

STATE OF MICHIGAN
COURT OF APPEALS

ERMA L. WILLIAMS, Personal Representative of
the ESTATE OF PATRICIA LOUISE
COLEMAN, Deceased,

UNPUBLISHED
December 19, 2006

Plaintiff-Appellant,

v

No. 261554
Berrien Circuit Court
LC No. 04-003350-NH

COMMUNITY HOSPITAL WATERVLIET,
SAMUEL DeLEON RODA, M.D., GREAT
LAKES MEDICAL CLINIC, a/k/a GREAT
LAKES MEDICAL CENTER, DAVID M.
McCANCE, D.O., DANIEL PAUL HEARLD,
D.O.,

Defendants-Appellees.

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right the trial court order granting defendants' motions for summary disposition under MCR 2.116(C)(7) on the ground that plaintiff's action was time-barred pursuant to the decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). We affirm.

I

The question in this case is whether plaintiff's wrongful death medical malpractice action was properly dismissed after the decision in *Waltz* because the 182-day statutory tolling period, MCL 600.5856, did not apply and thus the savings period for filing a wrongful death action, MCL 600.5852, expired during the required 182-day statutory notice period for filing a medical malpractice action, MCL 600.2912b. Plaintiff relied on MCL 600.5856 in calculating the period of limitations for filing her action. We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(7), considering all affidavits, pleadings, and other documentary evidence submitted by the parties. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If there are no genuine issues of material fact, we must decide as a matter of law whether the claim is statutorily time-barred. *Id.* Additionally, this case presents a matter of statutory interpretation and application, which is a question of law that we review de

nov. *Eggleston v Bio-Medical Applications of Detroit, Inc.*, 468 Mich 29, 32; 658 NW2d 139 (2003).

II

The period of limitation applicable to a wrongful death action generally constitutes the period applicable to the underlying theory of liability. *Waltz, supra* at 648. The limitation period for a medical malpractice action is two years from the date the claim first accrued.¹ MCL 600.5805(1) and (5);² *Farley v Advanced Cardiovascular Health Specialists PC*, 266 Mich App 566, 571; 703 NW2d 115 (2005). However, MCL 600.5852 sets forth a savings period in which a personal representative may pursue a wrongful death action:

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 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.

Accordingly, “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.” *Farley, supra* at 572-573.

In 1993, the Legislature enacted a number of changes to the Revised Judicature Act, including a 182-day notice provision for medical malpractice actions, MCL 600.2912b(1), and a provision for tolling the period of limitation during the 182-day notice period, MCL 600.5856(d). 1993 PA 78; *Morrison v Dickinson*, 217 Mich App 308, 311-312; 551 NW2d 449 (1996). The purpose of the notice requirement is “to encourage settlement without the need for formal litigation.” *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 715; 575 NW2d 68 (1997).

MCL 600.2912b(1) provides:

Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

MCL 600.5856(d) provides:

¹ The six-month discovery rule, MCL 600.5838a(2), does not apply in this case.

² Effective March 31, 2003, former MCL 600.5805(5) was renumbered as subsection (6). 2002 PA 715. Because subsection (5) prescribed the period of limitation applicable at the time this action accrued, MCL 600.5838a(1), this opinion refers to subsection (5).

The statutes of limitations or repose are tolled:

* * *

(d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.³

Under the statutory scheme for notice, “filing a notice of intent to sue will toll any period of limitations or repose, if such period . . . would otherwise bar the claim, for the time period set out in the written notice of intent provision (MCL 600.2912b[1]), that is, for a period not longer than 182 days.” *Farley, supra* at 572.

In *Waltz*, our Supreme Court held that the medical malpractice notice tolling provision did not toll the saving period under MCL 600.5852 for filing a wrongful death action:

Section 5856(d), by its express terms, tolls only the applicable “statute of limitations or repose.” As we recently stated in *Miller [v Mercy Mem Hosp]*, 466 Mich 196, 202; 644 NW2d 730 (2002)], the wrongful death provision, § 5852, “is a *saving statute*, not a statute of limitations.” (Emphasis supplied.) See also *Lindsey v Harper Hosp*, [455 Mich 56, 60-61, 65; 564 NW2d 861 (1997),] in which we explained that § 5852, as “the statute of limitations *saving provision*” and an “*exception* to the statute of limitations,” operated “to suspend the running of the statute until a personal representative is appointed to represent the interests of the estate.”

The plain language of § 5852 wholly supports our conclusion that it is not itself a “statute of limitations.”

* * *

By its own terms, § 5852 is operational only within the context of the *separate* “period of limitations” that would otherwise bar an action. Section 5852 clearly provides that it is an *exception* to the limitation period, allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired. [*Waltz, supra* at 650-651.]

III

In this case, according to the complaint, plaintiff’s decedent, Patricia Louise Coleman, died as a result of a heart attack on March 21, 2001. Coleman had been treated at defendant

³ Effective April 22, 2004, § 5856 was amended, renumbering subsection (d) as (c), and making other changes that do not affect this appeal. 2004 PA 87. This opinion cites the former subsection for consistency.

Great Lakes Medical Clinic by defendant McCance for various symptoms, including vertigo, shortness of breath, chest pain, leg pain, and numbness.⁴ Coleman was also treated by defendants Roda and Hearld. Plaintiff alleged that defendants committed medical malpractice that resulted in Coleman's death.

Plaintiff was appointed personal representative of Coleman's estate on July 16, 2002. Plaintiff filed a notice of intent for the medical malpractice action on April 5, 2004 and subsequently filed her complaint on September 14, 2004. Presuming that the savings period was tolled during the 182-day notice period, plaintiff calculated that she had the remainder of the two-year savings period⁵ in which to file her complaint after waiting the required 182-day notice period, and thus her complaint was timely filed.

Waltz was decided on April 14, 2004. Under the analysis in *Waltz*, plaintiff's action is time-barred because the notice tolling provision, MCL 600.5856, did not toll the wrongful death savings period, MCL 600.5852. Therefore, the savings period expired July 16, 2004, during the 182-day waiting period following plaintiff's notice of intent. In *Mullins v St. Joseph Mercy Hospital*, 271 Mich App 503; 722 NW2d 666 (2006) (Docket No. 263210, issued July 11, 2006), this Court held that *Waltz* applies retroactively. Thus, the analysis in *Waltz* is applicable to plaintiff's case.

IV

Plaintiff contends that the application of *Waltz* to her case violates her right to due process because the decision effectively shortens the period of limitations applicable to her claim. We disagree in light of binding precedents that have rejected this argument. *Waltz, supra* at 652 n 14; *Farley, supra* at 576 n 27.

V

Plaintiff alternatively argues that, even in the face of the retroactive application of *Waltz*, we should apply principles of equitable tolling under *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411; 684 NW2d 864 (2004) to conclude that *Waltz* should not be applied to this case. However, the considerations that might justify equitable tolling have been explicitly rejected by our Court in *Ward v Siano*, ___ Mich App ___; ___ NW2d ___ (2006) (Docket No. 265599, issued November 14, 2006), a case involving the identical question presented here, the applicability of the 182-day notice tolling provision, MCL 600.5856(d), to the wrongful death saving provision, MCL 600.5852.

Conclusion

We sympathize with plaintiff's argument that her cause of action has been unfairly cut off by a statute of limitations. While that may seem arbitrary, statutes of limitations are, by their

⁴ Coleman apparently also had other physical and medical conditions that were at issue.

⁵ The number of days from April 5, 2004, to July 16, 2004, added to the 182 days.

very nature, arbitrary. Under controlling precedents, we cannot provide plaintiff any relief, equitable or otherwise, from the statute of limitations that the Legislature has specified for this medical malpractice case. Such relief might only be afforded by our Supreme Court or the Legislature.

We affirm.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Jane E. Markey