

STATE OF MICHIGAN
COURT OF APPEALS

TINA LUPI SMITH, SUCCESSOR Personal
Representative of the Estate of BARBARA LUPI,

Plaintiff-Appellee,

v

TRINITY HEALTH-MICHIGAN, d/b/a ST.
JOSEPH MERCY HOSPITAL,

Defendant-Appellant,

and

THOMAS O'KEEFE, M.D.,

Defendant.

UNPUBLISHED
July 18, 2006

No. 266635
Washtenaw Circuit Court
LC No. 02-000013-NM;
05-000143-NH

TINA LUPI SMITH, SUCCESSOR Personal
Representative of the Estate of BARBARA LUPI,

Plaintiff-Appellee,

v

TRINITY HEALTH-MICHIGAN, d/b/a ST.
JOSEPH MERCY HOSPITAL,

Defendant-Appellant,

and

TIMOTHY SHINN, M.D., and MICHIGAN
HEART, P.C.,

Defendants.

No. 266636
Washtenaw Circuit Court
LC No. 05-000143-NH;
02-000013-NM

TINA LUPI SMITH, Personal Representative of
the Estate of BARBARA LUPI,

Plaintiff-Appellee,

v

TRINITY HEALTH-MICHIGAN, d/b/a ST.
JOSEPH MERCY HOSPITAL,

Defendant,

and

TIMOTHY SHINN, M.D., and MICHIGAN
HEART, P.C.,

Defendants-Appellants.

No. 266701
Washtenaw Circuit Court
LC No. 05-000143-NH

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

Plaintiff, the successor personal representative of the estate of Barbara Lupi, filed a medical malpractice action on February 9, 2005. The action was the third action filed arising from the death of Barbara Lupi, and defendants Trinity Health-Michigan, Timothy Shinn, M.D. and Michigan Heart, P.C., moved for summary disposition, arguing that the complaint was not timely filed. In Docket Nos. 266635 and 266636, defendant Trinity Health-Michigan appeals by leave granted the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(7). In Docket No. 266701, defendants Shinn and Michigan Heart, P.C., also appeal by leave granted from the trial court's denial of their motions for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Decedent died of sudden cardiac arrest on March 26, 2000, while recovering from bilateral total knee replacement surgery. Decedent's husband was named as the personal representative of her estate on April 13, 2000. On January 4, 2002, he filed a complaint against defendants, St. Joseph Mercy Hospital and Thomas O'Keefe, M.D., alleging negligence and medical malpractice. By 2004, decedent's husband was in failing health, and the probate court named decedent's daughter, plaintiff Tina Lupi Smith, as the successor personal representative of decedent's estate. Plaintiff was issued letters of authority on May 25, 2004. On February 9, 2005, plaintiff filed a complaint alleging medical malpractice against defendants Timothy Shinn, M.D., and Michigan Heart, P.C., and alleging nursing malpractice against defendant St. Joseph Mercy Hospital.

Defendants, St. Joseph Mercy Hospital, Dr. Timothy Shinn, and Michigan Heart, P.C., argue that the trial court should have dismissed plaintiff's February 9, 2005, complaint under

MCR 2.116(C)(7) because plaintiff failed to file her complaint in a timely manner. We disagree. “Whether a period of limitations applies in particular circumstances constitutes a legal question that this Court considers de novo.” *Mazumder v Univ of Mich Bd of Regents*, 270 Mich App 42, 48-49; ___ NW2d ___ (2006). This Court also reviews de novo the trial court’s denial of summary disposition to defendants pursuant to MCR 2.116(C)(7). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A savings provision, MCL 600.5852, provides a two-year saving period in which a personal representative may pursue a wrongful death action. The two years begins to run after the probate court issues letters of authority to the personal representative. MCL 600.5852. However, the decedent’s personal representative may not file a malpractice suit on behalf of decedent’s estate more than three years after the original limitations period for the claim has run. *Id.* In this case, that date is March 26, 2005. MCL 600.5805(1), (6).

The parties debate whether MCL 600.5852 provides that the two-year saving period runs from the date that the initial personal representative (decedent’s husband) was issued his letters of authority, or the date that the successor personal representative (plaintiff) was issued her letters of authority. Plaintiff argues that her claim is not barred by the statute of limitations because she filed her claim on February 9, 2005, within two years after the probate court issued letters of authority to her. Defendants argue that plaintiff’s claim is time-barred because it was not filed by April 13, 2002, two years after the probate court originally issued letters of authority to the predecessor personal representative.

In *Eggleston v Bio-Medical Applications of Detroit*, 468 Mich 29, 30; 658 NW2d 139 (2003), our Supreme Court considered “the question whether a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute, MCL 600.5852, or whether the two-year period is measured from the appointment of the initial personal representative.” This is the exact question posed by defendants on appeal. Our Supreme Court concluded:

[MCL 600.5852] simply provides that an action may be commenced by the personal representative “at any time within 2 years after letters of authority are issued although the period of limitations has run.” The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative. [*Id.* at 33 (citations omitted).]

According to *Eggleston*, the two-year saving period in which plaintiff may file a complaint of malpractice on behalf of decedent’s estate began to run on May 25, 2004, the day the probate court issued the letters of authority naming her as the successor personal representative of decedent’s estate. Plaintiff’s February 9, 2005, complaint was filed within the two-year savings period, as measured from the issuance of her letters of authority, and within three years after the statute of limitations on the malpractice claim expired, March 26, 2005. Thus, plaintiff’s complaint was not time-barred by the plain language of MCL 600.5852, and the trial court did not err when it refused to dismiss plaintiff’s complaint under MCR 2.116(C)(7).

The *Eggleston* Court's conclusions were based solely on the statutory language of MCL 600.5852. In *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383, 389-390; ___ NW2d ___ (2006), we explained:

As noted in *Eggleston*, the statute contains only two limitations on the circumstances under which a successor personal representative can take advantage of the two year period of limitations: the decedent passing away during the limitations period and the successor receiving letters of authority. Once these events occur, the statute simply indicates that if a lawsuit is brought by a successor, it must be filed within two years of the issuance of the letters of authority, but no more than five years after the cause accrued.

Decedent died before her malpractice cause of action expired, and plaintiff received letters of authority from the probate court naming her as the personal representative of decedent's estate. Thus, MCL 600.5852, as interpreted in *Eggleston*, applies, and plaintiff's complaint is timely. Defendants' attempts to distinguish this case and elude application of the straightforward rationale contained in *Eggleston* and *Verbrugghe* are unpersuasive.

We note that defendants Shinn and Michigan Heart also argue that, because the initial personal representative had already commenced a malpractice action, MCL 700.3613 only permits plaintiff to substitute herself into that original action and is not given another two years to file a separate cause of action. In *Verbrugghe, supra* at 392, we concluded, however, that MCL 700.3613 does not preclude a successor personal representative from initiating a separate cause of action. Accordingly, we reject defendants' argument that MCL 700.3613 precludes plaintiff from filing a separate cause of action in this case.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto