What a Difference a Day Makes

By: Lisa Sabon Anstess **July 14, 2017**

In this published matter of first impression, the Supreme Court's attention was drawn to the effect of a prospective medical malpractice plaintiff filing its notice of intent (NOI) on the very last day of the (typical) two year statute of limitations period. *Haksluoto v Mt. Clemens Regional Med Ctr, et al* (E-Journal No. 655020). The question was raised as to whether, with no "whole" days left in the limitations period, can the statute of limitations be tolled for the 182 day period?

Plaintiff Haksluoto is claiming that he was treated negligently on December 26, 2011, and subsequently filed a NOI two years later concerning said treatment on December 26, 2013. Plaintiff then waited 182 days and filed his Complaint on the "183rd day," on June 27, 2014. Defendants promptly filed a motion for summary disposition claiming the suit was time-barred. The trial court denied the motion, but on appeal, the Court of Appeals reversed.

Specifically, the Court of Appeals (*Haksluoto v Mt Clemens Regional Med Ctr*, 314 Mich App 424; 886 NW2d 920 (2016)) held that the 182 day notice period began the day after filing the NOI, here on December 27, 2013. It also held that the NOI expired June 26, 2014, but the statute of limitations was not tolled as there were no days left to toll. They relied on MCR 1.108, which is the rule governing calculation of time. The Court acknowledged that its analysis rendered a plaintiff incapable of filing a timely Complaint if the NOI was filed on the last day of the statute of limitations. If there was no NOI requirement, the Complaint could have been filed on the last day of the statute of limitations.

SECREST WARDLE NOTES

The Supreme Court in the published case of *Haksluoto v Mt. Clemens Regional Med Ctr, et al* (E-Journal No. 65502) undertook to examine the statute of limitations and tolling provisions in Michigan medical malpractice actions. The Court noted that the Revised Judicature Act (RJA), MCL 600.101, *et seq.*, requires that a prospective medical malpractice plaintiff provide alleged defendants at least 182 days of notice before filing suit, and also noted that the statute of limitations for the medical malpractice action is typically tolled during the 182 day notice. In a matter of first impression, the Supreme Court concluded that the statute of limitations period is tolled when the notice of intent is filed on the last day of the limitations period, even though no full days of the limitation period remain. Accordingly, plaintiff can timely file a Complaint the day after the notice period has ended under these specific circumstances.

The Supreme Court granted leave to appeal so as to consider whether a Complaint filed the day after the notice period ended was timely. It held that there was time remaining on the clock on the last day of the statute of limitations, as the entire day of December 26 had not yet elapsed.

The Supreme Court looked at fractions of a day and whether by law, we must either round up to a whole day remaining or round down to no days remaining. The Court analyzed the law regarding how time is counted and how to handle fractional days. MCL 8.6 provides that "in computing a period of days, the first day is excluded and the last day is included." This overlaps the court rule MCR 2.108. A prior court rule 9, §1 (1945) also applied the same method of excluding the first day and including the last day. It is repeatedly seen in historical practice. The method to this practice is to ensure that the party receives all of the time to which he or she is entitled.

The Court proceeded to address the unexpired fraction of a day remaining after plaintiff filed its NOI on the last day of the statute of limitations period. The Court looked to the age old law regarding rounding of fractional days. Under well-established common law predating American independence, there is no need to inquire into when exactly on December 26, 2013, Mr. Haksluoto filed his NOI.

After lengthy analysis of common law principles and cases cited from the 1800s, the Supreme Court held that applying common law jurisprudence of fractional days produces the "conclusion that a timely NOI preserves the day the NOI is filed as the day to be used once the limitation period begins running after the notice period ends." "The rule is that once the notice period ends and the time for the plaintiff to bring a claim once again begins to run, it will run for the number of *whole days* remaining in the limitations period when the NOI was filed, *plus* one day to reflect the fractional day remaining when the NOI itself was filed. There is no principled reason to treat the last day differently from any other – the abacus bead does not slide over until the day is over, and that applies with equal force to the ultimate and penultimate days of limitations."

In this circumstance, the plaintiff must wait an entire 182 day notice period before filing a Complaint. This makes certain that prospective defendants receive 182 whole days of notice. If the Complaint is filed earlier, it is premature and therefore legally insufficient to commence an action.

Thus, the Supreme Court concluded in this matter of first impression that when a NOI is filed on the final day of the limitations period, the next business day after the notice period expires is an eligible day to file suit. Accordingly, plaintiff filed his NOI on the final day of the limitations period. Some fraction of that day, December 26, 2013, remained. "Consequently, the NOI tolled the limitations period, leaving one day for plaintiff to file his complaint after the notice period ended." His Complaint filed the next day was timely.

We welcome your questions -

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