed until October 23, 2020, defendants contended that they were entitled to summary disposition as a matter of law.

Responding to these motions, plaintiff asserted that the various statutes governing medical malpractice and wrongful-death actions must be read *in pari materia* and construed as consistent with each other to implement the intent of the Legislature. Acknowledging that the two-year statute of limitations, MCL 600.5805(8), governed this medical malpractice action, plaintiff asserted that this period of limitations was extended by the wrongful-death saving provision, MCL 600.5852(1), and extended further pursuant to MCL 600.5856(c), tolling the limitations period following the service of the NOI. Citing MCL 600.5852(4), plaintiff contended that the deadline for commencing this action was April 20, 2022, and that this action was timely filed on October 23, 2020.

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***2** Attempting to distinguish *Waltz* from this case, plaintiff asserted that, in *Waltz*, the plaintiff had failed to file her complaint within the maximum five-year period established by the statute of limitations and the wrongful-death saving provision, but the complaint in this case was filed 18 months before the expiration of that period. Contending that *Waltz* was incorrectly decided, plaintiff urged the trial court to instead apply the decisions of our Supreme Court in *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987) and *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Plaintiff argued that in *Waltz* the Supreme Court directly contravened MCL 600.2912b and ignored clear statutory language. Plaintiff argued that application of *Waltz* to this case was "essentially asking by judicial fiat to shorten the two-year extension provided under MCL 600.5852 to 18 months."

In reply, defendants rejected plaintiff's reliance on *Hardy* and *Omelenchuk*, asserting that our Supreme Court implicitly overruled *Hardy* and explicitly overruled *Omelenchuk* in *Waltz*. Defendants also observed that plaintiff could have served the NOI at any time between June 4, 2017, and November 14, 2019, but failed to do so, and asserted that the trial court could not adopt plaintiff's argument "without violating MCR 7.215(C)(2) and principles of stare decisis."

On March 31, 2021, the trial court heard oral arguments on the motions for summary disposition via Zoom videoconferencing. The trial court issued its opinion and order six days later. The court ruled that defendants were entitled to summary disposition, explaining that MCL 600.5852 requires a plaintiff to commence an action within two years after letters of authority are issued and that, in *Waltz*, "the Michigan Supreme Court held that the notice tolling provision does not operate to toll the additional period permitted under 600.5852." Thus, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

II. ANALYSIS

Plaintiff argues that the trial court erred by applying *Waltz*, which plaintiff asserts contradicts clear statutory language. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). A court reviewing a motion for summary disposition under MCR 2.116(C)(7) must consider "the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v City of Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013). Documentary evidence must be viewed in a light most favorable to the nonmoving party. *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). When the facts are undisputed, whether a claim is barred by the applicable statute of limitations is also reviewed de novo. *In re Gerald L Pollack Trust*, 309 Mich App 125, 134; 867 NW2d 884 (2015).

This case involves the interpretation of several statutes governing medical malpractice and wrongful-death actions. This Court's primary goal when interpreting statutes is "to ascertain and give effect to the intent of the Legislature." *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 136; 762 NW2d 178 (2009) (quotation marks and citation omitted). If the statutory language is clear and unambiguous, "the Legislature is presumed to have intended the meaning expressed and judicial construction is neither required nor permitted." *Id.* (Quotation marks and citation omitted).

***3** A medical malpractice claim accrues at the time of the act or omission that is the basis for the claim. MCL 600.5838a(1). The two-year period of limitations applicable to malpractice actions generally, MCL 600.5805(8), applies to medical malpractice actions. MCL 600.5838a(2). A saving provision also applies to wrongful-death actions: if a person dies before or within 30 days of the expiration of the period of limitations, an action may be commenced by the personal representative of the decedent's estate at any time within two years after letters of authority are issued. MCL 600.5852(1). In an action alleging medical malpractice, the two-year saving period runs from the date of appointment of the first personal representative of the estate. MCL 600.5852(2). However, MCL 600.5852(4) provides that an action may not be commenced under this saving provision more than three years after expiration of the period

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of limitations, thus establishing a maximum period of five years from the date of accrual of the cause of action in which to commence a wrongful-death action premised on alleged medical malpractice.

In addition, a plaintiff in a medical malpractice action is required to give written notice of intent to file a claim not less than 182 days before commencing the action. MCL 600.2912b(1). Giving notice under § 2912b tolls the statute of limitations "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." MCL 600.5856(c).

Pursuant to MCL 600.5838a(1), in this case, plaintiff's claims against the various defendants accrued between February 17, 2017, when decedent was first treated by one of the defendants, and June 3, 2017, when decedent was last discharged from the hospital. Thus, pursuant to MCL 600.5805(8), the two-year malpractice limitations period expired no later than June 3, 2019. However, because decedent passed away before the limitations period expired, the wrongful-death saving provision, MCL 600.5852(2), extended the time for commencing an action to May 14, 2020, two years after the date plaintiff was appointed personal representative of decedent's estate. Thus, the original deadline for filing the complaint in this matter was May 14, 2020.

This deadline was extended at the onset of the COVID-19 pandemic. On March 10, 2020, the Governor issued Executive Order No. 2020-4, declaring a state of emergency across the state pursuant to the Emergency Management Act, MCL 30.401 *et seq.*, the Emergency Powers of the Governor Act, MCL 10.31 *et seq.*, and Const. 1963, art. 5, § 1. On March 23, 2020, our Supreme Court issued Administrative Order No. 2020-3, 505 Mich lxxxvi (2020), which suspended "all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110" and provided that "any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1)." The Supreme Court rescinded AO 2020-3, effective June 20, 2020, but ordered that "[f]or time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020." Administrative Order No. 2020-18, 505 Mich lxxxviii (2020).

When the state of emergency was declared on March 10, 2020, 65 days remained before the May 14, 2020 deadline for commencement of plaintiff's medical malpractice action. Thus, pursuant to AO 2020-18, plaintiff's deadline was extended to August 24, 2020. Plaintiff filed the complaint in this action on October 23, 2020, nearly two months after this deadline.

Plaintiff contends that this action was timely commenced on April 20, 2020, when the NOI mandated by MCL 600.2912b was served on defendants, because the two-year saving period for wrongful-death actions was tolled pursuant to MCL 600.5856(c), which provides that "statutes of limitation or repose" are tolled when "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...." MCL 600.5856(c). Upon service of notice, the period of limitations "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." *Id.*

***4** However, in *Waltz*, 469 Mich at 644, our Supreme Court concluded that the notice-tolling provision does not apply to the wrongful-death saving provision. In that case, the plaintiff's infant son received medical treatment for several months before his death on April 18, 1994. *Id.* at 644-645. In January 1999, the plaintiff notified the defendants, pursuant to MCL 600.2912b, of her intent to file suit. *Id.* at 645. On May 27, 1999, the plaintiff was appointed personal representative of her son's estate. *Id.* On June 23, 1999, the plaintiff filed a complaint alleging wrongful-death medical malpractice. *Id.* The trial court granted summary disposition in favor of the defendants, ruling that the notice-tolling provision did not toll the wrongful-death saving period, and that the plaintiff had not been appointed personal representative until after the two-year limitations period and the wrongful-death saving period had both expired. *Id.* at 646-647. This Court affirmed the trial court, ruling that "by its express language, MCL 600.5856(d)[2] tolls the statute of limitations, not the extended limit in MCL 600.5852. Consequently, the trial court did not err because the statute of limitations barred plaintiff's claim." *Waltz*, 469 Mich at 649-650 (citation omitted; footnote added).

The Supreme Court granted leave to appeal, specifically to "determine whether § 5856(d), the medical malpractice notice

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tolling provision, tolls the additional period permitted for filing wrongful death actions under the wrongful death saving provision, § 5852." *Id.* at 644. The Supreme Court explained that MCL 600.5852 is neither a statute of limitations nor a statute of repose, but "a *saving* provision designed 'to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.' " *Id.* at 655, quoting *Lindsey v Harper Hosp*, 455 Mich 56, 66; 564 NW2d 861 (1997). Thus, the Supreme Court concluded that "the notice tolling provision, § 5856(d)—which explicitly applies only to 'the statute of limitations or repose'—does not operate to toll the additional period permitted under § 5852 for filing wrongful death actions." *Waltz*, 469 Mich at 655.

Plaintiff attempts to distinguish *Waltz* from this case, asserting that, in *Waltz*, the plaintiff had failed to file her complaint within five years of her son's death, thus exceeding the maximum extension established under MCL 600.5852(4). However, this distinction is irrelevant given the Supreme Court's unambiguous conclusions that § 5856 "explicitly applies only to 'the statute of limitations or repose' " and that § 5852 "is not a 'statute of limitations' or a 'statute of repose.' " *Id.* If § 5852 is neither a statute of limitations nor a statute of repose, then service of the NOI tolls neither the two-year saving period, MCL 600.5852(1), nor the three-year ceiling, MCL 600.5852(4).

Plaintiff urges this Court to ignore these unambiguous conclusions of the Supreme Court. However, this Court is required to follow decisions of the Supreme Court "except where those decisions have *clearly* been overruled or superseded...." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). Plaintiff does not contend that *Waltz* has been overruled or superseded, but argues that this Court should instead follow the Supreme Court's decisions in *Hardy* and *Omelenchuk*, two cases decided before *Waltz*. This argument has no merit.

Hardy did not involve a medical malpractice claim. Rather, in *Hardy*, the issues were "(1) whether MCL 600.5852 applies to wrongful death cases in which death was 'instantaneous,' and (2) whether death by drowning is instantaneous as a matter of law." *Hardy*, 429 Mich at 424-425. Our Supreme Court concluded that "the saving provision contained in MCL 600.5852 operates to toll the statute of limitations in both survival-type actions and death-type actions brought under MCL 600.2922, the wrongful death statute." *Id.* at 425. Plaintiff contends that this language shows that the Supreme Court "clearly used the terminology 'to toll the statute of limitations.' "

***5** However, in *Hardy*, the Supreme Court cautioned that the language used in a court's opinion "must be construed in light of the facts and issues involved in a case under consideration and should not be interpreted as going beyond the scope of matters for adjudication...." *Id.* at 431. Because the central issue in *Hardy* was whether the saving provision applied to both types of wrongful-death actions, and not the distinction between a statute of limitations and a saving statute, *Hardy* is irrelevant to the issues in this case. Moreover, this Court is "obligated to follow the most recent pronouncement of the Supreme Court on a principle of law." *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 703 NW2d 486 (2005).

Plaintiff's reliance on *Omelenchuk* is similarly misplaced. As the Supreme Court explained in *Waltz*, 469 Mich at 652, the issue in *Omelenchuk* "was whether the malpractice notice tolling provision tolled the statutory limitation period for a full 182 days or, instead, for only 154 days, when a medical malpractice claimant does not receive the written response to the notice of intent contemplated under MCL 600.2912b(7)." In addition, in *Omelenchuk*, the Court was not required to determine whether the notice-tolling provision extended the wrongful-death saving period because the complaint was filed within the two-year malpractice limitations period, as extended under the notice-tolling provision. *Id.* at 653.

Plaintiff correctly asserts that, in *Omelenchuk*, 461 Mich at 577, the Supreme Court described the wrongful-death saving period as a period of limitations, stating that the "two-year limitation period" was set to expire two years after the plaintiffs received their letters of authority. However, in *Waltz*, 469 Mich at 653, the Court described that language as "passing references to § 5852 as creating a 'limitation period.' " The Court then explained that "[t]o the extent that our imprecise choice of words in *Omelenchuk* implied that § 5852 created a separate 'limitation period,' we again clarify that § 5852 is not a statute of limitations, but a *saving* statute." *Id.* at 654. Concluding its analysis of *Omelenchuk*, the *Waltz* Court explained further: "To the limited extent that the above-quoted portion of *Omelenchuk* might be viewed

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as sanctioning application of the notice tolling provision to the wrongful death saving provision, it is hereby overruled." *Id.* at 655.

Omelenchuk has been "clearly overruled" and is not binding precedent. *Associated Builders*, 499 Mich at 191-192. *Waltz* has not been overruled, and is binding on this Court, *id.*, as well as the trial court. *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 142; 863 NW2d 344 (2014). Thus, the trial court did not err by granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

III. CONCLUSION

Because plaintiff's service of the NOI did not extend the two-year wrongful-death saving period, the trial court did not err by granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

Affirmed.

N.P. Hood, J. (concurring.)

I concur in the majority opinion's analysis and conclusions because we are bound by the holding in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

All Citations

Not Reported in N.W. Rptr., 2022 WL 17368761

Footnotes

1 At the time plaintiff's claim accrued in this case, the two-year limitations period for malpractice actions was codified at MCL 600.5805(6); the statute was later amended by 2018 PA 183 and the two-year limitations period is now codified at MCL 600.5805(8).

2 Now codified at MCL 600.5856(c). See 2004 PA 87, effective April 22, 2004.

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2024 WL 1594617
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Ben OLDS, Personal Representative of the Estate of Linda S. Walsh, Plaintiff-Appellant,
v.
AMBULATORY SURGERY ASSOCIATES, LLC, doing business as Brookside Surgery Center, Defendant,
and
Pain DOC Anesthesiology, PC, and John Shaird M.D., Defendants-Appellees.

No. 360780
|
April 11, 2024

Calhoun Circuit Court, LC No. 2021-000540-NH

Before: Hood, P.J., and Redford and Maldonado, JJ.

Opinion

Per Curiam.

***1** In this medical malpractice action, plaintiff appeals by leave granted [1] the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) (claim is time-barred). [2] We reverse.

I. BACKGROUND

This case arises from Dr. Shaird's allegedly negligent treatment of Linda Walsh, who is now deceased. According to the complaint, Walsh began seeing Dr. Shaird in 2008 for treatment of chronic pain, and Dr. Shaird prescribed several different medications during their professional relationship which lasted nine years. Plaintiff alleged that Dr. Shaird continued prescribing the same doses of numerous narcotic drugs despite the facts that Walsh had a history of both alcohol and prescription drug abuse and had recently undergone significant weight loss during that time. Moreover, Walsh had reportedly told family members that she and Dr. Shaird had a sexual relationship. Dr. Shaird last treated Walsh on March 2, 2017, and she was found dead five days later. Following an autopsy, it was determined that the cause of death was an overdose. [3] At the time of her death, Walsh only weighed 100 lbs.

Walsh's estate did not bring this action until February 26, 2021, nearly four years after Walsh's death and well outside the applicable limitations period. However, plaintiff argued that the complaint, nevertheless, was timely filed because of the Michigan Supreme Court's COVID-19 tolling orders. Defendants were unpersuaded and, accordingly, filed a motion seeking summary disposition pursuant to MCR 2.116(C)(7). At the hearing regarding this motion, the trial court expressed frustration with plaintiff's attempt to utilize the tolling orders and made comments suggesting that some showing of need was required to rely on them:

> The issue of whether or not the COVID order issued by the Supreme Court, I'm not going to argue or, it's validity of whether or not they had the authority to do so. It's a very unique circumstance that we had here. But I find it interesting that the plaintiff, in this matter, doesn't indicate there's anything related to this particular case that resulted in, other than, hey, I get some bonus time here because of this, this rule so, I can file late.
>
> To take that order and say a ah, [sic] I get, I get some extra time, even though I missed my date, I'm lucky that this order was entered and that there was COVID although there's no factual circumstance here that gives them a reason to gain benefit from that order. Boy, it, it's a tough pill to swallow and I don't swallow it.

The court granted defendants' motion for summary disposition and denied plaintiff's subsequent motion for reconsideration. This appeal followed.

II. STANDARDS OF REVIEW

***2** "The question whether a cause of action is barred by the applicable statute of limitations is one of law, which this Court reviews de novo." *Frank v Linkner*, 500 Mich. 133, 140, 894 N.W.2d 574 (2017) (quotation marks and citation omitted). When reviewing a motion for summary disposition made pursuant to MCR 2.116(C)(7), this Court considers "all documentary evidence and accept[s] the complaint as factually accurate unless affidavits or other appropriate

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documents specifically contradict it." *Id.* (quotation marks and citation omitted).

Issues involving "the proper interpretation and application of statutes and court rules" are reviewed de novo. *Safdar v Aziz*, 501 Mich. 213, 217, 912 N.W.2d 511 (2018).

The proper interpretation and application of the Supreme Court's administrative orders is likewise reviewed de novo. *Carter v DTN Mgt Co*, —— Mich App ——, —— n 1*Carter v DTN Mgt Co*, —— Mich App ——, —— n 1; —— NW2d —— (2023), (Docket No. 360772); slip op. at 3. "Principles of statutory construction apply to determine the Supreme Court's intent in promulgating rules of practice and procedure." *Linstrom v Trinity Health-Mich*, —— Mich App ——, ——*Linstrom v Trinity Health-Mich*, —— Mich App ——, ——; —— NW2d —— (2023)—— NW2d —— (2023), (quotation marks and citation omitted) (Docket No. 358487); slip op. at 6. Accordingly, "interpretation of the Supreme Court's administrative orders begins with the language of the orders to discern the Supreme Court's intent and no further judicial construction is necessary if the language is unambiguous." *Id.*

III. DISCUSSION

The trial court erred by failing to exclude the 102-day stay period from its calculation of when the applicable limitations period expired. Additionally, defendants' argument that the Supreme Court lacked the authority to toll the statute of limitations is without merit.

A medical malpractice claim "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." MCL 600.5838a(1). Generally, a plaintiff must bring a medical malpractice action within two years of the date that the claim accrued. MCL 600.5805(8). However, MCL 600.5852 extends the limitations period in cases in which the party dies before the period of limitations has run. MCL 600.5852 provides, in relevant part, as follows:

> (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that 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.
>
> (2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate....
>
> * * *

In this case, plaintiff's claim of medical malpractice accrued on March 2, 2017, because that was the last date that Walsh was treated by Dr. Shaird. See MCL 600.5838a(1). Pursuant to MCL 600.5805(8), the limitations period for plaintiff's claims would have expired on March 2, 2019 because the statutory period of limitations for plaintiff's claim is generally two years. However, because Walsh died before the period of limitations had run, and the letters of authority were issued to Walsh's estate on December 27, 2018, the period of limitations was extended to December 27, 2020. See MCL 600.5852. Plaintiff filed this complaint on February 26, 2021, which ordinarily would be outside even this extended limitations period.

***3** However, on March 23, 2020, the Michigan Supreme Court issued Administrative Order No. 2020-3, 505 Mich cxxvii (2020) (AO 2020-3), which provides:

> In light of the continuing COVID-19 pandemic and to ensure continued access to courts, the Court orders that:
>
> For all deadlines applicable to the commencement of all civil and probate case types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).
>
> This order is intended to extend all deadlines pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19. Nothing in this order precludes a court from ordering an expedited response to a complaint or motion in order to hear and resolve an emergency matter requiring immediate attention. We continue to encourage courts to conduct hearings remotely using two-way interactive video

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> technology or other remote participation tools whenever possible.
>
> This order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses, *nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding.* Courts must have a system in place to allow filings without face-to-face contact to ensure that routine matters, such as filing of estates in probate court and appointment of a personal representative in a decedent's estate, may occur without unnecessary delay and be disposed via electronic or other means. [Emphasis added.]

The italicized portion was added to the order by an amendment made by the Supreme Court on May 1, 2020. See *Hubbard v Stier*, —— Mich App ——, ——*Hubbard v Stier*, —— Mich App ——, ——; —— NW2d —— (2023)—— NW2d —— (2023), (Docket No. 357791); slip op. at 4.

This order was rescinded effective June 20, 2020 by Administrative Order No. 2020-18, 505 Mich clviii (2020) (AO 2020-18). AO 2020-18 provides:

> In Administrative Order No. 2020-3, the Supreme Court issued an order excluding any days that fall during the State of Emergency declared by the Governor related to COVID-19 for purposes of determining the deadline applicable to the commencement of all civil and probate case types under MCR 1.108(1). Effective Saturday, June 20, 2020, that administrative order is rescinded, and the computation of time for those filings shall resume. For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020. For filings with time periods that did not begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020.

Therefore, "the exclusion period at issue is the 102 days from March 10, 2020 to June 20, 2020." *Compagner v Burch*, —— Mich App ——, —— n 12*Compagner v Burch*, —— Mich App ——, —— n 12; —— NW2d —— (2023)—— NW2d —— (2023), (Docket No. 359699); slip op. at 7.

A. APPLICATION OF ADMINISTRATIVE ORDERS

***4** The trial court misapplied AO 2020-3 by failing to exclude the 102-day tolling period from its calculation of plaintiff's filing deadline.

Defendants argue that AO 2020-3 only applied to deadlines that were set to expire during the emergency period. However, it is clear from the plain language of AO 2020-3 that the Supreme Court intended that all limitation periods pertaining to the initiation of an action be tolled irrespective of whether they were set to expire during the tolling period. AO 2020-3 provides that "*any day* that falls during the state of emergency declared by the Governor ... *is not included*" with respect to the calculation of "*all deadlines applicable to the commencement of all civil*" actions. (Emphasis added.) The order further clarifies that it "is intended to extend *all deadlines pertaining to case initiation* ...." *Id.* (emphasis added). It would have been easy for the Supreme Court to clarify that its intent was only to extend all deadlines set to expire during the state of emergency, and we decline defendants' invitation to read such language into the order. We also note the practical implications that such an interpretation would have had absent the benefit of hindsight: if AO 2020-3 was restricted to those deadlines set to expire during the state of emergency, then filers would have had no way of knowing whether their deadlines were tolled because it was unclear at that time how long the state of emergency would last.

In conclusion, AO 2020-3 clearly and unambiguously tolled all limitations periods pertaining to case initiation, and the trial court, therefore, erred by limiting AO 2020-3's applicability.

B. VALIDITY OF ADMINISTRATIVE ORDERS

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Binding caselaw issued by this Court counsels us to conclude that AO 2020-3 was constitutional.

Early this year, a prior panel of this Court affirmed the constitutionality of AO 2020-3 in a published opinion by which we are bound. See MCR 7.215(C)(2). In *Carter v DTN Mgt Co*, the plaintiff brought a premises liability action that would have been time-barred but for the application of AO 2020-3. *Carter*, —— Mich App at ——; slip op. at 1. The defendant argued that AO 2020-3 was null because the Supreme Court did not have the "authority to modify or toll the statute of limitations." *Id.* at 5. This Court explained that the Supreme Court can "establish, modify, amend, and simplify the practice and procedure in all courts of this state" by issuing administrative orders and promulgating court rules, but it also noted that this power is limited in that the Supreme Court cannot "issue orders or enact court rules that establish, abrogate, or modify the substantive law." *Id.* (quotation marks and citations omitted). This Court held that AO 2020-3 fell within the former category, reasoning that "[b]y its own terms, AO 2020-3 was modifying the computation of days under MCR 1.108 for purposes of determining filing deadlines, which is plainly a procedural matter." *Id.* at 6. In other words, the Supreme Court did not alter the amount of time allowed by statutes of limitations; rather, it altered the manner of counting days toward applicable limitation periods. *Id.* [4]

***5** In this case, defendants argue that recognizing plaintiff's interpretation of AO 2020-3 would mean that the Supreme Court impermissibly invaded the province of the Legislature by altering statutes of limitations. This is precisely the argument this Court rejected in *Carter*; therefore, we reject it again.

IV. CONCLUSION

The trial court's order granting summary disposition in favor of defendants is reversed. This case is remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs. See MCR 7.219(A).

Redford, J. (dissenting).

From the majority's opinion, I respectfully dissent. I would affirm the trial court's decision. For the reasons explained in *Compagner v Burch*, —— Mich App ——, ——*Compagner v Burch*, —— Mich App ——, ——; —— NW2d —— (2023), I do not believe that our Supreme Court had the constitutional authority to issue administrative orders that alter the running of legislatively defined statutory limitations periods. Despite agreeing with *Compagner*, I recognize that *Carter v DTN Mgt Co*, —— Mich App ——, ——*Carter v DTN Mgt Co*, —— Mich App ——, ——; —— NW2d —— (2023), remains binding on this Court respecting the Supreme Court's authority in that regard. The more pressing issue presented in this appeal, however, is whether the Supreme Court's administrative orders grant all litigants including plaintiff in this case an additional 102 days tacked onto the statutory limitations period. As explained by this Court in *Toman v McDaniels*, —— Mich App ——, ——*Toman v McDaniels*, —— Mich App ——, ——; —— NW2d —— (2023)—— NW2d —— (2023), even if the Supreme Court had the constitutional authority to issue administrative orders that interfere with the running of legislatively defined statutory limitations periods, the Supreme Court's administrative orders' plain language did not authorize tacking on additional days to statutory limitations periods that fell outside the specified period prescribed by the administrative orders.

This case demonstrates why the *Carter* Court's interpretation and application of our Supreme Court's March 23, 2020 Administrative Order No. 2020-3, 505 Mich cxxvii (2020) (AO 2020-3) is incorrect. The period of limitations for medical malpractice actions is controlled by statute. *Miller v Mercy Mem Hosp Corp*, 466 Mich. 196, 199, 644 N.W.2d 730 (2002). The limitations period for a malpractice action is two years. MCL 600.5805(8). A medical malpractice claim "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." MCL 600.5838a(1). A medical malpractice action that is not commenced within the statutorily prescribed time limits is time-barred. MCL 600.5838a(2).

Dr. Shaird last treated Walsh on March 2, 2017. She died on March 7, 2017, from acute severe combined drug intoxication. Letters of authority were issued to Walsh's estate on December 27, 2018. Plaintiff filed the complaint on February 26, 2021. Defendants moved for summary disposition under MCR 2.116(C)(7) on the ground that plaintiff's claims were time-barred. Plaintiff opposed the motion, arguing that, although plaintiff filed the complaint outside the two-year wrongful death savings period provided by MCL 600.5852, our Supreme Court's Administrative

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Order No. 2020-3 (AO 2020-3), 505 Mich cxxvii (2020) [1] entered March 23, 2020, promulgated after Michigan's Governor ordered a state of emergency in relation to the COVID-19 pandemic, and operative until rescinded by Administrative Order No. 2020-18 (AO 2020-18), 505 Mich clviii (2020) effective June 20, 2020, tolled the statute of limitations giving plaintiff until April 8, 2021, to file suit. [2] At the hearing on defendants' motion, the trial court disagreed with plaintiff's argument that the Supreme Court's administrative orders gave plaintiff extra time in which to file the complaint, ruled in favor of defendants, and entered an order dismissing plaintiff's claims against them. Plaintiff moved for reconsideration and the trial court denied the motion.

***6** Plaintiff argues that the trial court erred by granting defendants' motion under MCR 2.116(C)(7) because AO 2020-3 remained operative until rescinded by AO 2020-18 and thereby extended the two-year period plaintiff had to file the complaint by 102 days which, when applied in this case, rendered plaintiff's complaint timely filed. I disagree, and therefore, dissent. *Carter*'s interpretation of AO 2020-3 and the majority's application of it to this case, I respectfully conclude is in error.

I do not agree that plaintiff can tack on an additional 102 days simply because her statutory limitations period overlapped the period of AO 2020-3's operation. That is neither warranted nor just. In *Compagner*, this Court explained the accrual and filing deadlines for medical malpractice claims as follows:

> A medical malpractice claim "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." MCL 600.5838a(1). A plaintiff must bring a medical malpractice action within two years of the date the claim accrues, MCL 600.5805(8) and *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich. 304, 310, 901 N.W.2d 577 (2017), "or within 6 months after the plaintiff discovers or should have discovered the existence of the claim," MCL 600.5838a(2), whichever is later. However, a plaintiff's ability to bring a medical malpractice action is further limited by the statute of repose, which provides that "the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim." MCL 600.5838a(2); see also *Nortley v Hurst*, 321 Mich App 566, 572, 908 N.W.2d 919 (2017) ("The statute setting the deadlines for bringing a [medical] malpractice claim makes clear that the six-year period of repose caps the time for bringing a claim within six months of discovery.") *Id.*
>
> A plaintiff in a medical malpractice action is required to provide the defendants with written notice of intent to file a claim not less than 182 days before commencing the action. MCL 600.2912b(1). "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," then "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." MCL 600.5856(c). [*Compagner*, —— Mich App at ——, slip op. at 5.]

MCL 600.5852 provides a saving provision in wrongful death actions in cases in which an allegedly injured person dies before the applicable period of limitations has run as follows:

> (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that 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.
>
> (2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate....

In this case, plaintiff's decedent's medical malpractice claims accrued at the latest on March 2, 2017, the last date of Dr. Shaird's treatment. MCL 600.5838a(1). The statutory limitations period on Walsh's claims would have expired on March 2, 2019. MCL 600.5805(8). Because she died March 7, 2017, before the expiration of the limitations period, and the letters of authority were issued to Walsh's estate on December 27, 2018, under MCL 600.5852, plaintiff had two years in which to file the complaint because the deadline for filing extended from December 27, 2018 to December 27, 2020. [3] Plaintiff did not file the complaint until February 26, 2021, and admits that the filing fell outside the two-year wrongful death savings period provided by MCL 600.5852. Plaintiff's late filing resulted in the barring of plaintiff's claims. Plaintiff, however, asserts that AO 2020-3

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tolled from March 10, 2020 to June 20, 2020, a period of 102 days, the running of all statutory periods including the period provided under MCL 600.5852, resulting in plaintiff having an additional 102 days beyond the December 27, 2020 deadline in which to file the complaint.

***7** In *Armijo v Bronson Methodist Hosp*, — Mich App —, —*Armijo v Bronson Methodist Hosp*, — Mich App —, —; — NW2d — (2023)— NW2d — (2023) (Docket Nos. 358728, 358729), slip op. at 2, this Court noted that our Supreme Court entered AO 2020-3 after Michigan's Governor entered on March 10, 2020, an executive order that declared a state of emergency related to the COVID-19 pandemic. AO 2020-3, entered on March 23, 2020, 505 Mich cxxvii (2020), initially stated:

> In light of the continuing COVID-19 pandemic and to ensure continued access to courts, the Court orders that:
>
> For all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).
>
> This order is intended to extend all deadlines pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19. Nothing in this order precludes a court from ordering an expedited response to a complaint or motion in order to hear and resolve an emergency matter requiring immediate attention. We continue to encourage courts to conduct hearings remotely using two-way interactive video technology or other remote participation tools whenever possible.
>
> This order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses. Courts must have a system in place to allow filings without face-to-face contact to ensure that routine matters, such as filing of estates in probate court and appointment of a personal representative in a decedent's estate, may occur without unnecessary delay and be disposed via electronic or other means.

On May 1, 2020, however, our Supreme Court entered Amended Administrative Order No. 2020-3, 505 Mich cxliv (2020), which provided:

> On order of the Court, the following amendment of Administrative Order No. 2020-3 is adopted, effective immediately.
>
> [Additions to the text are indicated in underlining]
>
> In light of the continuing COVID-19 pandemic and to ensure continued access to courts, the Court orders that:
>
> For all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).
>
> This order is intended to extend all deadlines pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19. Nothing in this order precludes a court from ordering an expedited response to a complaint or motion in order to hear and resolve an emergency matter requiring immediate attention. We continue to encourage courts to conduct hearings remotely using two-way interactive video technology or other remote participation tools whenever possible.
>
> ***8** This order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses, nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding. Courts must have a system in place to allow filings without face-to-face contact to ensure that routine matters, such as filing of estates in probate court and appointment of a personal representative in a decedent's estate, may occur without unnecessary delay and be disposed via electronic or other means.

On June 12, 2020, our Supreme Court entered Administrative Order No. 2020-18, 505 Mich clviii (2020), rescinding its previous administrative order as follows:

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> In Administrative Order No. 2020-3, the Supreme Court issued an order excluding any days that fall during the State of Emergency declared by the Governor related to COVID-19 for purposes of determining the deadline applicable to the commencement of all civil and probate case types under MCR 1.108(1). Effective Saturday, June 20, 2020, that administrative order is rescinded, and the computation of time for those filings shall resume. For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020. For filings with time periods that did not begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020. [*Armijo*, —— Mich App at ——, slip op. at 2-4.[4]]

In *Armijo*, this Court noted that the defendants argued that our Supreme Court lacked authority to modify statutory limitations periods, but the *Armijo* panel opted not to address that constitutional issue as unnecessary for deciding the appeal because the plain language of our Supreme Court's administrative orders were dispositive of the substantive issue presented in that case. *Armijo*, —— Mich App at ——, slip op. at 6. To decide the issue, this Court endeavored to analyze the plain language of the administrative orders. This Court noted that the plain language of AO 2020-3 stated that our Supreme Court " 'intended to extend all deadlines pertaining to case initiation ... in civil ... matters during the state of emergency declared by the Governor related to COVID-19 but did not prohibit or restrict a litigant from commencing an action." *Id.* at ——, slip op. at 6. This Court stated that the "language of the initial administrative order expressed our Supreme Court's intent to extend statutory deadlines for filing civil matters during the state of emergency" and that amended AO 2020-3 similarly expressed the Court's intention to extend deadlines that fell during the state of emergency. *Id.* at ——, slip op. at 6-7. This Court explained that "the administrative orders by their plain language **only applied to deadlines which took place during the state of emergency**[.]" *Id.* at ——, slip op. at 7 (emphasis added). The interpretation of the plain language of the administrative orders enabled the Court to adjudicate the issue presented in *Armijo*.[5]

***9** A week after this Court issued its *Armijo* opinion, another panel of this Court decided *Carter*, and held the opposite, that the administrative orders applied to exclude the 102-day period from calculating any time period related to commencement of civil and probate cases. It concluded that AO 2020-3 provided litigants an additional 102 days to all statutory limitations periods that ran during the period AO 2020-3 remained operative, regardless whether an actual deadline for commencing an action fell within the period. *Carter*, —— Mich App at ——, slip op. at 4.[6] Shortly thereafter, the same panel that decided *Carter* decided *Linstrom v Trinity Health-Mich*, —— Mich App ——*Linstrom v Trinity Health-Mich*, —— Mich App ——; —— NW2d —— (2023)—— NW2d —— (2023) (Docket No. 358487), a medical malpractice action, and applied *Carter*'s conclusion that the administrative orders excluded all days within the state of emergency even when a deadline occurred outside the 102-day period in which AO 2020-3 operated.

In this case, defendants moved to allow supplemental briefing to advise this Court of recent published opinions. Several recent published cases have addressed related issues of computation of time and tolling of limitations periods in relation to AO 2020-3, including, *Wenkel v Farm Bureau Gen Ins Co of Mich*, —— Mich App ——*Wenkel v Farm Bureau Gen Ins Co of Mich*, —— Mich App ——; —— NW2d —— (2022)—— NW2d —— (2022) (Docket No. 358526); *Armijo*; *Carter*; *Linstrom*; and *Hubbard*. This Court granted defendants' motion and permitted each party to file a supplemental brief.[7] Defendants and plaintiff have done so.

Defendants explain in their supplemental brief on appeal that in *Wenkel*, an action to recover no-fault personal injury protection benefits, this Court interpreted AO 2020-3 as applying only to statutory limitations deadlines and deadlines for filing of responsive pleadings that fell during the state of emergency. Defendants' analysis comports with *Wenkel*. See *Wenkel*, —— Mich App at ——, slip op. at 4-5. Defendants

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next explain that *Armijo* similarly interpreted AO 2020-3 as only applying to those deadlines that actually fell within the period of the state of emergency and the amended AO 2020-3 stated that our Supreme Court intended to extend deadlines pertaining to case initiation. Defendants' analysis comports with this Court's analysis in *Armijo*. See *Armijo*, —— Mich App at ——, slip op. at 6-7.

Defendants acknowledge that, shortly after this Court issued *Armijo*, this Court issued its *Carter* decision which, contrary to *Wenkel* and *Armijo*, held that the tolling period under AO 2020-3 applied to all deadlines that expired after the conclusion of the state of emergency and extended such deadlines by 102 days. Defendants point out that the *Carter* panel disagreed with *Armijo*'s interpretation of AO 2020-3 and declared it mere dicta. Defendants also direct this Court's attention to the fact that the panel did not address *Wenkel*'s similar interpretation of the limited scope of applicability of AO 2020-3. Defendants contend that *Wenkel*'s and *Armijo*'s interpretations of AO 2020-3 are binding precedent and dispositive, requiring affirmance of the trial court's decision. Defendants' observations in this regard are illuminating.

Since the parties' filing of supplemental briefs, this Court issued its *Toman* opinion. In *Toman*, this Court concluded that *Carter*'s analysis of *Armijo* was faulty and that "*Armijo*'s holding necessarily also encompassed the additional conclusion that the AOs did not toll statutes of limitation that fell outside the exclusion period of the AOs." *Toman*, —— Mich App at ——; slip op. at 9-10. The Court resolved that the "issue of whether AO 2020-3 tolled the statute of limitations was therefore squarely before the Court in *Armijo*, and we conclude that *Armijo*'s conclusion that the AOs did not apply to statutes of limitation expiring after the exclusion period of the AOs was integral to its analysis and holding." *Id.* at ——; slip op. at 11. This Court declared that *Armijo* is controlling and binding precedent and *Carter* and *Linstrom* improperly failed to follow *Armijo*. *Id.* at ——; slip op. at 12-13. The Court followed *Armijo* and affirmed the trial court's summary disposition ruling in favor of defendants because AO 2020-3 did not apply to the statute of limitations which expired after the exclusion period specified under the AOs.

***10** Analysis of *Carter* reveals that the panel considered the same language but interpreted AO 2020-3's statement regarding "*deadlines*" that "*fall during the state of emergency*" to mean that the suspension applied to all time periods including statutory limitations periods that started before, ran during, and continued to run after the termination of the state of emergency. In my opinion, *Wenkel*'s and *Armijo*'s interpretation is more faithful to the plain language of AO 2020-3. The *Toman* Court determined the same.

Plaintiff counters that *Carter* and *Linstrom* control in this case and require reversal. Plaintiff asserts that application of the principles established in *Carter* to this case results in the extension of the period provided under MCL 600.5852 to April 8, 2021. Plaintiff explains that, because the two-year period had not expired before entry of AO 2020-3, it must benefit from the addition of 102 days. Plaintiff asserts that *Carter* is binding precedent respecting the constitutionality of AO 2020-3, and respecting the addition of 102 days to the applicable statutory limitations period under MCL 600.5852. Plaintiff submits that *Linstrom*, which applied *Carter*, similarly binds this Court. According to plaintiff, under *Carter* and *Linstrom*, the period for filing the complaint was extended by the 102 days tolled by AO 2020-3, and the trial court, therefore, had to add 102 days to the December 27, 2020 deadline provided by MCL 600.5852, but the trial court erroneously refused to apply the extension granted under AO 2020-3. Plaintiff contends that the trial court erred because *Carter* and *Linstrom* held that all cases in which the statute of limitations period had not expired before the declaration of emergency are entitled to COVID-19 tolling and 102-day extension.

Even assuming that our Supreme Court had authority to suspend the running of statutory limitations periods because of the COVID-19 epidemic state of emergency,[8] *Carter*'s and *Linstrom*'s interpretation of AO 2020-3 is flawed, particularly as applied in a case like this. Here, all relevant deadlines by which plaintiff had to act fell well outside the 102-day period during which AO 2020-3 existed and months after our Supreme Court rescinded that administrative order by AO 2020-18. The 102-day suspension of *deadlines* during the state of emergency should have no impact on this case nor interfere with the running of the statutory limitations period simply because it overlapped the period during which AO 2020-3 operated.

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***11** In *Moll v Abbott Labs*, 441 Mich. 1, 23, 490 N.W.2d 305; 444 Mich. 1, 506 N.W.2d 816 (1993), our Supreme Court explained the Legislature's purpose in adopting statutes of limitations:

> They encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they afford security against stale demands when the circumstances would be unfavorable to a just examination and decision; they relieve defendants of the prolonged fear of litigation; they prevent fraudulent claims from being asserted; and they remedy ... the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert. [Quotation marks and citation omitted, alteration in original.]

Our Supreme Court observed that statutes of limitations express the clear intent of the Legislature to promote prompt resolution of claims. *Id.* at 20, 490 N.W.2d 305. "The law imposes on a plaintiff, armed with knowledge of an injury and its cause, a duty to diligently pursue the resulting legal claim." *Id.* at 29, 490 N.W.2d 305. "Statutes regarding periods of limitations are substantive in nature." *Gladych v New Family Homes, Inc*, 468 Mich. 594, 600, 664 N.W.2d 705 (2003). *Carter*'s and *Linstrom*'s interpretation of AO 2020-3 undermines these fundamental principles.

In this case, plaintiff knew of the claims and the applicable limitations period during which ample time and opportunity existed to diligently pursue them. The date on which the statutory limitations period would expire and by which plaintiff could submit the NOI occurred after AO 2020-3 had come and gone. The deadlines for filing the complaint and the NOI fell outside the COVID-19 tolling period. Under *Carter*'s and *Linstrom*'s interpretation and application of AO 2020-3, all litigants in civil matters get 102 days added to the applicable statutory limitations period if their cause of action accrued before the imposition of the suspension of filing deadlines under AO 2020-3. The plain language of AO 2020-3, however, stated that it "intended to extend all *deadlines* pertaining to case initiation ... in civil ... matters *during the state of emergency* declared by the Governor related to COVID-19." AO 2020-3 (emphasis added). The plain language of AO 2020-3 indicates that the order applied to *deadlines* for initial filing of pleadings or motions, objections to pleadings, and "any day *that falls during the state of emergency* declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1)." AO 2020-3 (emphasis added). None of the deadlines pertaining to initiation of this civil matter fell within the period of the state of emergency. Consequently, nothing necessitated nor justified suspension of the running of the limitations period or tacking on another 102 days simply because the limitations period ran while the state of emergency existed and AO 2020-3 operated. Accordingly, a 102-day extension to the statutory limitations period makes no sense in this case.

It bears repeating that in *Armijo*, —— Mich App at ——, slip op. at 7, this Court concluded that "the administrative orders by their language only applied to *deadlines* which took place during the state of emergency[.]" (Emphasis added). The initial AO 2020-3 and the amended order specifically state that the "order is intended to extend all deadlines pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency ...." When a term is not defined in a statute (or as here in an administrative order entered by our Supreme Court), courts may consult dictionary definitions to determine the plain and ordinary meaning of a word. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 578, 609 N.W.2d 593 (2000). Here the word "deadline" is not defined in AO 2020-3, so we may look to the dictionary for guidance. *Merriam-Webster's Collegiate Dictionary* (11th ed.) in relevant part defines "deadline" as "a date or time before which something must be done." *Black's Law Dictionary* (11th ed.) similarly defines "deadline" as a "cutoff date for taking some action." By using the term "deadline" in AO 2020-3, as opposed to some other term, our Supreme Court plainly intended that AO 2020-3 applied to the dates by which the specified filings must be done by litigants. The Court in *Carter*, however, considered the same language and interpreted AO 2020-3's statement regarding *deadlines* that "*fall during the state of emergency*" to mean that the suspension applied to any and all periods, including all statutory limitations periods, that started before, ran during, and ran after the termination of the state of emergency. *Carter*'s interpretation disregards

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the plain, i.e., clear and obvious, limitation set by the term "*deadline*" and the orders' specific reference to filings related to initiation and commencement of actions. *Carter*, therefore, diverges far from the plain language of AO 2020-3. It is not unreasonable for defendants to question why *Carter* should control, particularly in a case such as the one at bar where no deadline of any sort fell during the state of emergency. [9]

All Citations

Not Reported in N.W. Rptr., 2024 WL 1594617

Footnotes

1 *Estate of Linda S Walsh v Ambulatory Surgery Assoc, LLC*, unpublished order of the Court of Appeals, entered September 29, 2022 (Docket No. 360780).

2 Defendant Ambulatory Surgery Associates, LLC, doing business as Brookside Surgery Center, was also granted summary disposition; however, it is not a party to this appeal.

3 The exact term used in the complaint was "acute severe combined drug intoxication."

4 This Court's opinion in *Carter* has not gone uncontested, but it continues to control this case's outcome. Compare *Carter*, —— Mich App at ——; slip op. at 3, with *Armijo v Bronson Methodist Hosp*, —— Mich App ——, ——*Armijo v Bronson Methodist Hosp*, —— Mich App ——, ——; —— NW2d —— (2023)—— NW2d —— (2023) (Docket Nos. 358728 & 358729); slip op. at 5-7 (holding that the Supreme Court's administrative orders issued during the COVID-19 state of emergency did not toll the notice period or two-year statute of limitations for malpractice claims). Prior to this case's submission, the Supreme Court granted leave to appeal in *Carter v DTN Mgt Co*, 511 Mich. 1025, 991 N.W.2d 586 (2023), and a majority opinion from a subsequent panel of this Court, while acknowledging that *Carter* controlled, disagreed with its conclusion and called for the convention of a special conflict panel, *Compagner*, —— Mich App at ——; slip op. at 2, 11. This Court declined to convene a conflict panel pursuant to MCR 7.215(J). See *Compagner v Burch*, unpublished order of the Court of Appeals, entered June 21, 2023 (Docket No. 359699). After this case's submission, a panel of this Court issued an opinion purporting to limit *Carter*'s entire holding as dictum. *Toman*, —— Mich App at ——; slip op. at 12-13. In essence, *Toman* concluded that *Carter* failed to follow *Armijo*, that its reading of parts of *Armijo* as nonbinding dicta was "plainly wrong," and that *Carter* was wrongly decided. See *id.* at ——; slip op. at 12-13. *Carter*, however, directly addressed the issue raised in this case: the effect of the administrative orders on the period of limitations. See *Carter*, —— Mich App at ——; slip op. at 1, 3-5. In doing so, Carter addressed language in *Armijo* which dealt with the medical malpractice waiting period. *Carter*, —— Mich App at —— n 3; slip op. at 5 n 3. *Toman* addresses the same issue as *Carter*, yet reaches a different conclusion. *Toman*, —— Mich App at ——; slip op. at 1, 4-13. Essentially, it determined that *Carter's* conclusion that portions of *Armijo* were dicta were wrongly decided and therefore dicta. *Toman*, —— Mich App at ——, ——; slip op. at 10-11, 17. We are bound by *Carter* because it was released first. See MCR 7.215(J)(1) (providing "first-out rule"); *Andrusz v Andrusz*, 320 Mich App 445, 456-457, 457 n 2, 904 N.W.2d 636 (2017).

1 The Supreme Court amended AO 2020-3 on May 1, 2020. 505 Mich cxliv, cxliv-cxlv (2020).

2 Plaintiff also asserted that equitable tolling applied because defendants delayed providing medical records to plaintiff.

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3 Plaintiff served defendants a notice of intent (NOI) as required under MCL 600.2912b on June 25, 2020, and the 182-day notice period elapsed on December 24, 2020, before the December 27, 2020 deadline to file suit provided under MCL 600.5852(2); therefore, NOI tolling under MCL 600.5856(c) did not apply to alter the filing deadline in this case.

4 In *Compagner*, this Court explained in a footnote in pertinent part:

> Simultaneously with the issuance of AO 2020-18, the Governor issued EO 2020-122, which similarly rescinded EO 2020-58 effective June 20, 2020. The Governor continued the COVID-19 state of emergency —through a series of EOs—through October 27, 2020. On October 2, 2020, the Supreme Court struck down the Governor's authority under the Emergency Management Act of 1976 (EMA) to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020, and it further struck down her authority under the Emergency Powers of the Governor Act of 1945, MCR 10.31 *et seq.* (EPGA), concluding that the EPGA was unconstitutional because it purported to delegate to the executive branch the legislative powers of state government. See *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division*, 506 Mich. 332, 958 N.W.2d 1 (2020). [*Compagner*, —— Mich App at ——, slip op. at 7 n 12.]

5 Accordingly, *Armijo's* analysis and interpretation cannot be understood as mere dicta.

6 *Carter* further held that the administrative orders were constitutional, thus deciding the issue that this Court declined to address in *Armijo. Carter*, —— Mich App at ——, slip op. at 6.

7 *Estate of Linda S Walsh*, unpublished order of the Court of Appeals, entered August 16, 2023 (Docket No. 360780).

8 Our Supreme Court entered its administrative orders based on the state of emergency declared by the Governor. In *In re Certified Questions from US Dist Ct, W Dist of Mich*, 506 Mich. 332, 337-338, 958 N.W.2d 1 (2020), however, the Court held:

> first, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA), MCL 30.401 *et seq.*, to declare a "state of emergency" or "state of disaster" based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq.*, because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law.

As stated by the Supreme Court, the Governor lacked the constitutional authority to issue executive orders beyond the short term permitted under the EMA and could not extend them to declare a "state of emergency" or "state of disaster" based on the COVID-19 pandemic after April 30, 2020. Since this is so, how can the Court's administrative orders based on acts of the Governor which our Supreme Court later concluded she did not have the authority to issue serve to toll all statutory limitations periods for 102 days irrespective of when such limitations periods began to run and regardless of whether their deadlines fell within such declared state of emergency?

9 We also incorporate and adopt by reference the analysis set forth by this Court in *Compagner* demonstrating how *Carter* misinterpreted AO 2020-3 and got the constitutional issue wrong as well. *Compagner*, —— Mich App at —— - ——, slip op. at 10-21. Further, as stated in *Compagner*:

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> We are troubled both by the arguably inconsistent manner in which the controlling, published caselaw has developed and by the fact that AO 2020-18—which rescinded AO 2020-3—employed language that appears to have facilitated an interpretation of AO 2020-3 (by this Court in *Carter*) that is inconsistent with the very language of AO 2020-3 itself (and with the earlier, published caselaw interpreting it). Arguably, AO 2020-18 and its interpretation by this Court in *Carter* effectively transformed an order—AO 2020-3—that by its terms indicated that it was intended to apply to deadlines "during the state of emergency" into one that would continue to apply to deadlines that fell well outside the state of emergency. [*Compagner*, —— Mich App at ——, slip op. at 11.]

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2025 WL 2682283
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Kristin PETITPREN, Personal Representative of the Estate of Karen Sue Edwards, Plaintiff-Appellant,
v.
The RIVERS OF GROSSE POINTE-SNF, Dr. Bruce G. Johnson, and Geriatric Associates of Michigan, PLLC, Defendants-Appellees,

No. 367609
|
September 18, 2025, 12:22 PM

Wayne Circuit Court, LC No. 22-000847-NM

Before: Letica, P.J., and Murray and Patel, JJ.

Opinion

Per Curiam.

***1** In this wrongful-death medical malpractice action, plaintiff, Kristin Petitpren, as personal representative of the Estate of Karen Sue Edwards, appeals as of right the trial court's August 21, 2023 order. The order granted summary disposition under MCR 2.116(C)(7) (claim barred by statute of limitations) and (C)(10) (no genuine issue of material fact), in favor of defendants The Rivers of Grosse Pointe-SNF (The Rivers); Dr. Bruce G. Johnson (Dr. Johnson); and Geriatric Associates of Michigan, PLLC (Geriatric Associates). We affirm.

I. BACKGROUND

On January 30, 2019, Karen Sue Edwards (the decedent) was hospitalized. On February 12, 2019, the decedent was discharged from the hospital and transferred to The Rivers, an assisted living facility. The decedent's medical records reflect, upon admission to The Rivers, the decedent had (1) a "[p]ressure ulcer of sacral region" and (2) "[l]ocal infection of the skin and subcutaneous tissue ...." Dr. Johnson, a board-certified internal medicine and geriatrics physician, was the decedent's attending physician at The Rivers. He evaluated and treated the decedent while she was a resident. Among other things, the decedent was to receive medical care in relation to her wounds and antibiotics. The decedent, who had a myriad of other health issues and whose condition declined while at The Rivers, was transferred back to the hospital on March 27, 2019. On April 28, 2019, the decedent died while receiving treatment at a hospital. The decedent's death certificate states she died from atherosclerotic coronary artery disease.

On August 1, 2019, a proceeding for informal probate of the decedent's estate was initiated, and letters of authority were issued to plaintiff. In 2021, plaintiff began the process of initiating a medical malpractice suit against defendants, including submitting a notice of intent (NOI) to file suit. On January 21, 2022, plaintiff filed suit against defendants, alleging the decedent's decubitus ulcers, or bedsores, worsened while in defendants' care. According to plaintiff, the decedent died of sepsis as a result of defendants' malpractice. Attached to the complaint was an affidavit of merit (AOM), supporting plaintiff's claims. Defendants answered the complaint, generally denied liability and alleged the claims were barred by the relevant statutes of limitation. Defendants filed affidavits of meritorious defense to support the decedent died because of her comorbidities, not any negligence on their part. Discovery and motion practice commenced.

In March 2023, plaintiff filed an amended complaint to allege claims of ordinary negligence and medical malpractice. In lieu of answering the amended complaint, Dr. Johnson and Geriatric Associates moved for summary disposition, alleging plaintiff's claims sounded in medical malpractice and were barred by the relevant two-year statute of limitations. The Rivers later moved for summary disposition, raising essentially the same arguments. Plaintiff contested the motions, asserting she pleaded claims for both medical malpractice and ordinary negligence. According to plaintiff, her claims were timely filed and summary disposition was premature because discovery was ongoing.

***2** On August 10, 2023, the parties appeared before the trial court and it waived oral argument, concluding there was a question of fact regarding the dates Dr. Johnson treated the decedent. The trial court also remarked that defendants' motions were premature because certain discovery was still outstanding and depositions needed to be taken. The court denied defendants' motions without prejudice and instructed

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the parties to appear before a discovery master. But the court did not enter an order outlining its rulings. [1]

Despite its earlier statements, eleven days later, the trial court granted defendants' motions for summary disposition in a written opinion and order. The trial court concluded plaintiff's claims sounded in malpractice, not ordinary negligence. The trial court also concluded plaintiff's medical malpractice claims were barred by the two-year statute of limitations and MCL 600.5852's wrongful-death saving provision. The trial court reached this conclusion after acknowledging that "[t]he deadline for filing [plaintiff's] complaint was ended by the COVID-19 pandemic." This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews "de novo a trial court's decision on a motion for summary disposition." *Bailey v Antrim Co*, 341 Mich App 411, 421, 990 N.W.2d 372 (2022) (quotation marks and citation omitted). "In determining whether the nature of a claim is ordinary negligence or medical malpractice, as well as whether such claim is barred because of the statute of limitations, a court does so under MCR 2.116(C)(7)." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich. 411, 419, 684 N.W.2d 864 (2004).

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 428-429, 789 N.W.2d 211 (2010) (citations omitted).]

"Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich. 153, 162, 516 N.W.2d 475 (1994). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476, 776 N.W.2d 398 (2009). "If the pleadings demonstrate that one party is entitled to judgment as a matter of law, or if affidavits and other documentary evidence show that there is no genuine issue of material fact concerning the running of the period of limitations, the trial court must render judgment without delay." *Estate of Dale v Robinson*, 279 Mich App 676, 682, 760 N.W.2d 557 (2008) (quotation marks and citation omitted).

***3** This Court also reviews "de novo questions of statutory interpretation." *Id.* "To the extent that this case asks [this Court] to interpret [our Supreme Court's] administrative orders ... for their legal meaning ..., that is also a question of law that [is] review[ed] de novo." *Carter v DTN Mgt Co*, —— Mich ——, ——; —— NW3d —— (2024) (Docket No. 165425); slip op. at 8-9. "De-novo review means that [an appellate court] review[s] the legal issue independently, without deference to the lower court." *Bowman v Walker*, 340 Mich App 420, 425, 986 N.W.2d 419 (2022) (quotation marks and citation omitted).

III. DO PLAINTIFF'S CLAIMS SOUND IN ORDINARY NEGLIGENCE? [2]

Plaintiff argues the trial court erred by concluding her claims sounded in medical malpractice, not ordinary negligence. We disagree.

The elements for ordinary negligence are: "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, 336 Mich App 616, 626, 971 N.W.2d 716 (2021). Similarly, to prevail in a medical malpractice action, "the plaintiff must establish: (1) the standard of care, (2) breach of that standard of care,

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(3) injury, and (4) proximate causation between the alleged breach and the injury." *Pennington v Longabaugh*, 271 Mich App 101, 104, 719 N.W.2d 616 (2006).

"The standard of care is a concept applicable to both ordinary negligence and medical malpractice claims. To prove ordinary negligence, a plaintiff must demonstrate, among other things, that the defendant owed the plaintiff a duty." *Meyers v Rieck*, 509 Mich. 460, 471, 983 N.W.2d 747 (2022). "Once the duty is established, the factfinder [then] determine[s] whether, in light of the particular facts of the case, there was a breach of the duty. In that analysis, the fact-finder determines what constitutes reasonable care under the circumstances." *Id.* (alterations in original; quotation marks and citations omitted). "Under a medical malpractice theory of liability, the defendant owes a duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science." *Id.* (quotation marks and citation omitted).

"[P]roximate cause in a traditional medical malpractice case is statutorily addressed in the first sentence of MCL 600.2912a(2) ...." *Benigni v Alsawah*, 343 Mich App 200, 213, 996 N.W.2d 821 (2022). MCL 600.2912a(2) states that "[i]n an action alleging medical malpractice, the plaintiff has the burden of proving that ... she suffered an injury that more probably than not was proximately caused by the negligence of the ... defendants." "[P]roximate causation in a malpractice claim is treated no differently than in an ordinary negligence claim, and it is well-established that there can be more than one proximate cause contributing to an injury." *Benigni*, 343 Mich App at 214, 996 N.W.2d 821 (alteration in original; quotation marks and citations omitted). However, in a medical malpractice claim, "[e]xpert testimony is required to establish the standard of care and a breach of that standard, as well as causation[.]" *Kalaj v Khan*, 295 Mich App 420, 429, 820 N.W.2d 223 (2012) (citations omitted). But, expert testimony is not required if "the alleged negligence was within the common understanding of the jury." *Woodard v Custer*, 473 Mich. 1, 9, 702 N.W.2d 522 (2005).

***4** A plaintiff commences an action by filing a complaint "within the applicable statute-of-limitations period ...." *Ottgen v Katranji*, 511 Mich. 223, 231, 999 N.W.2d 359 (2023). For medical malpractice actions, the statute of limitations "is generally two years ...." *Id.* If a medical malpractice claim is not commenced within the statutorily-prescribed time limits, it is "barred." MCL 600.5838a(2). In contrast, "the statute of limitations for ordinary negligence claims is three years." *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 234, 859 N.W.2d 723 (2014). Additionally, there are statutory and procedural requirements attendant to filing medical malpractice claims, see *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich. 26, 43, 594 N.W.2d 455 (1999).

"A plaintiff may not evade the appropriate limitation period by artful drafting," such as characterizing a malpractice claim as an ordinary negligence claim. *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253, 506 N.W.2d 562 (1993). See also *Dorris*, 460 Mich. at 43, 594 N.W.2d 455. "A medical malpractice claim is sometimes difficult to distinguish from an ordinary negligence claim. But the distinction is often critical." *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich. 509, 517-518, 918 N.W.2d 645 (2018) (footnotes omitted). "To determine the nature of [a] claim, we seek its gravamen, and therefore we disregard the labels given to the claim[ ] and instead read the complaint as a whole ...." *Meyers*, 509 Mich. at 469, 983 N.W.2d 747 (alterations in original; quotation marks and citation omitted). [3] "Michigan is a notice-pleading state" and "[a]ll that is required is that the complaint set forth allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]" *Johnson v QFD, Inc*, 292 Mich App 359, 368, 807 N.W.2d 719 (2011) (second alteration in original; quotation marks and citation omitted). See also *Dalley v Dykema Gossett*, 287 Mich App 296, 305, 788 N.W.2d 679 (2010) ("[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.") (alteration in original, quotation marks, and citation omitted).

Our Supreme Court has explained:

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only within the course of a professional relationship. Second, claims of medical malpractice necessarily raise questions involving

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> medical judgment. Claims of ordinary negligence, by contrast, raise issues that are within the common knowledge and experience of the [fact-finder]. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Bryant*, 471 Mich. at 422, 684 N.W.2d 864 (quotation marks and citations omitted).]

***5** The relevant question in this appeal is whether plaintiff's claims relate "to matters involving medical judgment outside the common knowledge and experience of the fact-finder." *Meyers*, 509 Mich. at 469, 983 N.W.2d 747 (brackets, quotation marks, and citation omitted).[4] If the jury can only evaluate the reasonableness of a medical professional's conduct "after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved." *Bryant*, 471 Mich. at 423, 684 N.W.2d 864. This determination is fact-specific, meaning a "court must examine the particular factual setting of the plaintiff's claim" to determine whether it "implicate[s] medical judgment ...." *Id.* at 421, 684 N.W.2d 864 n 9. In explaining what constitutes "medical judgment," our Supreme Court has said:

> [M]edical malpractice ... has been defined as the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science. [*Id.* at 424, 684 N.W.2d 864 (alterations in original; quotation marks and citation omitted).]

For example, if a medical professional fails to take any action to address a known problem, or hazardous condition, the claim may sound in ordinary negligence. See *Id.* at 431, 684 N.W.2d 864 ("If a party alleges in a lawsuit that [a] nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, ... the claim sounds in ordinary negligence. No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem."). In contrast, a claim that concerns the failure to monitor and assess risks to a patient—such as "the risk of positional asphyxiation posed by bed railings"— usually requires specialized medical knowledge; as a result, the claim would sound in medical malpractice. *Id.* at 426-427, 684 N.W.2d 864.

***6** Examining the particular factual setting that gave rise to plaintiff's claims, it is clear plaintiff's claims implicate medical judgment.[5] Indeed, the crux of plaintiff's claims is that if defendants had provided the decedent with proper care, nutrition, and treatment, she would not have developed additional decubitus ulcers and died of sepsis. These allegations involve questions of medical knowledge and are not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury. Stated otherwise, an ordinary lay person does not know (1) how decubitus ulcers and sepsis form, (2) how they are prevented in patients like the decedent, and (3) how they are treated in patients like the decedent. Even plaintiff acknowledges the decedent required extensive assistance and monitoring because of her medical conditions.

The reasonableness of defendants' actions can only be evaluated when considering whether providers with the same experience would have acted differently given the decedent's medical history and physical condition. How a reasonable medical professional would have provided treatment and care to the decedent is not within the common understanding of laypeople sitting on a jury. Contrary to plaintiff's arguments

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on appeal, the fact that plaintiff complained about the overall care, or lack of care, provided to the decedent does not automatically transform plaintiff's claims into ordinary negligence claims. It is clear, to determine whether defendants' conduct was unreasonable, the jury would have to know the manner of assistance appropriate when considering the decedent's individualized needs and abilities. This is not within a layperson's common knowledge or experience.

Additionally, contrary to plaintiff's arguments, the fact that the decedent ultimately died does not enable a layperson to simply infer the decedent would not have died if she was provided proper, or different, care by defendants. Importantly, "[t]here must be substantial evidence which forms a reasonable basis for the inference of negligence. There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. We cannot permit the jury to guess ...." *Skinner*, 445 Mich. at 165, 516 N.W.2d 475 (quotation marks and citation omitted). Indeed, "[s]omething more should be offered the jury than a situation which, by ingenious interpretation, suggests the mere possibility of [the] defendant's negligence being the cause of the injury." *Id.* (quotation marks and citation omitted). "A valid theory of causation ... must be based on facts in evidence." *Craig v Oakwood Hosp*, 471 Mich. 67, 87, 684 N.W.2d 296 (2004). Only an expert can discuss whether defendants' treatment of the decedent caused her death. In other words, an expert is needed to establish, but for the actions or inactions of defendants, the decedent would not have developed ulcers and died of sepsis. Because the facts alleged by plaintiff "raise questions involving medical judgment," her claims sound in medical malpractice. See *Bryant*, 471 Mich. at 423-424, 684 N.W.2d 864. Plaintiff was therefore required to comply with "the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim ...." See *Dorris*, 460 Mich. at 45, 594 N.W.2d 455 (citations omitted). This includes timely filing her lawsuit under authority relating to medical malpractice claims. See *id.* at 43, 594 N.W.2d 455; *Simmons*, 201 Mich App at 253, 506 N.W.2d 562.

IV. WERE PLAINTIFF'S MEDICAL MALPRACTICE CLAIMS TIME BARRED?

***7** Next, plaintiff argues her medical malpractice claims were timely filed. We again disagree.

Generally, medical malpractice actions are subject to a two-year statute of limitations from the time the claim accrues. MCL 600.5805(8). See also *Estate of Dale*, 279 Mich App at 683, 760 N.W.2d 557. A medical malpractice claim "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." MCL 600.5838a(1). "[A] wrongful-death medical-malpractice action is governed by the statute of limitations and the accrual statute applicable to medical-malpractice claims." *Estate of Dale*, 279 Mich App at 683, 760 N.W.2d 557. If a medical malpractice claim is not commenced within the statutorily-prescribed time limits, it is "barred." MCL 600.5838a(2).

The alleged medical malpractice occurred sometime between February 12 and March 27, 2019. These are the dates the decedent received care from defendants. At the latest, plaintiff's claims accrued on the last day the decedent allegedly received negligent medical care from defendants, which was March 27, 2019. Two years from March 27, 2019, was Saturday, March 27, 2021. Therefore, absent any tolling, the statute of limitations for the malpractice claims were set to expire, at the latest, on Monday, March, 29, 2021. See MCL 8.6; MCR 1.108(1).

Under MCL 600.2912b, however, a plaintiff alleging medical malpractice must give the defendant written notice at least 182 days before filing suit. See MCL 600.2912b(1). "MCL 600.2912b(1) requires the filing of an NOI and clearly imposes a time period that must elapse before the commencement of an action or proceeding, namely, the 182-day waiting period that must elapse from the time the NOI is submitted before a plaintiff may file suit." *Hubbard v Stier*, 345 Mich App 620, 631, 9 N.W.3d 129 (2023) (quotation marks omitted). Under MCL 600.5856, "[w]hen a plaintiff submits an NOI before the expiration of the limitations period, and the limitations period otherwise would expire during the 182-day notice period, the statute of limitations is tolled during the 182-day notice period." *Hubbard*, 345 Mich App at 626. "Depending upon when the NOI is submitted, the 'deadline' for filing suit may be days, weeks, or months following the expiration of the NOI waiting period." *Id.* at 632. But, "[t]he statute does not impose a deadline by

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which such a notice must be filed. Instead, the mandatory NOI provision sets a clock ticking, not unlike a kitchen timer, that must elapse before litigation may be commenced." *Id.* (footnote omitted). In order for tolling to occur, the NOI must have been filed before the expiration of the limitations period. *Id.* at 626.

Under ordinary circumstances, plaintiff was required to submitted the NOI within two years of March 29, 2021, for the limitations period for bringing the claim under MCL 600.5805(8) to have been tolled. The circumstances during this time period were not ordinary, however. On March 10, 2020, Michigan Governor Gretchen Whitmer issued Executive Order No. 2020-4, declaring a state of emergency in Michigan, because of the COVID-19 pandemic. "Out of concern for how COVID-19 affected ... administration of the courts, within two weeks of that emergency declaration, [our Supreme] Court ... adopted ... three COVID-19-related administrative orders." *Carter*, —— Mich at ——; slip op. at 4. First, on March 23, 2020, our Supreme Court entered Administrative Order No. 2020-3, 505 Mich cxxvii, cxxvii-cxviii (2020), with the intent to "extend *all deadlines* pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19." (Emphasis added.) In relevant part, the order also stated "any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1)."[6] *Id.*

***8** "On May 1, 2020, AO 2020-3 was amended ... to clarify its language." *Carter*, —— Mich App at ——; slip op. at 5. The Supreme Court amended AO 2020-3 to add the following underlined language: "This order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses, nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding." Administrative Order No. 2020-3; 505 Mich cxliv, cxliv-cxlv (2020). On June 12, 2020, our Supreme Court rescinded AO 2020-3, instructing the computation of time would resume on June 20, 2020. Administrative Order No. 2020-18, 505 Mich clviii-clvix. "AO 2020-3 and AO 2020-18 did not toll statutes of limitations, but instead, they affected the counting of the relevant time period for purposes of MCR 1.108(1)." *Carter*, —— Mich at ——; slip op. at 17 (footnote omitted). The statute of limitations in this case was extended 102 days under these administrative orders. See *Compagner v Burch*, 347 Mich App 190, 207-208, 210, 14 N.W.3d 794 (2023).

On March 10, 2020, plaintiff had one year and 19 days, remaining to file suit under MCL 600.5805(8)'s two-year requirement. On June 20, 2020, plaintiff had the same number of days remaining in the statutory limitations period as she had on March 10, 2020, when the state of emergency went into effect. See *Compagner*, 347 Mich App at 210. Under MCL 600.5805(8), plaintiff had until Friday, July 9, 2021, to file suit. For MCL 600.5856(c)'s tolling provision to apply, plaintiff had to mail the NOI by Friday, July 9, 2021. See MCL 600.2912b(1) and (2). See also *Compagner*, 347 Mich App at 207-208 ("the exclusion period defined by AO 2020-3 and AO 2020-18 was 102 days, from March 10, 2020 to June 20, 2020"). "When [a] defendant receives [an] NOI is irrelevant." See *DeCosta v Gossage*, 486 Mich. 116, 126, 782 N.W.2d 734 (2010).

According to defendants, plaintiff mailed the NOI, at the earliest, on June 21, 2021. Plaintiff did not dispute the date of mailing in the trial court, and does not attempt to do so in this Court. If the NOI was mailed on June 21, 2021, 18 days remained before the statute of limitations expired, thereby tolling the applicable limitations period for 182 days. The 182-day tolling period ended on December 20, 2021, and the limitations period began running again. To timely file the complaint, plaintiff had to file it by Friday, January 7, 2022. Because plaintiff did not do so, plaintiff's January 21, 2022 complaint was untimely when considered in the context of (1) MCL 600.5805(8)'s two-year statute of limitations; (2) MCL 600.5856(c)'s tolling provision, and (3) the COVID-19 related filing extensions in AO 2020-3 and AO 2020-18.

Yet, this analysis does not end our inquiry because "the Legislature has afforded personal representatives additional time in which to pursue legal action on behalf of a decedent's estate." *Estate of Dale*, 279 Mich App at 683, 760 N.W.2d 557. Under MCL 600.5852, which is known as the wrongful-death saving provision, "a personal representative may file a medical malpractice suit on behalf of a deceased person for two years *after* letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired." *Estate of Christopher P Eversole v Nash*, —— Mich App ——, ——; —— NW3d —— (2024) (Docket No. 366556); slip op. at 5-6 (emphasis in original; quotation marks and citations omitted). As already

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explained above, under MCL 600.5805(8), the limitations period for plaintiff's claims was set to expire on March 29, 2021. However, because the decedent died before the period of limitations had run, and the letters of authority were issued on August 1, 2019, the period of limitations was extended to Monday, August 1, 2021. See *Estate of Christopher P Eversole*, —— Mich App at ——; slip op. at 6 ("MCL 600.5852 plainly provides that the two-year saving period is measured from the date the letters of authority are issued.") (quotation marks and citation omitted.). Plaintiff filed the complaint on January 21, 2022, which ordinarily would be outside even this extended limitations period. The COVID-19 pandemic further complicates this issue because the question becomes whether the wrongful-death saving provision is a deadline applicable to the commencement of a civil case as contemplated by AO 2020-3.

***9** "Principles of statutory construction apply to determine the Supreme Court's intent in promulgating rules of practice and procedure." *City of Detroit v Kallow Corp*, 195 Mich App 227, 230, 489 N.W.2d 500 (1992). Accordingly, "interpretation of the Supreme Court's administrative orders begins with the language of the orders to discern the Supreme Court's intent and no further judicial construction is necessary if the language is unambiguous." *Linstrom v Trinity Health-Mich*, 345 Mich App 455, 466, 5 N.W.3d 99 (2023), rev'd on other grounds —— Mich ——; 14 N.W.3d 268 (2024). The same principles governing the interpretation of court rules apply to the interpretation of administrative orders. *Hubbard*, 345 Mich App at 629. "[W]e read an administrative order as a whole, reading the individual words and phrases in context, giving effect to every word and phrase, and avoiding an interpretation that would render any part surplusage or nugatory." *Id.* This Court enforces unambiguous language as it is written without speculation about our Supreme Court's intent. *Id.*

In *Hubbard*, 345 Mich App at 630, this Court considered "what AO 2020-3 tolled and, equally important, what it did not toll." In reconciling what it initially described as "diametrically opposed and inconsistent" language, *id.* at 631-634, the *Hubbard* Court held: "AO 2020-3, by its terms, applies to deadlines," *id.* at 633. This Court then held: "What the amended language clearly does not cover are pre-suit notice requirements, which establish deadlines by which notice must be given." *Id.* at 634. An example of presuit notice requirements are NOIs; thus, the 182 days tolled by filing a NOI within the statute of limitations time period is not extended by AO 2020-3. *Id.* at 633-634.

In *Wenkel v Farm Bureau Gen Inc Co of Mich*, 344 Mich App 376, 383-386, 1 N.W.3d 353 (2022), this Court considered whether the COVID extensions applied to toll the one-year-back rule in MCL 500.3145(2) of the no-fault act, MCL 500.3101 *et seq.* The *Wenkel* Court held the one-year-back rule was a damage-limitation provision—not a statute of limitations. *Wenkel*, 344 Mich App at 383-386. Therefore, the COVID extensions did not apply. *Id.* To reach that conclusion, the Court had to make a determination as to what deadlines AO 2020-3 was intended to apply. *Id.* In that regard, the Court stated:

> The Michigan Supreme Court's administrative order did not impact the filing deadlines for all pleadings and papers filed in the trial court. Rather, by its terms, the order tolled the "deadlines applicable to the commencement of all civil and probate case-types" and was "intended to extend all deadlines pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency ...." AO 2020-3. [*Wenkel*, 344 Mich App at 383.]

With respect to whether the wrongful-death saving provision operates as a statute of limitations, this Court recently explained in *Estate of Christopher P Eversole*, —— Mich App at ——; slip op. at 5-6:

> MCL 600.5852 is not a statute of limitations; rather, it is a *saving* provision designed to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions. Section 5852 clearly provides that it is an *exception* to the limitation period, allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired. In other words, under MCL 600.5852,

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> a personal representative may file a medical malpractice suit on behalf of a deceased person for two years *after* letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired. [Footnotes, quotation marks, and citations omitted.]

While MCL 600.5852 is not a statute of limitations, it is clearly a deadline to file suit. MCL 600.5852 "provides a maximum of five years from the date the deceased's medical-malpractice claim accrues in which a personal representative may bring a wrongful-death action." *Estate of Christopher P Eversole*, —— Mich App at ——; slip op. at 6. The wrongful-death saving provision is unlike a damage-limitation provision, see *Wenkel*, 344 Mich App at 383-386, and unlike a presuit requirement, see *Hubbard*, 345 Mich App at 630-634. The provision creates a deadline to file suit, *Estate of Christopher P Eversole*, —— Mich App at ——; slip op. at 5-6, and "AO 2020-3, by its terms, applies to deadlines," *Hubbard*, 345 Mich App at 633.

***10** Therefore, under AO 2020-3 and AO 2020-18, the deadline under the wrongful-death saving provision was extended 102 days. See *Compagner*, 347 Mich App at 207-208, 210. The fact that a plaintiff's "filing period began to run before AO 2020-3 took effect" is irrelevant. *Id.* at 210. Our Supreme Court has "specifically rejected the proposition the exclusion period was limited to those whose filing deadline fell within the state of emergency." *Id.* (quotation marks and citation omitted). On March 10, 2020, plaintiff had 16 months, and 22 days, remaining to file suit under MCL 600.5852's two-year-savings period. On June 20, 2020, plaintiff had the same number of days remaining in the statutory limitations period as she had on March 10, 2020, when the state of emergency went into effect. To timely file the complaint, plaintiff had to file it by Thursday, November 11, 2021, but she did not file it until January 21, 2022.

Plaintiff argues her suit was timely filed because she complied with MCL 600.2912b(1) and sent defendants the NOI 182 days before she filed suit. See MCL 600.2912b(1). According to plaintiff, sending the NOI tolled MCL 600.5852's time requirements. But, in *Waltz v Wyse*, 469 Mich. 642, 644, 677 N.W.2d 813 (2004), our Supreme Court concluded the notice-tolling provision now contained in MCL 600.5856(c) did not apply to the wrongful-death saving provision. MCL 600.5852 is neither a statute of limitations nor a statute of repose, but "a *saving* provision designed to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions." *Id.* at 655, 677 N.W.2d 813 (quotation marks and citation omitted). While plaintiff urges this Court to ignore these unambiguous conclusions of the Supreme Court, we must follow them unless they "have *clearly* been overruled or superseded ...." *Associated Builders & Contractors v City of Lansing*, 499 Mich. 177, 191-192, 880 N.W.2d 765 (2016). Because *Waltz* has not be overruled, this Court is bound by it. See *id.* Plaintiff's filing of the NOI did not toll MCL 600.5852's deadline.[7] Accordingly, the trial court did not err by concluding plaintiff's medical malpractice claims were time barred.[8] Summary disposition was not premature.

Affirmed.

Patel, J. (concurring in part, dissenting in part).

I join with my colleagues in the majority on all issues except for the issue of whether all of plaintiff's claims against defendant The Rivers of Grosse Pointe-SNF sounded in medical malpractice. I believe that plaintiff has pleaded claims of ordinary negligence against The Rivers that are within the common knowledge and experience of the fact-finder. Accordingly, I would reverse the dismissal of the ordinary-negligence claims against The Rivers and remand for further proceedings.

***11** In this wrongful-death action, plaintiff alleged claims of medical malpractice and ordinary negligence against all defendants. In lieu of filing an answer to plaintiff's first-amended complaint, defendants Dr. Bruce G. Johnson and Geriatric Associates of Michigan, PLLC moved for summary disposition under MCR 2.117(C)(7) and (10) arguing that plaintiff's claims were time barred. Dr. Johnson and Geriatric Associates further asserted that plaintiff's claims against them sounded in medical malpractice, not ordinary negligence, and thus plaintiff's ordinary-negligence claims should be dismissed as well. I concur with the majority that the trial court did not err by dismissing all of plaintiff's claims against Dr. Johnson and Geriatric Associates.

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The Rivers moved for summary disposition under MCR 2.116(C)(7) "as to all of plaintiff's medical malpractice claims" arguing that they were barred by the statute of limitations and requested the trial court to "dismiss with prejudice all of plaintiff's medical malpractice claims." The Rivers was well aware that plaintiff also asserted ordinary-negligence claims,[1] but it did not argue that plaintiff's ordinary negligence claims should also be dismissed. In its reply brief, The Rivers argued, for the first time, that "all of plaintiff's claims set forth in plaintiff's amended complaint sound in medical malpractice" under *Bryant v Oakpointe Villa Nursing Center, Inc*, 471 Mich. 411, 422, 684 N.W.2d 864 (2004) because "expert testimony is required to establish how often decedent was required to be repositioned (if at all), what hygiene steps were required and how frequently, and how much nutrition the decedent needed to prevent pressure ulcers from developing (if even preventable)." The Rivers was not permitted to raise this argument for the first time in its reply brief. MCR 2.116(G)(1)(a)(iii) ("Reply briefs must be confined to rebuttal of the arguments in the nonmoving party or parties' brief ...."). Consequently, I would conclude that the matter was not properly before the trial court.[2]

Even assuming that the issue was properly before the trial court, I respectfully disagree with the majority that all of plaintiff's claims against The Rivers sounded in medical malpractice. "A medical malpractice claim is sometimes difficult to distinguish from an ordinary negligence claim. But the distinction is often critical." *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich. 509, 517-518, 918 N.W.2d 645 (2018) (citation omitted). A court determines the gravamen of a claim by examining the underlying facts rather than the label attached to the claim. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich. 26, 45-46, 594 N.W.2d 455 (1999). In *Bryant v Oakpointe Villa Nursing Center, Inc*, 471 Mich. 411, 422, 684 N.W.2d 864 (2004), our Supreme Court set forth a two-pronged test for distinguishing between ordinary-negligence claims and medical malpractice claims: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." If the two questions are answered in the affirmative, then the claim sounds in medical malpractice.

***12** There is no dispute concerning the first prong of *Bryant*—the conduct occurred while the decedent was a resident at The Rivers, which is a licensed health care facility or agency as defined under MCL 600.5838a(1). The issue is whether all of plaintiff's claims against The Rivers "raise[ ] questions of medical judgment beyond the realm of common knowledge and experience." I believe that plaintiff has pleaded claims of ordinary negligence against The Rivers that are within the common knowledge and experience of the fact-finder.

Plaintiff's amended complaint is not a model of clarity—the allegations are blended and the claims are not clearly separated.[3] Pertinent to the ordinary-negligence claim, plaintiff alleged the decedent "was a full assist, bedridden, and required full care ... feeding, call light availability, and attention." Plaintiff asserted that, while the decedent was at The Rivers, defendants and staff "failed to feed/ nourish, ... [and] failed to provide access to call/help buttons[.]" Plaintiff maintained that "[f]ood, water, [and] call buttons were not accessible as required (nor provided by staff)." Plaintiff further alleged, "Despite orders for same, [decedent] was not turned as required ...." In addition, plaintiff asserted that the decedent was left for hours in a bed covered in vomit. In support of her allegations, plaintiff averred in an affidavit that the decedent "was not fed her meals by employees. Her food trays were cold, out of reach and not touched." She also averred that the decedent was "not provided water or drink; no cups of fluids were given to her, nor within her reach." Plaintiff further stated that the call button was not available or within the decedent's reach and, as a result, plaintiff could hear the decedent "screaming for help" when plaintiff entered the facility.

As our Supreme Court explained in *Bryant*, 471 Mich. at 431, 684 N.W.2d 864, no expert testimony is necessary if "[t]he fact-finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges." The decedent's inability to feed/hydrate herself and inability to access call/help buttons are observable facts that a lay person could understand without an explanation from a medical professional. Similarly, the decedent lying in her bed covered in vomit for hours is an observable fact. Likewise, if there were orders that the decedent needed to be turned, and The Rivers's staff failed to comply with those orders, those are also observable facts. There are no questions of medical judgment that would require the assistance of an expert for the jury to determine whether The Rivers's employees/agents failed to feed the

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decedent, give her fluids, clean her, provide her access to a call button, or turn her as ordered. Because no medical judgment was involved, these particular claims sound in ordinary negligence. *Id.*

This factual scenario is analogous to the hypothetical example of ordinary negligence in a nursing home situation given by the *Bryant* Court:

> Suppose, for example, that two [Certified Evaluated Nursing Assistants (CENAs)] employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a supervising nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day.

***13** If a party alleges in a lawsuit that the nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, the ... standard would dictate that the claim sounds in ordinary negligence. No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying only on common knowledge and experience can readily determine whether the defendant's response was sufficient. [*Id.* at 431, 684 N.W.2d 864.]

For these reasons, I would reverse the dismissal of the ordinary-negligence claims against The Rivers and remand for further proceedings. I concur with the majority on all other issues raised in this appeal.

All Citations

Not Reported in N.W. Rptr., 2025 WL 2682283

Footnotes

1 Plaintiff places great weight on the trial court's statements at the August 10, 2023 hearing. While the trial court verbally stated that summary disposition was premature, this is not controlling because "[t]rial courts speak through their written judgments and orders." *Seifeddine v Jaber*, 327 Mich App 514, 523, 934 N.W.2d 64 (2019).

2 The Rivers did not move for summary disposition of the ordinary negligence allegations in the first amended complaint, but defendants Dr. Johnson and Geriatric Associates did. Thus, plaintiff responded to the original negligence claim dismissal in its joint response to the dispositive motions. In reply, the Rivers clarified that it did not accept that a properly pleaded negligence claim was raised and that it should be dismissed. Plaintiff does not challenge the propriety of The Rivers' reply brief. Compare *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252, 673 N.W.2d 805 (2003), with MCR 2.116(G)(1)(a)(*iii*) ("Reply briefs must be confined to rebuttal of the arguments in the nonmoving" party's brief.). And, as acknowledged by the concurring and dissenting opinion, plaintiff failed to raise on appeal, in the statement of questions presented, a challenge to The Rivers reply brief and its content pertaining to ordinary negligence, resulting in any error being abandoned, see *Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 517, 838 N.W.2d 915 (2013).

3 Plaintiff relies on her affidavit and her expert's affidavit to support her contention that summary disposition was improper. But, we must look to the allegations in plaintiff's amended complaint to determine whether the claims sound in ordinary negligence or medical malpractice. See *Meyers*, 509 Mich. at 469, 983 N.W.2d 747. And, although plaintiff's expert avers that plaintiff's claims sound in ordinary negligence, this is not dispositive. See *Trowell*, 502 Mich. at 517, 918 N.W.2d 645 ("Whether a claim sounds in ordinary negligence or

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medical malpractice is a question of law ...."). See also *Maiden v Rozwood*, 461 Mich. 109, 130 n 11, 597 N.W.2d 817 (1999) ("[T]he witness did not create a question of fact by merely opining that [the] defendant's performance violated the statutory standard. Whether the statutory standard of care was violated is a legal conclusion. The opinion of an expert does not extend to legal conclusions.").

4 Preliminarily, the trial court must address whether each defendant is a person, or entity, capable of committing medical malpractice. *Estate of Swanzy v Kryshak*, 336 Mich App 370, 377-378, 970 N.W.2d 407 (2021). There is no dispute (1) all three defendants in this case are capable of committing medical malpractice; and (2) defendants' alleged wrongs occurred in the professional relationship with the decedent. But because plaintiff did not advance a direct negligence claim committed by The Rivers, her theory must be premised on vicarious liability. See *Cox v Bd of Hosp Managers*, 467 Mich. 1, 11, 651 N.W.2d 356 (2002). In order to demonstrate negligence by the agents working at The Rivers, plaintiff was required to show: "(1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury" pertaining to The Rivers' agents claimed to have been negligent. *Id.* at 12, 651 N.W.2d 356. We acknowledge that, in filing the first amended complaint, fourteen months after her initial complaint, plaintiff added references to negligence, but the "professional negligence" claim as pleaded by plaintiff failed to comport with *Cox*. Plaintiff did not separately address vicarious liability allegedly committed by The Rivers' agents. And although Michigan is a notice pleading state, "[a] complaint must contain '[a] *statement of the facts, without repetition, on which the pleader relies in stating the cause of action*, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 305, 788 N.W.2d 679 (2010) (emphasis added). Nonetheless, courts are not bound by a party's procedural labels and may look beyond the labels to determine the exact nature of the claim to avoid "artful pleading." *Altobelli v Hartmann*, 499 Mich. 284, 300, 884 N.W.2d 537 (2016). In the present case, we conclude that plaintiff's first amended complaint was less than clear that plaintiff was alleging an ordinary negligence claim premised on vicarious liability in light of the failure to identify the employees at issue, their role or title, and their supervision. Finally, because plaintiff referred to "professional negligence," she seemingly indicated that licensed nurses, not aides or lower level nurses, were involved.

5 Dr. Johnson and Geriatric Associates argue that plaintiff's amended complaint did not comply with MCR 2.111(B). "Our Supreme Court has characterized MCR 2.111(B)(1) as consistent with a notice pleading environment .... If a party fails to plead facts with sufficient detail, the court should permit the filing of an amended complaint setting forth [the] plaintiff's claims in more specific detail." *Dalley*, 287 Mich App at 305-306, 788 N.W.2d 679 (alteration in original; quotation marks and citations omitted). Although it was inartful, plaintiff's amended complaint was pleaded with sufficient detail.

6 MCR 1.108 concerns the computation of time.

7 Plaintiff also appears to argue that principles of equity should apply to toll the statute of limitations, citing *Mazumder v Univ of Mich Regents*, 270 Mich App 42, 61, 715 N.W.2d 96 (2006). But, our Supreme Court reversed this Court's judgment, specifically determining that "the court erred in invoking the doctrine of equitable tolling under these circumstances." *Mazumder v Univ of Mich Regents*, 480 Mich. 1045, 1045-1046, 743 N.W.2d 889 (2008). Additionally, even if the legal principles outlined in *Mazumder* applied, plaintiff in this case is not entitled to equitable tolling. Plaintiff does not demonstrate any inequity. Rather, plaintiff simply failed to comply with *Waltz*'s well-established holding and timely file her medical-malpractice complaint.

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8 Although plaintiff contends that summary disposition was premature because discovery had not closed, additional discovery did not stand a reasonable chance of uncovering factual support for her argument that her lawsuit was timely filed. The events and dates pertinent to answering the question of whether the statute of limitations expired are undisputed, including the dates that the decedent was treated at The Rivers, the date decedent died, the date plaintiff secured her letters of authority, and the date plaintiff filed suit.

1 The Rivers previously moved for summary disposition under MCR 2.116(C)(8) MCL 2.112(L)(2)(b), and MCR 2.119 arguing that plaintiff's affidavit of merit failed to meet the requirements of MCL 600.2912d(1) because plaintiff's expert was "not qualified to offer standard of care testimony against the Defendant nursing staff ...." Consequently, The Rivers asserted that dismissal of all of plaintiff's claims was required. In response, plaintiff asserted that her claims against The Rivers were not limited to nursing malpractice; rather, her claims included vicarious liability claims against The Rivers for defendant Johnson's negligence, for The Rivers's "wound care team," for administrators, and for the ordinary negligence of its aides, orderlies, interns, and nurses. Plaintiff stated that "most all of the simple criticisms of hospital employees ... or 'nurses' were for simple, ordinary negligence, not things which require 'medical judgment.' " Plaintiff argued that "it does not require medical judgment to put a call light within the patient's reach, or to see days of puke and vomit in her bed and clean it." At the hearing for The Rivers's first dispositive motion, defense counsel stated that its first motion was for *partial* summary disposition "strictly related to any medical malpractice claims related or made against the nursing staff at the Rivers and solely related to [the affidavit of merit] issue."

2 Plaintiff has not raised a waiver argument on appeal.

3 Count I is labeled: "Additional Facts and Violations of the Standards of Care." Count II is labeled: "Professional Negligence/Malpractice Causing Severe, Permanent Damages/Death."

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