STATE OF MICHIGAN

COURT OF APPEALS

LINDSAY LUKAVSKY,

Plaintiff-Appellant,

EDWARD W SPARROW HOSPITAL ASSOCIATION, SPARROW HEALTH SYSTEM, and JARRED K HOLD DO,

Defendants-Appellees.

UNPUBLISHED
October 19, 2023

No. 361311
Ingham Circuit Court
LC No. 21-000378-NH

Before: Hood, P.J., and REDFORD and MALDONADO, JJ.

PER CURIAM.

Plaintiff, Lindsay Lukavsky, appeals by leave granted[1] the trial court's order granting partial summary disposition in favor of defendants, Edward S. Sparrow Hospital Association (Sparrow) and Dr. Jarred K. Hold, D.O., pursuant to MCR 2.116(C)(7) (claim is time-barred). The court's order resulted in the dismissal of any of plaintiff's claims arising on or before December 1, 2018, and plaintiff argues that the trial court erred by misapplying the Michigan Supreme Court's COVID-19 tolling orders. We reverse.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 27, 2018, plaintiff slipped on ice in a parking lot and fell, injuring her leg. Plaintiff was treated at Sparrow Hospital for multiple fractures and a dislocated ankle. She was released that day, but she returned early the following morning in severe pain. Plaintiff's splint was removed on November 30, and plaintiff alleges that defendant Holt failed to treat her for "compartment syndrome". Plaintiff ultimately underwent surgery on December 5 and was not discharged from the hospital until December 9. Plaintiff alleges several ongoing problems arising

[1] *Lukavsky v Edward W Sparrow Hosp Assoc*, unpublished order of the Court of Appeals, entered October 17, 2022 (Docket No. 361311).

from the alleged malpractice, including "drop foot," PTSD, "painful ambulation," and the need for "a cane or walker."

On November 25, 2020, plaintiff served a Notice of Intent Letter (NOI), and on June 2, 2021, plaintiff filed a complaint alleging claims of malpractice against Dr. Holt and Sparrow Hospital. On October 26, 2021, defendants filed a motion seeking partial summary disposition pursuant to MCR 2.116(C)(7), arguing that any claims arising on or before December 1, 2018 were barred by the statute of limitations. Defendants argued that because the alleged malpractice occurred from November 27, 2018 to December 2, 2018 and because the NOI was served on November 25, 2020, the limitations period expired between May 28, 2021 and June 2, 2021. According to defendants, because the complaint was filed on June 2, any claims that accrued during the period including November 17, 2018 until December 1, 2018 were time-barred. Defendants acknowledged that the Michigan Supreme Court entered an administrative order tolling statute of limitations, but they argued that the order only applied "to deadlines which would have expired during the Covid state of emergency" and that the orders did not apply in this case because the limitations period expired after the state of emergency concluded. Defendants also argued that the Supreme Court lacked the authority to issue orders modifying statutes of limitations.

On March 16, 2022, a hearing was conducted to consider defendants' motion. The court decided to grant defendants' motion and explained its reasons:

> The Court notes that none of these actions, however, fell within the period of the stay. So the stay looks like it was initially ordered from March 23rd through June 20. That's when the stay was in effect, the full period.
>
> So, I mean, I'm—it's really a toss-up for me, gentleman. I don't think I can tell the Supreme Court what it was. But I'm going to conclude that there was—these times were outside the time of the stay, that the Notice of Intent wasn't filed until November 25th, 2020. That was outside the stay.
>
> The statute already provided for what the statute of limitations would be, an additional time that a person would have for filing a complaint once the 182 days expired. Unfortunately in this case it was only two days.
>
> But the Court does not agree that if something that occurred outside the stay, or after June 20th I think the date is, that that means that everybody's statute of limitations is extended by an additional 102 days. And so the Supreme Court would have to tell me that. It would seem here that these actions, it was a period of six months plus, a little over six months, everything still was in place.
>
> The notice was filed two days before the statute ran. Got an extension of 182 days on that. There was [sic] two days left. The Court agrees there was a short window. But under the administrative orders, none of this action fell during the course of the stay, so the Court declines to extend the statute of limitations by an additional 102 days as requested by Plaintiff in this matter.

The trial court allowed plaintiff to seek recovery only with respect to the events that took place on December 2, 2018. This appeal followed.

II. STANDARDS OF REVIEW

"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 NW2d 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 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 NW2d 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; __ 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 ___, ___; ___ 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 limitation period expired. Additionally, defendant's argument that the Supreme Court lacked the authority to toll the statute of limitations is without merit.

"A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." MCL 600.5805(1). In general, "the period of limitations is 2 years for an action charging malpractice." MCL 600.5805(8). However, in cases involving medical malpractice, potential plaintiffs must provide potential defendants with a written notice of intent to sue at least 182 days before commencing the action. MCL 600.2912b(1). "[I]f the mandatory notice of intent to sue is given in such a manner that the period of limitations would expire during the 182–day notice period" then the limitations period is tolled "for 182 days from the date notice is given." *Mayberry v General Orthopedics, PC*, 474 Mich 1, 5; 704 NW2d 69 (2005); see also MCL 600.5856(c).

In this case, plaintiff's claims accrued, at the earliest, on November 27, 2018.[2] Accordingly, the two-year limitations period expired on November 27, 2020. MCL 600.5805(8).

[2] Because we conclude that the court misapplied the relevant administrative order, we need not address whether any of plaintiff's claims actually did accrue before December 2, 2018.

Plaintiff's NOI was served on November 25, 2020; because this was only two days before the expiration of the limitations period, the statute was tolled for 182 days. See *Mayberry*, 474 Mich at 5. Thus, the limitations period was set to expire on May 28, 2021. Plaintiff's complaint was filed on June 2, 2021, which would ordinarily be after the expiration of the limitations period. It was on this basis that the trial court granted summary disposition with respect to claims accruing November 27, 2018 through December 1, 2018.

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 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 ___, ___; ___ 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; ___ NW2d ___ (2023) (Docket No. 359699); slip op at 7.

In this case, plaintiff argues that AO 2020-3 and AO 2020 are applicable and added 102 days to the limitations period, thereby extending the filing deadline to September 7, 2021. However, the trial court erroneously concluded that, because the filing deadline was not until after the conclusion of the COVID-19 state of emergency, AO 2020-3 does not apply to this case and the limitation period was not tolled.

A. APPLICATION OF ADMINISTRATIVE ORDERS

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

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 or not 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 to cases in which the limitation period would have expired during the state of emergency.

B. VALIDITY OF ADMINISTRATIVE ORDERS

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*.[3]

In this case, defendants argue 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. Defendants also present a strained argument, lacking citation to authority, positing that the Supreme Court's emergency powers do not extend so far as to allow it to alter deadlines that fall outside the state of emergency. Defendants argue that "[a]llowing the courts to grant additional time in a case (such as this one) in which no deadlines were affected, would represent a previously unrecognized power on the part of the judiciary to expand limitations periods." To the extent that this argument is distinct from the previous one, it is no less without merit. The Supreme Court did not extend deadlines that fell outside of the state of emergency; rather, as explained in *Carter*, the Supreme Court instructed courts to exclude from its calculations of when limitations period end any days that fell within the state of emergency. *Id*.

IV. CONCLUSION

The trial court's order partially granting summary disposition in favor of defendants is reversed. This case is remanded to the circuit court for additional proceedings consistent with this opinion. We do not retain jurisdiction.

[3] This Court's opinion in *Carter* has not gone uncontested. Not only has the Supreme Court granted leave to appeal, *Carter v Dtn Mgt Co*, ___ Mich ___ (2023) (Docket No. 165425), 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. Nevertheless, we remain bound by *Carter*. MCR 7.215(C)(2).

/s/ Noah P. Hood
/s/ Allie Greenleaf Maldonado