STATE OF MICHIGAN

COURT OF APPEALS

DONALD MCLEAN and CHRISTINE MCLEAN, Personal Corepresentatives of the Estate of KAREN MCLEAN, Deceased,

Plaintiffs-Appellants,

v

ROBERT B. MCELHANEY, M.D.; MAUREEN PHENIX, MSW, CSW; SAMUEL W. HARMA; and HIAWATHA BEHAVIORAL HEALTH,

Defendants-Appellees.

FOR PUBLICATION
December 13, 2005
9:00 a.m.

No. 257540
Chippewa Circuit Court
LC No. 03-006994-NH

Official Reported Version

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

SAWYER, J.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7). We affirm.

Plaintiffs brought this medical malpractice action following the death of their daughter, Karen McLean, who had been treated by defendants for alcoholism and depression. Karen was last seen by defendants on February 12, 2001, and died two days later. Plaintiffs were issued letters of authority appointing them personal corepresentatives of Karen's estate on March 13, 2001. They served defendants with a notice of intent to file a malpractice suit on October 29, 2002, and they filed their complaint on September 5, 2003. The trial court granted summary disposition in favor of defendants, finding that plaintiffs' claims were time-barred. This Court reviews de novo a trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(7). *Ousley v McLaren*, 264 Mich App 486, 490; 691 NW2d 817 (2004).

On appeal, plaintiffs first assert that our Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), is inapplicable to this case because plaintiffs served defendants with a notice of intent within two years of the issuance of their letters of authority. We disagree.

Generally, malpractice actions must be brought within two years of the date of accrual to be timely. MCL 600.5805(6);[1] *Omelenchuk v City of Warren*, 461 Mich 567, 569; 609 NW2d 177 (2000), overruled in part on other grounds by *Waltz, supra* at 655. However, the running of the period of limitations will be tolled for 182 days if the plaintiff serves a notice of intent to file suit on the prospective defendants within 182 days of the time that the period of limitations would otherwise expire. MCL 600.2912b(1); MCL 600.5856(c);[2] *Omelenchuk, supra*, at 574-575. In addition

> [i]f 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. [MCL 600.5852.]

However, MCL 600.5852 is a saving statute and not a statute of limitations. *Waltz, supra* at 650-651. Therefore, MCL 600.5856(c), which applies only to statutes of limitations or repose, does not toll the additional period provided for filing an action under the wrongful death saving statute, MCL 600.5852. *Waltz, supra* at 648.

The period of limitations applicable to this action began to run on February 12, 2001, when the cause of action accrued. MCL 600.5805(6). Plaintiffs were issued letters of authority appointing them personal corepresentatives of Karen's estate on March 13, 2001. They served defendants with a notice of intent to file a claim on October 29, 2002. Because this notice of intent was served within 182 days of the expiration of the period of limitations, the running of the period of limitations was tolled for 182 days. MCL 600.5856(c); *Omelenchuk, supra* at 574-575. The period of limitations began to run again on April 29, 2003, at which point plaintiffs had 108 days left in which to file their complaint. Thus, plaintiffs should have filed their complaint by August 15, 2003. However, plaintiffs did not actually file their complaint until September 5, 2003.

Plaintiffs believed that they had an additional month in which to file their complaint because our Supreme Court in *Omelenchuk* indicated that the two-year period of limitations was calculated as beginning on the date of the appointment of the decedent's representatives, rather than on the date of the accrual of the claim. *Omelenchuk, supra* at 577. However, in *Waltz*, our Supreme Court clarified that any language in *Omelenchuk* indicating that the notice period tolling statute applied to the wrongful death saving statute was dicta and was overruled. *Waltz, supra* at 653-655. Therefore, plaintiffs' complaint was untimely under *Waltz*.

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[1] Formerly, MCL 600.5805(4).

[2] Formerly, MCL 600.5856(d).

Plaintiffs attempt to distinguish *Waltz* because, unlike plaintiffs, the plaintiff in *Waltz* did not serve a notice of intent within two years of the accrual of her cause of action. This factual distinction is insufficient to render *Waltz* inapplicable. Because plaintiffs served defendants with a notice of intent within two years of the accrual of their cause of action, they were entitled to the 182-day period during which the running of the period of limitations was tolled. MCL 600.5856(c). However, they did not file their complaint within two years of when letters of authority were issued to them. Therefore, the wrongful death saving statute did not save their cause of action. MCL 600.5852.

Plaintiffs next assert that *Waltz* should only be applied prospectively because it decided an issue of first impression that was not clearly foreshadowed. This issue has already been decided in *Ousley, supra* at 493-495, in which this Court held that *Waltz* neither overruled clear and uncontradicted case law, nor decided an issue of first impression whose resolution was not clearly foreshadowed. *Id*. at 493. This Court is bound to "follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals . . . ." MCR 7.215(J);[3] *Horace v City of Pontiac*, 456 Mich 744, 754; 575 NW2d 762 (1998). Moreover, in three orders entered the same day, the Supreme Court remanded cases to this Court for consideration as on leave granted, with the specific direction that *Waltz* be given full retroactive application. *Wyatt v Oakwood Hosp & Med Centers*, 472 Mich 929 (2005), *Evans v Hallal,* 472 Mich 929 (2005), and *Forsyth v Hopper,* 472 Mich 929 (2005). The Supreme Court's view of the matter seems clear. Accordingly, plaintiffs' assertion that *Waltz* should not be applied retroactively must fail.

In a half-page analysis, plaintiffs further assert that *Waltz* amends the wrongful death saving statute by implication in violation of Const 1963, art 4, § 25, because the decision "reduce[s] by 182 days the time provided for bringing suit" under the wrongful death saving statute. Plaintiffs failed to raise this issue before the trial court. Therefore, it has not been properly preserved for review. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). Moreover, plaintiffs' cursory treatment of this issue indicates that plaintiffs have abandoned it on appeal. See *Yee v Shiawassee Co Bd of Commr's,* 251 Mich App 379, 406; 651 NW2d 756 (2002). However, we note that even were we to review this issue, we would be bound to reject plaintiffs' claim of error. See *Ousley, supra* at 495-496.

Finally, plaintiffs assert that the trial court should have permitted a voluntary dismissal of plaintiffs' claims without prejudice so that a new personal representative could have been appointed to file suit on behalf of Karen's estate. We disagree. This Court will not reverse the decision of a trial court denying a plaintiff 's motion for voluntary dismissal "absent an abuse of discretion." *Mleczko v Stan's Trucking, Inc,* 193 Mich App 154, 155; 484 NW2d 5 (1992).

Plaintiffs rely on *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), for their assertion that a successor personal representative would be able to

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[3] Formerly, MCR 7.215(H).

timely file a complaint in this case. In *Eggleston*, our Supreme Court held that a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute. *Id.* at 30. However, the facts of the present case are distinguishable. In *Eggleston*, the decedent's widower "was appointed temporary personal representative and issued letters of authority on April 4, 1997. He died on August 20, 1997." *Id.* at 31. The decedent's son was appointed her successor personal representative on December 8, 1998, and he filed a medical malpractice complaint on June 9, 1999. *Id.* Thus, the estate of the decedent was represented for a total of approximately 10 1/2 months when the complaint was filed, and neither the initial nor the successor representative represented the estate for the full two years available to him under the wrongful death saving statute. Contrarily, plaintiffs were afforded the full two years permitted under the wrongful death saving statute to file their complaint, but failed to do so. Moreover, plaintiffs' failure was not due to the untimely demise of a predecessor representative, but to their own negligence in calculating the proper time for filing the complaint. Accordingly, we conclude that plaintiffs are not entitled to relief under *Eggleston*.

Moreover, dismissal without prejudice would have been inappropriate in this case because defendants would have been legally prejudiced if the trial court had taken that course of action. *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972). An order granting summary disposition is an adjudication on the merits. *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). Here, defendants were entitled to summary disposition because plaintiffs failed to file their claim within the period established by the Legislature. Thus, defendants were entitled to a judgment on the merits that would bar relitigation under the doctrine of res judicata. *Id.* If plaintiffs' request for dismissal without prejudice had been granted, defendants would conceivably have been subject to the relitigation of plaintiffs' claim if a new personal representative was appointed to act on behalf of Karen's estate. Being subject to a second suit that would otherwise be barred under the doctrine of res judicata would be legally prejudicial to defendants. Accordingly, we conclude that the trial court did not abuse its discretion by denying plaintiffs' request for dismissal without prejudice.

Turning to the points raised in the dissent, we do agree with *some* of the thoughts expressed in the dissent, but that does not change the fact that we are required to follow *Ousley*. *Ousley* requires us to apply *Waltz* retroactively. Our dissenting colleague's opinion is colorful and his metaphors are interesting, but the path we must follow is clear.

Tempting as it may be to utilize MCR 7.215(J)(2) in an effort to critique the reasoning in *Ousley* and in an effort to initiate the process of convening a special conflict resolution panel under the court rule, considering the high volume of appeals in this Court, in our judgment a better use of our limited judicial resources in this case would be to recommend that the Michigan Supreme Court take this case for substantive review. The Court could then address the retroactive application of the *Waltz* decision as determined in *Ousley* and provide its reasoning for whatever decision it announces.

Although not of precedential value, we note that the Supreme Court has denied leave in *Ousley*, 472 Mich 927 (2005). And as discussed above, the Supreme Court has remanded at least three cases to this Court directing us to give *Waltz* full retroactive effect. Even assuming that

those orders are not to be given precedential effect beyond those individual cases, the Supreme Court's view of the matter is hardly ambiguous. We certainly share concerns that this Court, as well as trial courts and litigants, is better served with opinions that provide the legal rationale and reasoning for decisions reached by the Supreme Court rather than conclusions or directives set forth in orders that pertain to the case in which application for leave is sought. But at this point, that is a task for the Supreme Court to take up if it so chooses. Given that Court's pronouncements on the topic, it would be little more than a fool's errand to involve 28 Court of Appeals judges in the somewhat laborious process set forth in MCR 7.215(J) to address the topic of how to handle the retroactive application of *Waltz*. Sound judgment would suggest that any change in the state of the law should come from the Michigan Supreme Court, if it is so desired.

Affirmed. Defendants may tax costs.

Murphy, J., concurred.

/s/ David H. Sawyer
/s/ William B. Murphy