

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN FORSYTH, as Personal
Representative of the Estate of BARRY HUGH
FORSYTH, Deceased,

UNPUBLISHED
August 3, 2006

Plaintiff-Appellee,

v

DR. JOHN HOPPER, DR. ERIC WYNTON
AYERS, and AFFILIATED INTERNISTS CORP,

No. 263378
Wayne Circuit Court
LC No. 03-315237-NH

Defendants,

and

DR. JONATHAN EDWARD PASKO and
DETROIT RECEIVING HOSPITAL,

Defendants-Appellants.

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

In this wrongful death action alleging medical malpractice, defendants Dr. Jonathan Pasko and Detroit Receiving Hospital appeal as on leave granted the trial court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(7). We reverse.

This case arises from the death of plaintiff's husband, who is alleged to have suffered an ultimately fatal anaphylactic reaction to medications administered to him by defendants on September 12, 2000. Plaintiff was issued letters of authority appointing her personal representative of her husband's estate on February 1, 2001, and, on November 8, 2002, served defendants with notice of her intent to file a medical malpractice claim. Plaintiff asserted such a claim in a complaint alleging medical malpractice filed in the trial court on May 12, 2003.

Our Supreme Court thereafter released its decision in *Waltz v Wyse*, 469 Mich 642, 644, 650; 677 NW2d 813 (2004), wherein it held that the notice of intent tolling provision of MCL 600.5856(c) does not toll the two-year period for commencing an action as personal representative of a decedent's estate provided for by the wrongful death savings provision of

MCL 600.5852, but rather, “by its express terms, tolls only the applicable ‘statute of limitations or repose.’” Relying on *Waltz*, defendants moved for summary disposition of plaintiff’s complaint pursuant to MCR 2.116(C)(7), arguing that because she failed to file her complaint within the savings period set forth in MCL 600.5852, i.e., by February 1, 2003, plaintiff’s claim for medical malpractice was time-barred despite the fact that notice of her intent to file suit was given within the savings period.

Finding that *Waltz* applied only prospectively and that, in any event, the complaint at issue was nonetheless timely because it was filed within the three-year outside limit set forth in MCL 600.5852, the trial court denied defendants’ motion. After this Court denied defendants’ subsequent application for leave to appeal the trial court’s decision, our Supreme Court remanded the matter to us for consideration as on leave granted, with express direction to give its holding in *Waltz* “full retroactive application.” See *Forsyth v Hopper*, 472 Mich 929 (2005). Upon doing so,¹ we find that plaintiff’s complaint was time-barred and that the trial court therefore erred in failing to grant summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

A trial court’s decision on a motion for summary disposition is reviewed de novo. *Waltz*, *supra* at 647. “Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations.” *Id.* With regard to claims for medical malpractice, “a plaintiff . . . [generally] must bring his claim within two years of when the claim accrued, or within six months of when he discovered or should have discovered his claim.” *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997); see also MCL 600.5805(6) and MCL 600.5838a(2). A plaintiff alleging medical malpractice must also file, “not less than 182 days before the action is commenced,” a notice of intent to sue. MCL 600.2912b(1). Pursuant to MCL 600.5856(c), filing of this notice will toll “any period of limitations or repose” and may, therefore, extend the two-year period of limitations set forth in MCL 600.5805(6) by up to 182 days. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 572; 703 NW2d 115 (2005). In the context of a wrongful death action, the two-year medical malpractice period of limitation may also be extended pursuant to MCL 600.5852, which provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But

¹ Although plaintiff argues that *Waltz* should be afforded only prospective application, and thus should not be applied in this case, she does not dispute that we are bound to follow the Supreme Court’s directive to apply *Waltz* retroactively to this matter. See, e.g., *In re Hague*, 412 Mich 532, 545; 315 NW2d 524 (1982). Further, we note that a panel of this Court convened pursuant to MCR 7.215(J) recently held that the Supreme Court order in this case, along with similar orders in *Wyatt v Oakwood Hosp & Medical Ctrs*, 472 Mich 929 (2005) and *Evans v Hallal*, 472 Mich 929 (2005), constitute binding precedent that requires that *Waltz* be given full retroactive application. *Mullins v St Joseph Mercy Hosp*, ___ Mich App ___; ___ NW2d ___ (2006).

an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

MCL 600.5852 does not, however, extend the deadline for filing a wrongful death action based on medical malpractice to five years, i.e., three years after the two-year period of limitations set forth in MCL 600.5805(6) has run. In *Waltz, supra* at 655, the Court held that MCL 600.5852 is merely “a *savings* provision designed to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.” (Citation and internal quotation marks omitted) (Emphasis in original). Thus, as recognized by this Court in *Farley, supra* at 573 n 16, MCL 600.5852 does not create an independent, extended period of limitation for wrongful death actions:

We note that the three-year ceiling in this provision does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it. [Emphasis in original.]²

Thus, under MCL 600.5852, “a personal representative may file a medical malpractice suit on behalf of a deceased person for two years after letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired.” *Id.* at 572-573; see also *Waltz, supra* at 648-649.

Applying *Waltz* and *Farley*, we conclude that plaintiff’s suit was not filed in a timely manner, notwithstanding the fact that it was filed within three years after the expiration of the two-year statute of limitations applicable to medical malpractice actions. Plaintiff commenced this action on May 12, 2003, beyond the two-year medical malpractice period of limitation, which the parties agree began to run on September 12, 2000, and outside the wrongful death saving provision that afforded her two years to file her claim from the date she received her appointment as the personal representative of the decedent’s estate, February 1, 2001. Although plaintiff gave defendants notice of her intent to file a medical malpractice action on November 8, 2002, the Supreme Court clarified in *Waltz* that a wrongful death medical malpractice plaintiff’s filing of the mandatory notice of intent to sue pursuant to MCL 600.2912b does not operate to

² In *Farley, supra* at 568, 574, this Court held that according to *Waltz* the wrongful death saving provision of MCL 600.5852 was not tolled by the notice tolling provision of MCL 600.5856(d), and that the wrongful death medical malpractice suit brought by the plaintiff in *Farley* was, therefore, untimely. There, the plaintiff filed her notice of intent after the statutory limitations period set for in MCL 600.5805(6) had expired. *Id.* at 567-568. She also filed her complaint after two years from the date the letters of authority were issued. *Id.* We note that the procedural facts of this case are virtually identical to those of *Farley*.

toll the running of the wrongful death savings period provided for by MCL 600.5852.³ Consequently, plaintiff's May 12, 2003 complaint was time-barred, and summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) was therefore proper.

Reversed.

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

³ Plaintiff attempts to distinguish *Waltz* because, unlike plaintiff, the plaintiff in *Waltz* filed her notice of intent before being appointed personal representative of her son's estate, and nearly five years after the decedent's death. Those facts, however, do not distinguish *Waltz* from the case at bar because the Court did not rely on them as a basis for its decision. See *Waltz, supra* at 647 n8, 651.