STATE OF MICHIGAN

COURT OF APPEALS

VELMA COPPOLA, Personal Representative of the Estate of ARSENIA GABBANA, Deceased,

Plaintiff-Appellant,

v

MIDDLEBELT NURSING HOME, INC., d/b/a, MIDDLEBELT HEALTHCARE CENTER and KETAN TOLIA, M.D., Jointly and Severally,

Defendants-Appellees.

UNPUBLISHED
July 27, 2006

No. 265316
Wayne Circuit Court
LC No. 05-513454-NH

Before: Hoekstra, PJ, and Neff and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendants pursuant to MCR 2.116(C)(7). This case arose when the decedent died eleven months after being discharged from the nursing home. We affirm.

We review a trial court's decision regarding a summary disposition motion pursuant to MCR 2.116(C)(7) de novo, considering all documentary evidence submitted by the parties and accepting as true the contents of the complaint unless otherwise contradicted by evidence. *Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004). The decedent was admitted to the nursing home on February 25, 1998, and Tolia was assigned as her physician. At the time of her admission, plaintiff did not have any pressure sores. The decedent developed decubitus ulcers[1] on her ischium[2] and buttocks and, as a result, was hospitalized from September 5, 2001, to September 11, 2001. After her hospitalization, the decedent was transferred to another nursing home where she continued to have problems with the decubitus ulcers until her death on August

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[1] According to L D H P Medical Review Services Corporation, a decubitus ulcer is also called a bedsore, pressure ulcer, or pressure sore. www.ldhpmed.com/DU_explanation.htm.

[2] The ischium is defined as "1. the backward-facing lower bone of each half of the vertebrate pelvis; the lower portion of either innominate bone in humans. 2. either of the bones on which the body rests when sitting." *Random House Webster's College Dictionary* (2001).

16, 2002. Letters of authority were issued to plaintiff on November 8, 2002. Notice of intent to sue was mailed July 19, 2004.

Plaintiff filed a medical malpractice suit against Tolia and the nursing home on May 4, 2005. In lieu of answering the complaint, Tolia moved for summary disposition pursuant to MCR 2.116(C)(7). The nursing home's answer raised as an affirmative defense that plaintiff's claim was barred by the statute of limitation. It later filed a concurrence with Tolia's summary disposition motion. Plaintiff responded that pursuant to *Waltz v Wyse*, the period of limitation did not begin until the decedent's death on August 16, 2002; because the notice of intent was filed before the period of limitation ended, plaintiff was entitled to the 182-day tolling provision; and the two-year period under the savings provision did not end on November 8, 2004, but on May 9, 2005 because it was tolled by the notice provision, and plaintiff's May 5, 2005 filing of her complaint was timely.

Plaintiff alternatively argued that *Waltz* should not have been applied to her case because (a) cases giving *Waltz* retroactive effect were wrongly decided where *Waltz* overturned precedent followed by attorneys statewide, a more flexible approach to prospectivity was required, and the period of limitation in effect when the action accrued controlled; (b) plaintiff was entitled to judicial tolling where *Waltz* changed the notice and complaint filing deadlines at a time when plaintiff could no longer comply with the new deadlines; and (c) the changes in calculating notice and complaint filing deadlines denied plaintiff due process.

The court granted defendants summary disposition. It noted that the medical malpractice claim accrued on the date of the act, September 5, 2001. In the absence of a tolling or savings provision, the period of limitation would have expired on September 5, 2003. Because plaintiff's complaint was not filed until May 4, 2005, plaintiff's complaint was not filed within the original period of limitation. The court then explored whether the savings provision operated to make plaintiff's filing timely and concluded that it did not. The court also concluded that because the notice of intent was not filed until after the period of limitation ended, it was not applicable as a tolling provision. Citing *Waltz,* the court noted that the notice provision did not toll the savings provision period. Addressing plaintiff's argument that *Waltz* should not be retroactively applied, the court stated it was bound by stare decisis to follow precedent. It found plaintiff was not entitled to equitable tolling because she did not file her complaint until after both the period of limitation and the savings provision period had expired, and this was not a situation in which plaintiff filed a timely but defective complaint or was tricked by defendants into filing a late complaint. Noting that plaintiff failed to support her due process argument with authority, the court deemed the argument abandoned.

Plaintiff first argues the court's conclusion, that her claim accrued on September 5, 2001, was erroneous because the Supreme Court in *Waltz* determined that the period of limitation in a wrongful death case accrued at the time of the decedent's death. We disagree.

Although the Supreme Court in *Waltz* referred to the decedent's death as the accrual date of the plaintiff's claim, the decedent died in the emergency room of the defendant hospital. *Waltz, supra* at 644. The decedent's death effectively put an end to any medical treatment he received from defendants in *Waltz, supra*. Whether the plaintiff's cause of action accrued on the last day of treatment or on the date of the decedent's death was irrelevant in *Waltz* because the two dates were the same. Hence, the Supreme Court's casual reference to the decedent's date of

death as the accrual date of the plaintiff's claim was merely dicta and was not binding. See *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003).

Instead, the statute of limitation for a wrongful death claim is governed by the statute of limitation for the underlying claim. *Lipman v William Beaumont Hosp*, 256 Mich App 483, 489-490; 664 NW2d 245 (2003); *Waltz, supra* at 648. Moreover, wrongful death actions "'accrue as provided by the statutory provisions governing the underlying liability theory.'" *Jenkins v Patel*, 471 Mich 158, 165; 684 NW2d 346 (2004). Generally in a medical malpractice action, suit must be filed within two years of the claim's accrual date. *Lipman, supra* at 490, citing MCL 600.5805(5).[3] "A claim for medical malpractice accrues on the date of the alleged act or omission giving rise to the claim." *Id.*, citing MCL 600.5838a(1). Because there is no indication that defendants provided additional care or treatment to the decedent after the decedent was discharged from the nursing home, the court did not err when it found that plaintiff's claim accrued on September 5, 2001, the date of the decedent's discharge.[4]

Plaintiff next argues that *Waltz* should not have been applied retroactively. We disagree.

On several occasions, our Supreme Court has vacated opinions and remanded for reconsideration in light of *Waltz*. *Wyatt v Oakwood Hosp & Med Centers*, 472 Mich 929 (2005); *Forsythe v Hopper*, 472 Mich 929 (2005); *Evans v Hallal*, 472 Mich 929 (2005); *Lentini v Urbancic*, 472 Mich 885 (2005). In three of these cases, the Court directed that *Waltz* be given full retroactive effect. *Wyatt, supra*; *Forsythe, supra*; *Evans, supra*. In *Mullins v St Joseph Mercy Hosp*, ___ Mich App ___, ___; ___ NW2d ___ (2006), slip op at 1, this Court convened a conflict panel to determine whether *Waltz* should be applied retroactively. In a four-to-three decision, the panel found that the Supreme Court had unambiguously expressed its intent that *Waltz* be applied retroactively. *Id.* Hence, full retroactive application was appropriate here.

Plaintiff next argues that the period of limitation should have been judicially or equitably tolled because plaintiff was prevented from filing suit earlier as a result of the notice waiting period imposed by MCL 600.2912b. We disagree.

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[3] MCL 600.5805(5) was renumbered as MCL 600.5805(6) by 2002 PA 715, effective March 31, 2003.

[4] Plaintiff's claim that the trial court's decision led to an absurd outcome because it resulted in the accrual of the wrongful death cause of action before the decedent even died has no merit.

> [U]nder the wrongful death act a cause of action accrues at the time of infliction of the fatal injury, rather than the time of death (*Hawkins* [*v Regional Med Labs*, 415 Mich 420, 437; 329 NW2d 729 (1982)]) . . . even where the death is immediate, the act and injury causing death still must logically precede the death itself and thus the action accrues prior to and survives death. [*Hardy v Maxheimer*, 429 Mich 422, 440; 416 NW2d 299 (1987) (voiding the distinction between instantaneous and noninstantaneous death for the purpose of the saving provision, MCL 600.5852).]

In limited situations involving particular, unusual circumstances, a court may exercise its judicial power to provide equitable relief. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590 n 65; 702 NW2d 539 (2005). See, for example, *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996). The nursing home argues that plaintiff could have filed her notice of intent earlier and complied with both the savings provision and § 2912b. Plaintiff's claim accrued on September 5, 2001, the last day of treatment by defendants. The decedent died on August 16, 2002, and Plaintiff was issued letters of authority on November 8, 2002. The Supreme Court issued its opinion in *Waltz* on April 14, 2004. Because plaintiff did not file a notice of intent until July 19, 2004, after the expiration of the two-year period of limitation under § 5805(6), which expired September 5, 2003, plaintiff was not entitled to the tolling provision under MCL 600.5856(c). However, as of April 14, 2004, plaintiff had 208 days remaining in her savings provision period. Plaintiff could have filed her notice of intent as late as May 10, 2004, and still have filed her complaint by November 8, 2004, within the two-year savings period, while complying with the 182-day waiting period. A plaintiff bears the burden of complying with notice provisions. *Burton v Reed City Hosp Corp*, 471 Mich 745, 753; 691 NW2d 424 (2005). Because plaintiff could have met this burden, equitable tolling was not in order. See *Ward v Rooney-Gandy*, 265 Mich App 515, 527-529; 696 NW2d 64 (2005) (*O'Connell, J, dissenting*), rev'd 474 Mich 917 (2005) for reasons stated in the dissent (a failure to comply with procedural requirements is a negligent failure to preserve one's rights that does not warrant equitable relief).

Plaintiff next argues that the limitation period applicable to her claim was shortened after the time when she could have complied with *Waltz*, and this after-the-fact shortening of the time within which she could file her claim denied her due process. We disagree.

A statute of limitation requires a person asserting a claim to act within a legislatively prescribed time or forego the action altogether. *Dyke v Richard*, 390 Mich 739, 746; 213 NW2d 185 (1973). If a law of limitation does not afford a reasonable time within which to act, the law violates due process. *Dyke, supra.* Here, MCL 600.5838a(1) provided that plaintiff's claim accrued on September 5, 2001, the last day defendants cared for the decedent. MCL 600.5805(1) and (6) provided that the period of limitation was two years from the date plaintiff's claim accrued, or September 5, 2003. MCL 600.5856(c) provided that if plaintiff filed a notice of intent in compliance with MCL 600.2912b within the applicable period of limitation and the period of limitation would have expired during the mandatory notice period, then the period of limitation would have been tolled for "the number of days remaining in the applicable notice period after the date notice if given." Therefore, plaintiff potentially had two years and 182 days from the time the action accrued, or until March 6, 2004, to file her complaint.

In addition, MCL 600.5852 provided that plaintiff had two years from November 8, 2002, the time she was issued letters of authority to file a complaint as long as the time period did not extend more than three years from the date the period of limitation expired. Thus, under this provision, plaintiff had until November 8, 2004, to file her complaint. The plain language of the applicable statutes provided plaintiff reasonable time within which to file her complaint. Nothing in *Omelenchuk* or *Waltz* altered the plain language of the applicable statutes.

> "[I]f the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance

> interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." [*Devillers, supra* at 585, quoting *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000).]

Moreover, the Supreme Court already rejected in *Waltz* the argument that its decision effectively reduced by 182 days the periods provided for in § 5852, *Waltz, supra* at 652 n 14, and this Court is bound by the Supreme Court's decision.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Donald S. Owens