STATE OF MICHIGAN

COURT OF APPEALS

ANTOINETTE LONG, Next Friend of DOUNIKA LONG, a Minor, Plaintiff-Appellee, v CHILDREN'S HOSPITAL OF MICHIGAN, ALEXA CANADY, M.D., SANDEEP SOOD, M.D., and PEDIATRIC NEUROSURGERY GROUP, P.C., Defendants-Appellants.	UNPUBLISHED August 1, 2006 No. 266948 Wayne Circuit Court LC No. 02-243011-NH

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Defendants appeal by leave granted an order denying their motion for summary disposition under MCR 2.116(C)(7) based on the statute of limitations in this medical malpractice action. We reverse.

This Court reviews de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). "We consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Id*. Additionally, the interpretation and application of statutes are questions of law subject to de novo review. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The minor was 12 years old at the time of the alleged malpractice. Thus, her lawsuit is subject to the period of limitations set forth in MCL 600.5838a. MCL 5838a(2) provides that an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in § 5805. MCL 5805(6) provides that the period of limitations is two years for an action charging malpractice. Accordingly, the present action should have been commenced within two years of December 7, 1999, but plaintiff did not file it until December of 2002. Plaintiff asserted that the minor was insane at the time her cause of action accrued and, therefore, the period of limitations was extended by the general savings provision provided in MCL 600.5851(1).

In *Vega v Lakeland Hosp*, 267 Mich App 565, 572; 705 NW2d 389 (2005), the Court held that medical malpractice claimants cannot avail themselves of the provision in MCL 600.5851(1) allowing tolling of the statute of limitations because of insanity. Defendants argue that the trial court erred by holding that *Vega* applies prospectively only, thereby holding that the statute of limitations was tolled by the alleged insanity of the minor.[1]

In *Vega*, the issue was whether MCL 600.5851(1), including its savings provision, applied to medical malpractice claimants. *Id*. at 569. MCL 600.5851(1) provides, in relevant part:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of old or insane at the time the claim accrues, the person or those claiming under the person have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

And, MCL 600.5851(7) provides:

> Except as otherwise provided in subsection (8), if, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday or within the period of limitations set forth in section 5838a, whichever is later. If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has reached his or her eighth birthday, he or she is subject to the period of limitations set forth in section 5838a.

The plaintiff in *Vega*, the conservator of an estate of a minor plaintiff, filed a medical malpractice claim after the two-year statutory period of limitations contained in MCL 600.5838a had expired. *Vega, supra* at 567. However, the plaintiff argued that the minor was insane under MCL 600.5851(2) and, thus, the minor's claim was extended by the general savings provision contained in MCL 600.5851(1). *Id*. at 567-568.

This Court considered whether the phrase "[e]xcept as otherwise provided in subsections (7) and (8)" contained in MCL 600.5851(1) excluded application of the general savings provision to medical malpractice claimants proceeding under § 5851(7). The *Vega* court

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[1] Plaintiff argues that defendants waived the statute of limitations defense by not specifically asserting in their affirmative defenses that insanity tolling does not apply to medical malpractice actions. But in her answer to the application for leave to appeal, plaintiff admitted that defendants' motion for summary disposition, filed in lieu of an answer, included that plaintiff's suit was untimely under MCL 600.5851(7). Further the record reflects that, in their later motion for summary disposition, defendants argued that plaintiff's suit was untimely under MCL 600.5851(1). Defendants' arguments are sufficient to overcome plaintiff's contention that defendants waived this issue.

concluded that it unambiguously excluded such claimants. *Vega, supra* at 571. Further, the Court found that subsection one and subsection seven did not conflict or cause any ambiguity when read together because subsection one applies to all claims, except medical malpractice claims, that fall under the RJA. *Id.* Finally, this Court noted that subsection seven was enacted more recently and was more specific than subsection one. *Id*. at 571-572. Thus, this Court concluded that the plaintiff could not avail herself of the insanity disability and, because the plaintiff's claim was filed after the two-year period of limitations, the trial court properly granted the defendant's motion for summary disposition. *Id*. at 572.

Defendants maintain that the trial court erred by concluding that *Vega* should be given only prospective application. Generally, judicial decisions are given full retroactive effect. *Pohutski v Allen Park,* 465 Mich 675, 695; 641 NW2d 219 (2002). Prospective application is appropriate, however, when the holding of the new decision overrules established precedent or decides an issue of first impression whose resolution was not clearly foreshadowed. *Holmes v Michigan Capital Medical Ctr,* 242 Mich App 703, 713; 620 NW2d 319 (2000). But an issue of first impression does not in and of itself justify giving the decision only prospective application where the decision does not announce a new rule of law or change existing law, but merely provides an interpretation that has not previously been the subject of an appellate decision. *Id.* See also *Lincoln v Gen'l Motors Corp,* 461 Mich 483, 491; 607 NW2d 73 (2000).

While *Vega* did decide an issue of first impression, it did not announce a new rule of law nor did it overrule clear and uncontradicted case law.[2] *Vega* merely interpreted the plain and unambiguous language of the statute. The phrase "[e]xcept as otherwise provided in subsection (7)" unambiguously excluded the class of plaintiffs described in subsection (7), i.e., medical malpractice claimants, from relying on the savings provision. Further, the language of MCL 600.5851(1) and (7) clearly foreshadowed *Vega's* holding that medical malpractice claimants cannot avail themselves of the insanity grace period provided in § 5851(1). MCL 600.5851(1) provides for disability tolling "*[e]xcept as provided in subsections* (7) and (8) . . . ." (Emphasis added.) Further, subsection (7) provides, specifically for medical malpractice cases, a different age-based tolling provision that takes no account of insanity. MCL 600.5851(7). When read together, MCL 600.5851(1) and (7) provide no insanity tolling provision for medical malpractice claimants. Accordingly, retroactive application of *Vega* is appropriate.

Reversed and remanded for entry of an order granting summary disposition in favor of defendants. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper

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[2] Indeed, the dissenting judge in *Vega* did not contend that the majority overruled existing case law. *Vega, supra* at 574-578 (Jansen, J., dissenting).