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A Second Notice of Intent to File A Claim Can Serve to Toll Statute of Limitations

Mayberry v. General Orthopedics, P.C., et al

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(No. 126136, rel'd. 10/04/05)

In this recent decision, the Michigan Supreme Court held that if a notice of intent to file a medical malpractice claim does not initiate a tolling period, a second notice of intent to sue, sent with fewer than 182 days remaining in the limitations period, *could* serve to toll the statute of limitations under MCL 5856(d).

In *Mayberry,* the defendant physician performed plaintiff's wrist surgery on Nov. 22, 1999. The plaintiffs (husband and wife) alleged that the defendant physician negligently cut a nerve in the husband's wrist, thus causing him to lose some use of his wrist.

Subsequently, the plaintiffs mailed a notice of intent to sue to the defendant physician on June 21, 2000. On Oct. 12, 2001, one month before the statute of limitations expired, the plaintiffs mailed another notice of intent, which named the physician and his professional corporation and also set forth additional allegations. The plaintiffs filed a complaint against the defendants on March 19, 2002, 158 days after the second notice of intent was mailed.

The defendants moved for summary disposition, arguing that the complaint was filed after the running of the statute of limitations period. The plaintiffs argued that the second notice of intent served to toll the statute of limitations period, and, therefore, the complaint was timely.

Relying on the holding in *Ashby v. Byrnes,* 251 Mich. App. 537; 651 N.W.2d 922 (2002), the Michigan Court of Appeals held that only the plaintiffs' first notice of intent was eligible for tolling and, therefore, granted the defendants' motion. In *Ashby,* the court found that "only the initial notice results in the tolling of the limitation period irrespective of how many additional notices are subsequently filed."

The Ashby court reasoned that MCL 2912b(6), which prohibits tacking or addition of successive 182-day periods after the initial notice of intent is given, "nowhere suggests that this limiting language applies only when the first notice filing tolled the period of limitation." Thus in the present case, the Court of Appeals reasoned that the plaintiffs' second notice of intent did not initiate tolling under MCL 5856(d) because MCL

2912(b) prohibited "obtaining the benefit of *another* 182-day tolling period based on the filing of multiple notices of intent."

The Michigan Supreme Court disagreed with the appellate court's analysis and subsequently overruled *Ashby*. The Supreme Court stated that tacking "generally refers to adding time periods together to affect the running of a limitations period." Furthermore, because tacking is a legal term of art, the reference to tacking in MCL 2912(b)(6) must be "interpreted in a manner that is consistent with its acquired meaning." The Supreme Court found that tacking, as referred to in MCL 2912(b)(6), applied only to limitation periods that had been initiated under MCL 5856(d), and, therefore, only multiple tolling periods were precluded.

As a result, the Supreme Court held that because the plaintiffs' first notice of intent did not serve to toll the statute of limitations, there were no successive 182-day periods as prohibited by MCL 2912(b)(6). Instead, only a single 182-day tolling period was initiated as a result of the second notice of intent, thus the plaintiffs' complaint was timely filed.

The significance of this case is that if a notice of intent to file a medical malpractice claim is filed *more than* 182 days before the statute of limitations expires, as occurred in the present case, a tolling period will not commence. However, if a second notice of intent to file a medical malpractice claim is filed when there is *less than* 182 days until the statute of limitations expires, a tolling period will begin with the second notice.

Click here for a complete copy of the Michigan Supreme Court's ruling in Mayberry v. General Orthopedics, P.C., et al.

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