

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
October 15, 2003 Session

FRANK FETZER MILLS, JR., ET AL. v. LUIS L. WONG, M.D., ET AL.

**Direct Appeal from the Circuit Court for Shelby County
No. 300304 T.D. Robert A. Lanier, Judge**

No. W2002-02353-COA-R3-CV - Filed November 21, 2003

This case involves an appeal from the trial court's grant of defendants' motion for summary judgment. The trial court dismissed the plaintiff's complaint for failure to bring their medical malpractice claim within the applicable three-year statute of repose. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Richard J. Myers, Memphis, Tennessee, for the appellants, Frank Fetzer Mills, Jr. and Rebecca Smith Mills.

William H. Haltom, Jr., and Joseph M. Clark, Memphis, Tennessee, for the appellee, Charter Lakeside Behavioral Health System, Inc.

Robert B. C. Hale, Memphis, Tennessee, for the appellees, Janet K. Johnson, M.D., Yvette Marion and Miriam Johnson, Co-Executors of the Estate of Janet K. Johnson, M.D. and Kenneth F. Tullis, M.D.

Michael L. Robb and Kevin Baskette, Memphis, Tennessee, for the appellee, John F. O'Connell, M.D.

OPINION

_____As alleged in the complaint, Plaintiff/Appellant, Frank Fetzer Mills, Jr. (Mr. Mills), went to Defendant/Appellee, Charter Lakeside Behavioral Health Systems, Inc. (Charter) on November 17, 1994. Mr. Mills sought diagnosis and care for depression, insomnia, and other mental and physical problems he was experiencing. At the time of Mr. Mills' admittance, the following Defendants provided his care: psychiatrist, Dr. Kenneth Tullis; pediatrician, and now

deceased, Janet K. Johnson; and internist, John. F. O'Connell. Mr. Mills was hospitalized for ten days at Charter and diagnosed only with alcoholism and drug addiction. On November 27, 1994, Charter transferred Mr. Mills to its own rehabilitation center where he stayed for an additional thirty days.

On February 7, 1997, Dr. Stein conducted an ophthalmologic exam on Mr. Mills and diagnosed him with Wilson's Disease, which, if not treated, is a fatal genetic disorder. This was the first time that Mr. Mills learned of this diagnosis. On January 21, 1998, Mr. Mills and his wife, Rebecca Smith Mills (Mrs. Mills), filed a complaint against the Defendants in the circuit court of Shelby County.¹ Mr. and Mrs. Mills non-suited their complaint on February 11, 1998, and re-filed on January 19, 1999. Subsequently, Charter, on behalf of itself and its employees, filed a motion to dismiss based on the Mills' failure to bring their medical malpractice claim within the three-year statute of repose enumerated in Tenn. Code Ann. § 29-26-116 (2000). In the Mills' response to Charter's motion, they filed affidavits from medical professionals opining that Mr. Mills was mentally incompetent at the time of the December 1994 treatment. The Mills argued that the legal disability statute, Tenn. Code Ann. § 28-1-106 (2000), tolled the three-year statute of repose.

On August 28, 2002, the trial court entered an order granting Charter's motion by characterizing it as a motion for summary judgment rather than a motion to dismiss. The trial court stated in its order that *Penley v. Honda*, 31 S.W.3d 181, 188 (Tenn. 2000), held that the legal disability statute, § 28-1-106, does not toll the statute of repose and thereby overrules any contrary dicta contained in *Bowers by Bowers v. Hammond*, 954 S.W.2d 752, 758 (Tenn. Ct. App. 1997).

Issues Presented

Mr. and Mrs. Mills appeal and raise the following issues, as we restate them, for review by this Court:

1. Whether mental incompetency tolls the medical malpractice statute of repose, Tenn. Code Ann. § 29-26-116 (2000).
2. Whether due process requires tolling § 29-26-116 during Mr. Mills incompetency.

¹ The cause of action against Daniel S. Boyd, M.D., individually, and the other clinics where he worked was dismissed by the trial court prior to this appeal. The cause of action against Luis L. Wong, M.D. was previously dismissed by this Court's reversal of the trial court's denial of his motion to dismiss for improper venue. *Mills v. Wong*, 39 S.W.3d 188, 190 (Tenn. Ct. App. 2000).

Standard of Review

This Court must decide whether it was error for the trial court to award summary judgment to the Defendants. Summary judgment should be awarded when the moving party can demonstrate that there are no genuine issues regarding material facts and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). Mere assertions that the non-moving party has no evidence does not suffice to entitle the moving party to summary judgment. *McCarley*, 960 S.W.2d at 588. The moving party must either conclusively demonstrate an affirmative defense or affirmatively negate an element which is essential to the non-moving party's claim. *Id.* If the moving party can demonstrate that the non-moving party will not be able to carry its burden of proof at trial on an essential element, summary judgment is appropriate. *Id.*

This Court reviews an award of summary judgment *de novo*, with no presumption of correctness afforded to the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002). In determining whether to award summary judgment, we must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). Summary judgment should be awarded only when a reasonable person could reach only one conclusion based on the facts and inferences drawn from those facts. *Id.* If there is any doubt about whether a genuine issue of material fact exists, summary judgment should not be awarded. *McCarley*, 960 S.W.2d at 588.

Whether mental incompetency tolls the medical malpractice statute of repose

Tenn. Code Ann. § 29-26-116(a) (2000) provides in pertinent part:

(a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

....

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

The purpose of subsection (3) “is to address the perceived medical malpractice insurance crisis by placing an absolute three-year limit upon the time within which a medical malpractice action may be brought.” *Green v. Sacks*, 56 S.W.3d 513, 518 (Tenn. Ct. App. 2001) (citing *Cronin v. Howe*, 906 S.W.2d 910, 913 (Tenn. 1995); *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn.

1978)). The only basis for tolling the statute is that found in the statute itself, the fraudulent concealment exception, or any other contained in the code specifically referencing the statute of repose. See Tenn. Code Ann. § 29-26-116(a)(3); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 184-85 (Tenn. 2000); *Green*, 56 S.W.3d at 518.

_____ Mr. Mills contends that he was prevented from bringing a timely claim because he was suffering from a mental disability and, as a result, the statute of repose should be tolled. While Tenn. Code Ann. § 28-1-106 (2000) tolls the applicable statute of limitation for mental incompetency, no such statutory exception exists for the statute of repose.

Tennessee case law has evolved to eliminate any possible tolling of the statute of repose for mental incompetency. In *Penley v. Honda Motor Co.*, 31 S.W.3d 181 (Tenn. 2000), the Tennessee Supreme Court held that the Tennessee Products Liability Act's applicable statute of repose is not tolled due to a plaintiff's mental incompetency. *Penley*, 31 S.W.3d at 188. The court went on to address the medical malpractice statute of repose by addressing this Court's decision in *Bowers by Bowers v. Hammond*, 954 S.W.2d 752 (Tenn. Ct. App. 1997). In *Bowers*, this Court held that the plaintiff's status as a minor tolled the medical malpractice statute of repose until the plaintiff reached the age of majority. *Bowers*, 954 S.W.2d at 758. In dicta, this Court went on to say that a plaintiff's mental incompetency would also toll the medical malpractice statute of repose. See *id.* at 754, 758-59 (citing *Adkins v. Martin*, slip op. at 6-9 (Tenn. Ct. App. Mar. 28, 1993)). In *Penley*, the Tennessee Supreme Court disagreed with the rationale used in *Bowers* by stating "[t]he *Bowers* holding is in stark contrast to the plain language of the statute, which admits of no tolling other than for fraudulent concealment, and the holding fails to recognize the policies underlying the statute of repose itself." *Penley*, 31 S.W.3d at 188. Further, the court ruled that "[t]o the extent that the *Bowers* dicta can be read to toll any statute of repose for mental incompetency under Tennessee Code Annotated section 28-1-106, however, it is overruled." *Penley*, 31 S.W.3d at 188. As a result, this Court will follow the rationale and holding as enumerated in the *Penley* decision.

Whether Due Process requires tolling the Statute of Repose

Mr. Mills also contends that due process requires tolling the medical malpractice statute of repose due to his suffering from mental incompetency. Mr. Mills finds support for his argument in the Tennessee Supreme Court's decision of *Seals v. State of Tenn.*, 23 S.W.3d 272 (Tenn. 2000). In *Seals*, the petitioner pled guilty to first-degree murder and was sentenced to life imprisonment. *Id.* at 274. Over a year after his conviction, the petitioner filed for post-conviction relief contending ineffective assistance of counsel and that his guilty plea was not of his own volition. *Id.* The trial court dismissed the post-conviction relief petition because it was filed outside the post-conviction relief one-year statute of limitation.² *Id.* The petitioner

² Mr. Mills asserts in his brief that the applicable statute of limitations, Tenn. Code Ann. § 40-30-202(a) (1997), for post-conviction relief should instead be characterized as a statute of repose. This Court declines to undertake
(continued...)

appealed the trial court’s decision and the Tennessee Supreme Court ultimately held that due process does require tolling the post conviction relief statute of limitation when a petitioner suffers from mental incompetency. *See id.* at 274-80. In the due process analysis, the court looked to the petitioner’s private interests at stake which it determined to be the “opportunities to attack the convictions and sentences of incarceration on the ground that the petitioner[] [was] deprived [of his] constitutional rights during the conviction process.” *Id.* at 277. While post-conviction relief may be characterized as a civil action, all the substantive rights involved are those stemming from a criminal action and protected by rules of criminal procedure. This Court is not willing to extend the due process analysis used in *Seals* to a case involving the civil medical malpractice statute of repose.

Conclusion

In light of the foregoing, we hold that mental incompetency does not require tolling of the medical malpractice statute of repose. Accordingly, the trial court’s grant of Defendants’ motion for summary judgment is affirmed. Costs of this appeal are taxed to the appellants, Frank Fetzer Mills and Rebecca Smith Mills, and their surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE

²(...continued)
such a characterization because of its mootness in light of our decision.