STATE OF MICHIGAN

COURT OF APPEALS

LINDA JEAN CLEMENS, Personal Representative of the Estate of THEREL B. KUZMA, Deceased,

Plaintiff-Appellant,

v

JOHN D. KOZIARSKI, M.D., F.A.C.S., FAMILY SURGICAL SERVICES, P.C., FAMILY SURGICAL CARE, P.C., and XYZ UNKNOWN CORPORATION,

Defendants-Appellees.

UNPUBLISHED
September 18, 2007

No. 264688
Calhoun Circuit Court
LC No. 03-001783-NH

CAROL A. MACKENZIE, Personal Representative of the Estate of THEREL B. KUZMA, Deceased,

Plaintiff-Appellant,

v

JOHN D. KOZIARSKI, M.D., F.A.C.S., and FAMILY SURGICAL SERVICES, P.C.,

Defendants-Appellees,

and

FAMILY SURGICAL CARE, P.C., and XYZ UNKNOWN CORPORATION,

Defendants.

No. 265619
Calhoun Circuit Court
LC No. 05-001212-NH

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

PER CURIAM.

These consolidated appeals involve wrongful death medical malpractice actions. In Docket No. 264688, plaintiff Linda Jean Clemens, the personal representative of the estate of decedent Therel B. Kuzma, appeals by delayed leave granted from a circuit court order granting defendants summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations). In Docket No. 265619, plaintiff Carol A. MacKenzie, the estate's successor personal representative, appeals as of right from a circuit court order granting defendants summary disposition under subrule (C)(7). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo a circuit court's summary disposition rulings. *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 v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004), 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).

The decedent's medical malpractice claims accrued on October 3, 2000, and thus the two-year period of limitation in MCL 600.5805(6) extended through October 3, 2002. Clemens failed to file within this two-year period of limitation either a mandatory notice of her intent to sue defendants, MCL 600.2912b, or a complaint on the estate's behalf.

But Clemens' appointment as personal representative on November 28, 2000, gave her until November 28, 2002, to commence this action within the wrongful death saving period. MCL 600.5852. Clemens gave notice of her intent to sue defendants on November 26, 2002, but her provision of this notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). *Waltz*, *supra* at 648-651, 655. Accordingly, Clemens' filing of the first action on May 28, 2003, occurred nearly six months after the wrongful death saving period had expired.

The estate maintains that *Waltz* should not apply retroactively. But controlling decisions of this Court have determined that (1) the Supreme Court's holding 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,"[1] *Ward v Siano*, 272 Mich App 715, 720; 730 NW2d 1 (2006), lv in abeyance 729 NW2d 213 (2007).

The estate also contends that MacKenzie's appointment as its successor personal representative on August 23, 2004, afforded her a new wrongful death saving period in which to pursue legal action, which she timely did by filing the complaint in LC No. 05-001212-NH on April 7, 2005. The Michigan Supreme Court in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 33; 658 NW2d 139 (2003), determined 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." 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.[2] Finding *Eggleston* distinguishable, however, this Court has rejected the notion that the appointment of a successor personal representative revives a complaint untimely filed by an original personal representative. *Glisson v Gerrity*, 274 Mich App 525, 538-539; 734 NW2d 614 (2007); *McMiddleton v Bolling*, 267 Mich App 667, 671-674; 705 NW2d 720 (2005).

Furthermore, the Michigan Supreme Court's recent decision in *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007), undermines the estate's suggestion on appeal that notwithstanding Clemens' filing of an untimely complaint, MacKenzie had the authority to timely file a complaint on its behalf until October 3, 2005. 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 Michigan Supreme Court held that res judicata barred the successor's action. *Id*. at 419-422.

Application of the analysis in *Washington* to this case yields a conclusion that res judicata likewise bars MacKenzie from pursuing a second wrongful death medical malpractice action on the estate's behalf. First, the circuit court found involuntary dismissal of the complaint filed by Clemens warranted under subrule (C)(7), which ground represents a dismissal on the merits under MCR 2.504(B)(3), and the court in no respect purported to "limit[] the scope of the merits

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[1] 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.

[2] "[T]he three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. Therefore, the fact that the three-year ceiling was not yet reached when [the plaintiff] filed suit is irrelevant." *Farley*, *supra* at 575.

decided."[3] *Washington*, *supra*, slip op at 419. Additionally, MacKenzie shares privity with Clemens because both represented the legal interest of the estate. *Id*. at 421-422. Regarding the third res judicata element, whether the matter raised in the second case was or could have been resolved in the first, a comparison of the complaint filed by Clemens and the substantially similar complaint filed by MacKenzie reflects that although the complaint filed by MacKenzie more specifically details its allegations of negligence against Dr. Koziarski, the nearly sixty paragraphs identifying defendants and the underlying facts are identical in both Clemens' and MacKenzie's complaints. MacKenzie's complaint thus involves the same operative facts as the basis for relief asserted in the original complaint filed by Clemens. *Id*. at 420.

Apart from the fact that the circuit court should have directed dismissal of Clemens' complaint with prejudice, we conclude that the circuit court properly granted defendants summary disposition of both complaints pursuant to MCR 2.116(C)(7).[4]

Affirmed.

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

[3] The circuit court erred to the extent that it dismissed Clemens' complaint under subrule (C)(7) "without prejudice." *McLean v McElhaney*, 269 Mich App 196, 202-203; 711 NW2d 775 (2005), lv in abeyance 728 NW2d 867 (2007); *Rinke v Automotive Moulding Co*, 226 Mich App 432, 439-440; 573 NW2d 344 (1997); *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh, PA*, 223 Mich App 559, 563-565; 567 NW2d 456 (1997).

[4] The circuit court did not consider the applicability of res judicata, but this Court will not reverse a "lower court when it reaches the correct result, albeit for the wrong reason." *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).