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Successor Personal Representative Cannot Revive An Untimely Complaint

Estate of Naomi Harris, deceased v. Steven F. Bolling, M.D., et al.

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(No. 261216, rel'd. 08/16/05)

In this recent decision, the Michigan Court of Appeals held that the appointment of a successor personal representative could not revive or render timely an untimely complaint filed by the original personal representative.

On April 1, 1999, defendant doctor performed heart surgery on Naomi Harris. He then treated her as an outpatient over a month later. Complications arose and Ms. Harris sought treatment at Botsford Hospital. However, her condition worsened and she died on Aug. 17, 2000.

On Sept. 28, 2000, Jane Middleton was appointed personal representative of the Harris estate. A notice of intent was served on the defendants May 24, 2002. The medical malpractice complaint was filed on March 19, 2003. A successor representative, Darlene Middleton, was appointed on May 17, 2004. On Sept. 17, 2004, the trial court entered a stipulated order that amended the caption to reflect the successor representative's appointment.

The defendants then filed a motion for summary disposition based upon the argument that the complaint was not filed within two years of the appointment of the original personal representative as required by *Waltz v. Wyse*, 469 Mich 642; 677 NW2d 813 (2004). The defendants also argued that the appointment of a successor personal representative did not cure the untimely filing of the action by the original personal representative.

MCL 700.3701 does not support the conclusion that an untimely complaint can be rendered timely by the appointment of a successor personal representative.

In response, the plaintiff argued that *Waltz* should not be applied retroactively and that the appointment of a successor personal representative rendered the complaint timely. The trial court, referencing the ruling made in *Ousley v. McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), held that *Waltz* was to be applied retroactively and granted the defendants' motion for summary disposition.

On appeal, the plaintiff maintained that although the complaint was filed more than two years after the appointment of the original personal representative, the notice of intent was sent within the two-year savings provision, and therefore the plaintiff was allowed an extra 182 days to file the complaint, an argument that had been presented in *Omelenchuk v. Warren*, 461 Mich 567; 609 NW2d 177 (2000). The Michigan Court of Appeals rejected the *Omelenchuk* argument, noting that the *Waltz* court clarified *Omelenchuk's* "imprecise choice of words" in referring to MCL 600.5852 as setting forth a limitation period by stating that MCL 600.5852 was "not a statute of limitations but rather a saving statute." Thus the appeals court held that the plaintiff was incorrect in its argument that the notice tolling provision applied to the wrongful death saving provision in MCL 600.5852.

In a parallel argument, the plaintiff relied upon *Eggleston v. Bio-Medical Applications of Detroit*, 468 Mich 29; 658 NW2d 139 (2003). In *Eggleston*, the Michigan Supreme Court held that MCL 600.5852 permitted a successor personal representative to bring an action within two years of the issuance of the successor personal representative's letters of authority. Based upon this decision, the plaintiff argued that the appointment of a successor personal representative revived the untimely complaint of the predecessor representative. The Appeals Court differentiated the present case from *Eggleston* by noting that *neither* personal representative in the present case had filed a complaint within two years of the issuance of letters of authority.

The plaintiff also argued that the filing was timely because MCL 700.3701 states that a successor personal representative's powers "relate back in time to give acts by the person appointed that are beneficial to the estate occurring before the appointment the same effect as those occurring after the appointment" and that a "personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative." The Appeals Court rejected this argument as well, holding that the actions of the original personal representative, specifically the late filing of the medical malpractice complaint, were not beneficial to the estate. Therefore, MCL 700.3701 does not support the conclusion that an untimely complaint can be rendered timely by the appointment of a successor personal representative.

For a complete copy of the Michigan Court of Appeals decision on *Estate of Naomi Harris, deceased v. Steven F. Bolling, M.D., et al.*, [click here](#).

Editor's note: Thank you to Kevin Barry for contributing to this Rapid Report.