STATE OF MICHIGAN

COURT OF APPEALS

Estate of JEAN CAROL BENJAMIN, Deceased, by DESIREE L. KIMPSON, Personal Representative,

Plaintiff-Appellee,

v

BOTSFORD GENERAL HOSPITAL and JOHN PARMELY, D.O.,

Defendants-Appellants.

UNPUBLISHED
October 9, 2007

No. 269253
Oakland Circuit Court
LC No. 2002-044309-NH

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

In this wrongful death medical malpractice action, defendants appeal as on leave granted[1] from a circuit court order denying their motion for summary disposition under MCR 2.116(C)(7) (statute of limitations). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo the circuit court's summary disposition ruling. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004), quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

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[1] *Benjamin v Botsford Gen Hosp*, 474 Mich 1085; 711 NW2d 340 (2006).

"Whether a period of limitations applies to preclude a party's pursuit of an action constitutes a question of law that we [also] review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

The period of limitation governing a wrongful death action depends on the period of limitation applicable to the underlying theory of liability. *Lipman v William Beaumont Hosp*, 256 Mich App 483, 490; 664 NW2d 245 (2003). A medical malpractice plaintiff has two years from the date the cause of action accrued in which to file suit. MCL 600.5805(6).[2] A medical malpractice claim generally "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1).[3] The circuit court's finding that the date of death controls accrual in wrongful death actions premised on medical malpractice ignores the plain language of § 5838a(1), which "reflects the Legislature's desire *to focus the accrual date of medical malpractice claims on the occasion of the act or omission complained of . . . .*" *McKiney v Clayman*, 237 Mich App 198, 203; 602 NW2d 612 (1999) (emphasis added). Because the alleged negligence of defendants occurred between December 29, 1999, the date of the decedent's admission to Botsford Hospital and her allegedly unsuccessful thrombectomy, and January 3, 2000, the date of the operation to remove part of her colon, which Dr. Parmely purportedly approved, her malpractice claims accrued on these dates.

Because the decedent's medical malpractice claims accrued by January 3, 2000, at the latest, the two-year period of limitation provided in MCL 600.5805(6) extended through January 3, 2002, at the latest. Vernon Benjamin, the original personal representative, failed to file within this two-year period either a mandatory notice of his intent to sue defendants, MCL 600.2912b, or a complaint on the estate's behalf.

But Benjamin's appointment as personal representative on August 17, 2000, gave him until August 17, 2002, to commence this action within the wrongful death saving period. MCL 600.5852. Benjamin gave notice of his intent to sue defendants on April 4, 2002, but this notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). *Waltz*, *supra* at 648-651, 655. Accordingly, Benjamin's filing of the action on October 3, 2002, occurred nearly six months after the wrongful death saving period had expired.

The estate maintains that *Waltz* should not apply retroactively. Controlling decisions of this Court have determined, however, that (1) the Supreme Court's holding in *Waltz* "applies retroactively in all cases," *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), lv gtd 477 Mich 1066 (2007), and (2) equitable or "judicial tolling should not

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[2] When the decedent's cause of action accrued, subsection (6) was codified as subsection (4). The analysis in this report references the current subsection.

[3] Although MCL 600.5838a(2) gives a medical malpractice plaintiff until "6 months after the plaintiff discovers or should have discovered the existence of the claim" to file suit, the discovery rule is not at issue in this case.

operate to relieve wrongful death plaintiffs from complying with *Waltz*'s time restraints,"[4] *Ward v Siano*, 272 Mich App 715, 720; 730 NW2d 1 (2006), lv in abeyance ___ Mich ___; 729 NW2d 213 (2007).

The estate also contends that plaintiff's appointment as its successor personal representative on July 16, 2004, afforded her a new wrongful death saving period in which to pursue legal action, which she timely did by filing a first amended complaint in August 2004. The Michigan Supreme Court in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 33; 658 NW2d 139 (2003), determined that MCL 600.5852 "clearly allows an action to be brought within two years after letters of authority are issued to the personal representative." Because § 5852 "does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative," the Supreme Court held that the successor personal representative could timely file suit within two years after receiving his letters of authority, and "'within 3 years after the period of limitations ha(d) run.'" *Id*., quoting § 5852.[5]

This Court has distinguished *Eggleston* and declined to apply it, however, in cases like this involving the original personal representative's untimely filing of a complaint. See *McLean v McElhaney*, 269 Mich App 196, 201-202; 711 NW2d 775 (2005), lv in abeyance ___ Mich ___; 728 NW2d 867 (2007) (finding the plaintiff copersonal representatives' medical malpractice compliant untimely and rejecting their *Eggleston*-based assertion "that the trial court should have permitted a voluntary dismissal of [the] plaintiff's claims without prejudice so that a new personal representative could have been appointed to file suit on behalf of [the] estate"); *McMiddleton v Bolling*, 267 Mich App 667, 671-674; 705 NW2d 720 (2005) (rejecting the contention that "the subsequent appointment of the successor personal representative reviewed the complaint that the original personal representative filed untimely, i.e., more than two years after the original personal representative appointed.")

The Michigan Supreme Court's recent decision in *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007), further undermines the notion that notwithstanding an original personal representative's filing of an untimely complaint, a successor personal representative has the authority to pursue an action against the same defendants. In *Washington*, the original personal representative filed an untimely complaint that the circuit court dismissed pursuant to MCR 2.116(C)(7), and the plaintiff, a later-appointed successor personal representative, also filed a complaint on the estate's behalf. *Id*. at 415. The Supreme Court held that res judicata barred the successor's action. *Id*. at 417-422. Concerning the first

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[4] Furthermore, as summarized in *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 576 n 27; 703 NW2d 115 (2005), both the Michigan Supreme Court and this Court have rejected the notion that a retroactive application of *Waltz*, in a manner that renders an estate's commencement of suit as untimely, qualifies as an unconstitutional abbreviation of the period for filing suit.

[5] "[T]he three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. Therefore, the fact that the three-year ceiling was not yet reached when [the plaintiff] filed suit is irrelevant." *Farley*, *supra* at 575.

res judicata element, decision of a prior action on the merits, the Supreme Court found that the circuit court's order dismissing the original complaint under subrule (C)(7) amounted to a decision on the merits, explaining that "[i]n the absence of any language in an order of dismissal limiting the scope of the merits decided," or language specifying that the order is without prejudice, MCR 2.504(B)(3) "plainly provides that the order operates as an adjudication of the entire merits of a plaintiff's claim." *Id*. at 419. With respect to the second res judicata element, the Supreme Court observed that the successor personal representative had privity with the original personal representative because they both represented the same legal interest, that of the estate. *Id*. at 421-422. Regarding the last res judicata element, that the matter raised in the second case was or could have been resolved in the first, the Supreme Court explained that the inquiry was governed by resort to a transactional test, which "provides that the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief." *Id*. at 420 (internal quotation omitted). The Supreme Court concluded that because the successor's complaint mirrored that filed by the original representative, "the matter asserted in the second suit was raised in the first." *Id*. at 420-421.

In summary, the circuit court erred by denying defendants summary disposition pursuant to MCR 2.116(C)(7) because (1) Vernon Benjamin untimely filed the initial complaint beyond both the medical malpractice period of limitation and the wrongful death saving period, and (2) plaintiff's appointment as the estate's successor personal representative did not resuscitate this untimely filed action.

We reverse and remand for entry of an order granting defendants summary disposition pursuant to MCR 2.116(C)(7). We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood