STATE OF MICHIGAN

COURT OF APPEALS

PAMELA FOWLER, Personal Representative of the Estate of DOLORES ALICE SCHEI, Deceased,

Plaintiff-Appellant,

v

BOTSFORD GENERAL HOSPITAL and SANFORD H. SKLAR, M.D.,

Defendants-Appellees.

UNPUBLISHED
September 11, 2007

No. 259325
Oakland Circuit Court
LC No. 2003-049422-NH

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

PER CURIAM.

In this wrongful death medical malpractice action, plaintiff, the personal representative of the decedent's estate, appeals as of right from a circuit court order granting defendants summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Initially, we reject plaintiff's protestation that defendants insufficiently pleaded their statute of limitations affirmative defense. First, defendants complied with MCR 2.111(F)(3)(a), given that they premised their motions for summary disposition on plaintiff's untimely filing of the complaint beyond the two-year medical malpractice period of limitation, a defense they specifically raised in their affirmative defenses to the complaint. Additionally, as plaintiff acknowledges, MCL 600.5852 constitutes a saving period, not a period of limitation. *Waltz v Wyse*, 469 Mich 642, 648-651; 677 NW2d 813 (2004). Second, to the extent that plaintiff suggests that defendants should have mentioned the wrongful death saving period in their affirmative defenses, MCR 2.111(F)(3) does not refer to the squandering of a saving period as an affirmative defense, and plaintiff offers no case law suggesting that subrule (F)(3) should encompass defenses involving statutory saving periods. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). Third, plaintiff made no request for a more definite statement of defendants' position with respect to their period of limitation affirmative defense, MCR 2.115, thus precluding their claim that the affirmative defenses lacked sufficient

particularity. *Fenton Country House, Inc v Auto-Owners Ins Co*, 63 Mich App 445, 447; 234 NW2d 559 (1975).[1]

With respect to the propriety of the circuit court's grant of summary disposition on the basis that plaintiff untimely filed the complaint, this Court reviews de novo a 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, supra*, 469 Mich 647-648, 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 by September 1, 2000, and thus the two-year period of limitation in MCL 600.5805(6) extended through September 1, 2002. The parties agree that plaintiff gave defendants notice of her intent to sue, as required by MCL 600.2912b, on May 23, 2002, before the two-year medical malpractice period of limitation expired. Pursuant to § 2912b and MCL 600.5856(c), this notice tolled the malpractice period of limitation for 182 days. The 182-day tolling period extended through November 21, 2002, and the 101-day remaining portion of the medical malpractice period of limitation thereafter ran through March 2, 2003. Plaintiff's filing of the complaint on April 29, 2003 occurred after the medical malpractice limitations period had expired.

But plaintiff's appointment as the estate's personal representative on November 2, 2000, gave her until November 2, 2002, to commence this action within the wrongful death saving period. MCL 600.5852. Although plaintiff gave notice of her intent to sue on May 23, 2002, the notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). *Waltz, supra* at 648-651, 655. Consequently, plaintiff's filing of this action occurred nearly six months after the wrongful death saving period expired.[2]

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[1] Even assuming that defendants' period of limitation defense qualifies as insufficient as stated, and thus violates MCR 2.111(F)(3) because it neglects to identify that the statutory saving period, MCL 600.5852, had expired, this insufficiency did not occasion a level of prejudice warranting reversal of the circuit court's summary disposition order because plaintiff had the opportunity to raise before the circuit court her claims regarding the timeliness of the complaint and the inapplicability of *Waltz* to this case. MCR 2.613(A); *Hanon v Barber*, 99 Mich App 851, 855-856; 298 NW2d 866 (1980).

[2] This Court has rejected plaintiff's contention that the three-year period mentioned in the second
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Although plaintiff challenges the retroactive applicability of *Waltz* to this case, controlling decisions of this Court have held 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.

Plaintiff argues that the circuit court should have ordered dismissal of the action without prejudice to permit the appointment of a successor personal representative, citing *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003). In *Eggleston*, the Michigan Supreme Court found 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." *Id.* at 33. 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.

But in *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007), the Supreme Court more recently addressed the concept of res judicata in the context of wrongful death medical malpractice actions filed by initial and successor personal representatives. 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 422. Concerning the first element of res judicata, a 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 element of res judicata, the Supreme Court observed that the successor personal representative was in privity with the original personal representative because they both represented the same legal interest, that of the estate. *Id*. at 422. Regarding the last element of res judicata, 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. The Supreme Court concluded

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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).

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.

We conclude that the circuit court correctly dismissed plaintiff's action with prejudice because res judicata would bar any medical malpractice action that a successor personal representative potentially could file on the estate's behalf. Applying the analysis in *Washington*, the circuit court unconditionally ordered the dismissal of plaintiff's complaint with prejudice pursuant to MCR 2.116(C)(7), and under MCR 2.504(B)(3), the circuit court's order amounts to a dismissal on the merits. *Washington*, *supra*. Additionally, a successor personal representative would share privity with plaintiff because both would represent the legal interest of the estate. *Id*. at 422. Regarding the third element of res judicata, even assuming that a successor personal representative could formulate different theories of liability, any potential complaint seeking recovery for defendants' improper treatment of the decedent between August 29, 2000, and September 1, 2000, would necessarily involve the same operative facts as the basis for relief. *Id*. at 421.

Affirmed.

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