STATE OF MICHIGAN

COURT OF APPEALS

FLORENCE SHORT, Personal Representative of the Estate of JONATHON CROSS, Deceased,

Plaintiff-Appellant,

V

AUDBERTO C. ANTONINI, M.D., ADDIE JO BRISKIE, R.N., and ANITA YOUNG, R.N.,

Defendants-Appellees,

and

DUANE WATERS HOSPITAL and OAKS CORRECTIONAL FACILITY,

Defendants.

UNPUBLISHED
December 20, 2005

No. 256423
Jackson Circuit Court
LC No. 03-002370-NI

Before: Kelly, P.J., and Meter and Davis, JJ.

DAVIS, J. (*concurring*).

I concur with the opinion of my colleagues because current case law would appear to compel that analysis. I write separately because I am certain that the Legislature did not intend such a result, and I believe this Court should not have afforded *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004) retroactive application in *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004).

The cause of action in this case arose with decedent's death on May 11, 2000. Plaintiff received letters of appointment as decedent's personal representative on November 3, 2000. In the ordinary course of events, MCL 600.5805(6) provides for a two-year statute of limitations, which would have expired on May 11, 2002. However, MCL 600.5852 provides as follows:

> 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, plaintiff had until November 3, 2002, to commence the present action. Plaintiff sent a notice of intent to file a medical malpractice claim to all defendants on October 1, 2002. This notice is mandated by MCL 600.2912b as a prerequisite to filing suit. If not filed, plaintiff's claim would be subject to summary dismissal. Furthermore, MCL 600.2912b requires a plaintiff to wait 182 days after filing the notice before filing a complaint. However, when plaintiff sent the notice of intent, the limitations period provided by MCL 600.5852 had only 34 days remaining. My colleagues correctly apply *Waltz*, *supra*, to find that the limitations period ran out and time-barred plaintiff's claim during the mandatory 182-day waiting period.

Plaintiff did file her complaint on April 21, 2003. Presumably, plaintiff did so in reliance on MCL 600.5856(d),[1] under which "if the period of limitations would expire during the notice period, the period of limitations is tolled for 182 days and then resumes running after the 182-day period." *Burton v Reed City Hosp Corp*, 471 Mich 745, 748; 691 NW2d 424 (2005). Therefore, 182 days after October 1, 2002, or April 1, 2003, plaintiff's remaining 34 days would have continued to run, giving her until May 5, 2003, to timely file her complaint. Plaintiff complied with these requirements. Nearly a year later on April 14, 2004, in *Waltz*, *supra*, our Supreme Court stated that because MCL 600.5852 is not itself a statute of limitations, but an exception to a statute of limitations, the notice tolling provision does not apply. *Waltz*, *supra* at 648-651. We are bound by the rule of *Waltz* and the retroactive application thereof. *Ousley*, *supra* at 493-495. Accordingly, plaintiff's suit was effectively barred 33 days after issuing the letter of intent and five months before MCL 600.2912b(6) would allow for the filing of a complaint.

I would not follow the retroactive application of *Waltz* by *Ousley* if not constrained to do so. Instead, I believe that the standards set forth by our Supreme Court in *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002), "where injustice might result from full retroactivity," obligate us to apply *Waltz* prospectively only. Our Supreme Court noted three factors to be considered: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id.* As in that case, *Waltz* was intended to correct what our Supreme Court believed to be a misinterpretation of a statute. *Pohutski*, *supra* at 697; *Waltz*, *supra* at 653-655. Also as in *Pohutski*, there has been extensive reliance on the pre-*Waltz* interpretation of the statutes by plaintiffs who reasonably believed they had two years in which to commence their causes of action. Finally, *Pohutski* was also based on the fact that retroactive application would deny plaintiffs in cases currently pending relief to which they reasonably believed they were entitled, and "they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing." *Pohutski*, *supra* at 698-699. In *Pohutski*, our Supreme Court concluded that retroactive application was inappropriate. This Court in *Ousley* should have reached the same conclusion.[2]

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[1] Slightly reworded and moved to MCL 600.5856(c) by 2004 PA 87, which became effective April 22, 2004.

[2] This Court's retroactivity analysis in that case apparently relied not on *Pohutski* but on earlier decisions. See *Ousley v McLaren*, 264 Mich App 486, nn 12-14, 26; 691 NW2d 817 (2004).

It is well-established that statutes of limitations serve an important public policy of protecting the rights of both plaintiffs and defendants by effecting a compromise. They are intended to satisfy defendants' needs for certainty and freedom from stale claims. They are simultaneously intended to afford plaintiffs a reasonable time in which to investigate and commence their claims. *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14, 19, 22-24; 564 NW2d 857 (1997), overruled in part on other grounds *Rory v Continental Ins Co*, 473 Mich 457, 476-478, 486-489; 703 NW2d 23 (2005). Statutes of limitations presumptively establish the Legislature's determination of what that reasonable time is. *Lothian v City of Detroit*, 414 Mich 160, 165-166; 324 NW2d 9 (1982). The Legislature has clearly deemed two years to be a reasonable time for an injured plaintiff to bring a medical malpractice action. MCL 600.5805(6).

Statutes serving a common purpose should be read together and harmonized. *Lindsey v Harper Hosp*, 455 Mich 56, 65; 564 NW2d 861 (1997). Compliance with the notice provision of MCL 600.6912b means that a plaintiff must decide whether to bring an action 182 days before the action can formally be "commenced." As a *practical* matter, that reduces the *effective* limitations period for a plaintiff from two years to a year and a half. The logical significance of MCL 600.5856(d) is that the Legislature was aware that the notice period reduces the time available to a plaintiff by 182 days, and it intended that a claim be timely as long as the defendant was *notified* of the impending claim within two years. This view logically serves the dual purposes of a statute of limitations: it affords plaintiffs a reasonable time in which to research and bring their claims, thereby ensuring that meritorious claims are not needlessly sacrificed while baseless claims are not needlessly brought, and it affords defendants continued timely notice of claims against them, thereby ensuring that they are not subject to stale claims or time-related difficulties in defending against them.

It is not reasonable that the Legislature would apply different reasoning to claims of medical malpractice resulting in death and requiring appointment of a personal representative. Investigating such a claim can be anticipated to be more difficult and time consuming for a number of immediately apparent reasons: the deceased is unavailable to tell his or her story, the immediate aftermath is likely traumatic and confusing to all parties involved, and the judicial act of appointing a personal representative requires time even in the best of circumstances. Affording the personal representative *less* time in which to research the validity of such a claim is counterintuitive to the plain reading of MCL 600.5852, which appears to be a legislative acknowledgement of these dynamics and to be a special-purpose statute of limitations applicable to personal representatives. The statute would seem intended to give personal representatives the same time for preparation from the date of their appointments as living plaintiffs would have from the date of their injuries. There is no apparent additional prejudice to defendants, who remain entitled to advance notice of a pending claim and are additionally protected by the Legislature's provision of a clear statute of repose. See *City of Novi v Woodson*, 251 Mich App 614, 628; 651 NW2d 448 (2002).

This view would appear consistent with our Supreme Court's interpretation of MCL 600.5852 as "a *saving* provision designed 'to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.'" *Waltz*, *supra* at 655, quoting *Lindsey*, *supra* at 66 (emphasis in original). As discussed, our Legislature established two years as a reasonable time. The notice-tolling provision indicates that our Legislature understood the functional effect of the notice provision, and it ensured that plaintiffs

would remain entitled to a reasonable time in which to prepare their cases. It seems unlikely the Legislature would have intended to apply that entitlement where a plaintiff has not been fatally injured, but to refuse that entitlement if the alleged malpractice happens to be fatal. Retroactive application of *Waltz* compounded the problem.

The anomaly that exists in these circumstances may be something that our Supreme Court may wish to revisit and our Legislature may wish to reconsider.

/s/ Alton T. Davis