

**Court of Appeals, State of Michigan**

**ORDER**

Mihaela Mili v Tender Care Mich Inc.

Docket No. 265824

LC No. 05-506781-NH

Jessica R. Cooper  
Presiding Judge

Mark J. Cavanagh

E. Thomas Fitzgerald

Judges

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The Court orders that the July 27, 2006 opinion is hereby VACATED because of a clerical error in the caption. A new opinion is attached.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 08 2006

Date

*Sandra Schultz Mengel*  
Chief Clerk

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MIHAELA MILI, Personal Representative of the  
Estate of DEMETRIUS MORTON, Deceased,

Plaintiff-Appellant,

v

TENDERCARE MICHIGAN, INC., d/b/a  
WAYNE LIVING CENTER

Defendant-Appellee,

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UNPUBLISHED  
July 27, 2006

No. 265824  
Wayne Circuit Court  
LC No. 05-506781-NH

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

PER CURIAM.

Plaintiff's decedent died on September 4, 2001 as a result of complications developed while a patient under defendant's care. Decedent's son, Michael Mili, was granted Letters of Authority by the Wayne County Probate Court on November 30, 2001. Plaintiff's counsel filed a general negligence action<sup>1</sup> on October 16, 2003.<sup>2</sup> Defendant filed a motion for summary disposition, arguing the claim sounded in medical malpractice, not in negligence.<sup>3</sup> After oral arguments, the trial court denied that motion.

MCL 600.5852 allows that a personal representative may file a wrongful death action on behalf of the estate represented within two years after Letters of Authority are granted. The Letters of Authority issued to Michael Mili therefore expired on November 30, 2003. After that date had passed, plaintiff's counsel, decided as a tactical matter, that a medical malpractice claim

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<sup>1</sup> In this complaint, plaintiff alleged decedent had been provided a custom made wheelchair by defendant, that the use of this wheelchair had caused pressure ulcers to develop, and that decedent had died in hospice care from sepsis caused by the infected ulcers.

<sup>2</sup> On the same day, plaintiff's counsel also sent a Notice of Intent to Sue to defendant, alleging possible nursing and medical malpractice claims, but did not follow up on this Notice with an actual claim of malpractice until March 8, 2005.

<sup>3</sup> Defendant argued that questions about the appropriate wheelchair to use and the standard of care for maintaining a safe environment in a nursing center were outside the scope of knowledge of the layperson and not appropriate for general negligence litigation.

should be filed on behalf of the estate. Counsel sent a request, on April 5, 2004, to the attorney for decedent's estate to substitute decedent's daughter-in-law, Mihaela Mili, as personal representative. The Probate Court issued new Letters of Authority on February 4, 2005. Plaintiff's counsel then filed a complaint alleging both general negligence and medical malpractice<sup>4</sup> on March 8, 2005.<sup>5</sup>

Defendant filed a motion for summary disposition on the ground that the second complaint, being based on the same occurrence as the first complaint, is barred by MCR 2.203 compulsory joinder. The trial court heard arguments on August 26, 2005 and granted the motion, reasoning primarily based on *Waltz v Wyse*, 469 Mich 642, 677 NW2d 813 (2004) that the claim was time barred. Plaintiff appeals.

On appeal, the parties argue two main issues: whether a successor personal representative gets a new two-year filing period for wrongful death actions under MCL 600.5852, and whether *Waltz* applies retroactively and therefore bars plaintiff's claim. This Court reviews de novo questions of whether a claim is within the statutory limitations period. *Soloway v Oakwood Hosp. Corp.*, 454 Mich 214, 216; 561 NW2d 843 (1997). This Court also reviews de novo decisions on summary disposition motions. *Maskery v Board of Regents*, 468 Mich 609; 664 NW2d 165 (2003).

As to the first issue, plaintiff's counsel relies on *Eggleston v Biomed Applications of Detroit*, 468 Mich 429; 658 NW2d 139 (2003) for the proposition that if a new personal representative receives Letters of Authority from the Probate Court, the new representative gets a new two-year limitations clock. This reliance on *Eggleston* is misplaced, because the facts are inapposite. In *Eggleston*, the initial representative was appointed as a temporary representative only, did not file any claims on behalf of the estate, and died four and a half months into the two-year period. In this case, the original personal representative had more than the full two years of filing time, and he did file a claim on behalf of the estate during that time. The substitution of a successor is here not a matter of practical necessity, as in *Eggleston*, but of tactical positioning.

As to the second issue, the retroactivity of *Waltz* was recently decided by a conflict panel convened by the Court of Appeals. *Mullins v St. Joseph Mercy Hosp*, \_\_\_ Mich. App \_\_\_; \_\_\_

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<sup>4</sup> The malpractice claim alleged twelve violations of appropriate care, including failure to assess and document the patient's skin integrity, failure to provide proper nutrition and hydration; failure to properly turn and reposition the patient to prevent development of ulcers; failure to properly treat the ulcers once developed; failure to have a properly trained staff; and failure to transfer the patient to an acute care facility in a timely manner.

<sup>5</sup> The scheduled trial date for the first complaint was May 31, 2005.

NW2d \_\_\_\_, Docket No. 263210, issued July 11, 2006. We are regrettably bound to follow the precedent set in *Mullins*, and the retroactive application of *Waltz* therefore disposes of plaintiff's claim as time barred.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Mark J. Cavanagh  
/s/ E. Thomas Fitzgerald