

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT COSTA, Personal Representative of the  
ESTATE OF JAYNE J. COSTA, Deceased,

UNPUBLISHED  
December 6, 2005

Plaintiff-Appellee,

v

No. 256673  
Washtenaw Circuit Court  
LC No. 02-001480-NH

OTTO GAGO, M.D.,

Defendant-Appellant,

and

MICHIGAN HEART & VASCULAR  
INSTITUTE, INC, and ST. JOSEPH MERCY  
HOSPITAL ANN ARBOR, a/k/a TRINITY  
HEALTH – MICHIGAN,

Defendants.

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Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying his motion for summary disposition brought pursuant to MCR 2.116(C)(7) in which defendant argued that plaintiff's claim was barred by the applicable statute of limitations. We reverse and remand this case to the trial court for entry of summary disposition in defendant's favor. This case is being decided without oral argument pursuant to MCR 7.214(E).

**I. FACTS**

On December 27, 2002, plaintiff filed a complaint against defendant. Plaintiff is the personal representative of Jayne J. Costa, who died on January 12, 2000. While plaintiff's complaint does not note the specific date of death, the parties do not dispute that Costa died on January 12, 2000. Plaintiff alleged that the Costa's death was the result of medical malpractice committed by defendant during decedent's quadruple bypass surgery performed on January 10, 2000. On March 11, 2003, defendant answered plaintiff's complaint denying any malpractice and asserting as an affirmative defense that plaintiff's claim was barred by the applicable statute of limitations. On May 18, 2004, defendant filed a motion for summary disposition pursuant to MCR

2.116(C)(7) and (C)(10) arguing that plaintiff's claim was barred by the applicable statute of limitations because plaintiff failed to file his claim before the expiration of the two-year statute of limitations on January 12, 2002, [January 10, 2002] or before the expiration of the two-year savings period granted him as a personal representative that expired on November 29, 2002. Defendant argued that, while plaintiff filed a notice of intent to sue defendant on June 18, 2002, before the expiration of the two-year savings period, our Michigan Supreme Court had recently decided in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), that the filing of the notice did not toll the two-year savings period granted plaintiff under the wrongful death savings statute.

## II. RETROACTIVE APPLICATION OF *WALTZ V WYSE*

Defendant asserts that the trial court erred by failing to apply our Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), to the present case. We agree.

### A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and the timeliness of a claim, *Farley v Advanced Cardiovascular Health Specialists, PC*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2005), slip op at 4. Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations.

### B. Analysis

In *Waltz*, *supra* at 650, our Supreme Court held that the tolling statute, MCL 600.5856, does not apply to the wrongful death savings statute, MCL 600.5852. This Court has already determined, in *Ousley v McLaren*, 264 Mich App 486, 494-495; 691 NW2d 817 (2004), that the *Waltz* decision applies retroactively. Not only is the *Ousley* decision binding precedent on this Court, MCR 7.215(J)(1), but, on June 17, 2005, our Supreme Court remanded three medical malpractice cases to this Court and, in each order, stated, "We further direct the court to give the holding of *Waltz v Wyse* ... full retroactive application." *Evans v Hallal*, 472 Mich 929; 697 NW2d 526 (2005); *Wyatt v Oakwood Hospital and Medical Centers*, 472 Mich 929; 697 NW2d 528 (2005); *Forsyth v Hopper*, 472 Mich 929; 697 NW2d 526 (2005). In light of our Supreme Court's directive and this Court's precedent in *Ousley*, *supra*, plaintiff's argument against retroactive application of *Waltz* must fail. Furthermore, this Court has already determined that the *Waltz* decision applies to the two-year savings period granted personal representatives in MCL 600.5852. *Farley*, *supra* slip op at 6-7.

Plaintiff failed to file his claim before the expiration of the two-year period of limitations and also before the expiration of the two-year period granted him as a personal representative. As a result his claim is barred by the statute of limitations.

Reversed and remanded to the trial court for entry of summary disposition in defendant's favor pursuant to MCR 2.116(C)(7). We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Bill Schuette