

STATE OF MICHIGAN
COURT OF APPEALS

BEN OLDS, Personal Representative of the ESTATE
OF LINDA S. WALSH,

UNPUBLISHED
April 11, 2024

Plaintiff-Appellant,

v

AMBULATORY SURGERY ASSOCIATES, LLC,
doing business as BROOKSIDE SURGERY
CENTER,

No. 360780
Calhoun Circuit Court
LC No. 2021-000540-NH

Defendant,

and

PAIN DOC ANESTHESIOLOGY, PC, and JOHN
SHAIRD M.D.,

Defendants-Appellees.

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

PER CURIAM.

In this medical malpractice action, plaintiff appeals by leave granted¹ 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.

¹ *Estate of Linda S Walsh v Ambulatory Surgery Assoc, LLC*, unpublished order of the Court of Appeals, entered September 29, 2022 (Docket No. 360780).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

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

"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

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

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 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.

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.

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.

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

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

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).

/s/ Noah P. Hood

/s/ Allie Greenleaf Maldonado

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 ___, ___; ___ 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 (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 NW2d 636 (2017).