

STATE OF MICHIGAN
COURT OF APPEALS

KATHY LANGE, Personal Representative of the
Estate of BETTY LANGE, Deceased,

UNPUBLISHED
September 13, 2007

Plaintiff-Appellee,

v

ST. JOSEPH MERCY HOSPITAL ANN ARBOR,
a/k/a TRINITY HEALTH MICHIGAN,

No. 259496
Washtenaw Circuit Court
LC No. 03-000792-NH

Defendant,

and

TERUN LAMA, M.D.,

Defendant-Appellant.

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

In this wrongful death medical malpractice action, defendant Dr. Terun Lama appeals by leave granted from a circuit court order denying his motion for summary disposition premised on MCR 2.116(C)(7). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a 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).]

“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).

In this case, the decedent’s medical malpractice claims accrued at the latest by November 7, 2000, and thus the two-year period of limitation in MCL 600.5805(6) extended through November 7, 2002. Although Karen Joy Bellers, the original personal representative of the decedent’s estate, did not file either the mandatory notice of her intent to sue defendants, MCL 600.2912b, or the complaint within the two-year malpractice period of limitation, her appointment as the estate’s personal representative on June 4, 2001, gave her until June 4, 2003, to commence this action within the wrongful death saving period. MCL 600.5852. Bellers gave notice of her intent to sue defendants on February 5, 2003, but this notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). *Waltz*, *supra* at 648-651, 655.¹ Consequently, Bellers’s filing of this action on July 21, 2003, occurred approximately six weeks after the wrongful death saving period expired.

Although the estate challenges the retroactive applicability of *Waltz* to this case, controlling decisions of this Court have found that (1) the Supreme Court’s decision 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 operate to relieve wrongful death plaintiffs from complying with *Waltz*’s time restraints,” *Ward v Siano*, 272 Mich App 715, 720; 730 NW2d 1 (2006), *lv in abeyance* 729 NW2d 213 (2007). 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 unconstitutional.

The circuit court nonetheless found that plaintiff’s appointment as the estate’s successor personal representative on June 29, 2004, made the original complaint timely, relying on *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003). In *Eggleston*, *supra* at 33, the Michigan Supreme Court determined that the language of 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.

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. In a nearly

¹ This Court has rejected the estate’s suggestion that the three-year period mentioned in the second sentence of MCL 600.5852 constitutes a saving period or period of limitation independent of the two-year period referenced in the first sentence of § 5852. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 575; 703 NW2d 115 (2005).

identical factual scenario, this Court rejected the contention that “the subsequent appointment of the successor personal representative revived the complaint that the original personal representative filed untimely, i.e., more than two years after the original personal representative was appointed.” *McMiddleton v Bolling*, 267 Mich App 667, 671-672; 705 NW2d 720 (2005). The Court in *McMiddleton* explained in relevant part as follows:

Plaintiff argues that according to [*Eggleston*], she *could* have filed a complaint two years after she was appointed successor personal representative. However, after being appointed successor personal representative she did not file a complaint. Indeed, . . . [the] complaint was not filed within two years after appointment of either the original personal representative or the successor personal representative. . . . Thus, *Eggleston* does not support the conclusion that the complaint in this case was timely filed.

* * *

Plaintiff contends that she did not need to file another complaint, because the previous personal representative had already filed one. However, applying MCL 600.5852 and the Supreme Court’s ruling in *Eggleston*, it is clear that a successor personal representative cannot rely on the untimely filed complaint that was filed before she was appointed. . . . [Pursuant to § 5852,] the successor personal representative could have filed a complaint *after* her appointment, not *before* her appointment. [*McMiddleton, supra* at 672-673 (emphasis in original).]

The Court further disagreed that MCL 700.3701 gave a successor representative the authority to ratify an untimely complaint filed by the original representative. *Id.* at 673-674; see also *Glisson v Gerrity*, 274 Mich App 525, 538-539; 734 NW2d 614 (2007).

Although plaintiff alternatively suggests on appeal that she had the authority to timely file her own complaint on behalf of the estate until November 7, 2005, our Supreme Court’s recent decision in *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007), which discussed res judicata in the context of wrongful death medical malpractice actions filed by initial and successor personal representatives, undermines this suggestion. Pursuant to the Supreme Court’s analysis of the requisite res judicata elements in *Washington*, this claim preclusion doctrine would bar any medical malpractice action that plaintiff potentially may have initiated on the estate’s behalf. First, the circuit court should have unconditionally ordered dismissal with prejudice of the complaint filed by Bellers pursuant to MCR 2.116(C)(7), which order under MCR 2.504(B)(3) would amount to a dismissal on the merits. *Washington, supra*. Additionally, plaintiff, the estate’s successor personal representative, shares privity with Bellers because both represented the legal interest of the estate. *Id.* at 422. Consideration of the third res judicata element, whether the matter raised in the second case was or could have been resolved in the first, involves some degree of speculation given that a successor has not filed a complaint. The original complaint, however, sets forth in broad terms its allegations of negligence by defendants during their treatment of the decedent between October 28, 2000 and November 7, 2000. Even assuming that plaintiff could formulate different theories of liability, any potential complaint seeking recovery for improper treatment of the decedent by these same defendants between October 28, 2000 and November 7, 2000 would involve the same operative facts as the basis for relief asserted by Bellers in the original complaint. *Id.* at 421.

In summary, we conclude that the circuit court erred by denying Dr. Lama summary disposition pursuant to MCR 2.116(C)(7) because Bellers untimely filed the complaint beyond both the medical malpractice period of limitation and the wrongful death saving period, and because plaintiff's appointment as the estate's successor personal representative did not revive this untimely filed action.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto