

STATE OF MICHIGAN
COURT OF APPEALS

MARSHALL POWELL, JR., Individually, and
MARSHALL POWELL, JR., and BARBARA
JARRELLS, Co-Personal Representatives of the
Estate of FLORCIE MAE POWELL,

Plaintiffs-Appellants,

v

OAKWOOD HEALTHCARE, INC., d/b/a
OAKWOOD ANNAPOLIS HOSPITAL, ALOK
SHUKLA, M.D., and JAMES
NEUENSCHWANDER, M.D.,

Defendants-Appellees.

UNPUBLISHED
December 22, 2005

No. 263639
Wayne Circuit Court
LC No. 04-407872-NH

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants' motions for summary disposition and dismissing this medical malpractice case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On May 27, 1998, decedent died after receiving emergency treatment from defendants. Plaintiffs were appointed co-personal representatives of decedent's estate, and letters of authority were issued on June 15, 2000.¹ On June 10, 2002, plaintiffs filed a notice of intent (NOI) to file a medical malpractice action, as required by MCL 600.2912d. The filing of a NOI tolls the two-year statute of limitations for 182 days. MCL 600.5856(d).² On December 13, 2002, plaintiffs

¹ The limitations period for a medical malpractice action is two years. MCL 600.5805(6). MCL 600.5852, a savings provision applicable to wrongful death actions, provides that if a person dies prior to the expiration of the limitations period, as happened in this case, the personal representative may commence an action within two years after letters of authority are issued. An action cannot be maintained unless it is filed within three years after the limitations period has expired.

² MCL 600.5856 was amended, and MCL 600.5856(d) is now found at MCL 600.5856(c).
(continued...)

filed suit. The parties dismissed that action without prejudice and agreed that: the complaint would be refiled within fourteen days, the original filing and service dates would be applicable in the subsequent action, and all available defenses would apply in the subsequent action.

Plaintiffs refiled the complaint in a timely manner. Defendants filed answers in which they raised the statute of limitations as an affirmative defense. Defendants then moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiffs' complaint was barred by the statute of limitations because it was filed more than two years after the date of the alleged malpractice and no savings provision applied. Defendants relied on *Waltz v Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004), in which the Supreme Court held that the tolling period provided in MCL 5856(d) did not apply to the savings provision in MCL 600.5852. In response, plaintiff argued that *Waltz, supra*, should not be applied retroactively, that defendants should be estopped from asserting this defense because it was not raised as an affirmative defense, and that equitable tolling should apply to preserve their action.

The trial court granted defendants' motions for summary disposition, finding that because plaintiffs did not file suit within two years after the alleged malpractice occurred or within two years after letters of authority were issued, the action was time-barred. *Waltz, supra*. The trial court rejected plaintiffs' assertion that *Waltz, supra*, should be applied prospectively only, noting that in *Ousley v McLaren*, 264 Mich App 486, 493-494; 691 NW2d 817 (2004), this Court held that *Waltz, supra*, applied retroactively. In addition, the trial court rejected plaintiffs' arguments regarding waiver of an affirmative defense and equitable tolling.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

We affirm. We are bound to follow the holdings in *Ousley, supra*, and *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 568; 703 NW2d 115 (2005), that *Waltz, supra*, must be applied retroactively. MCR 7.215(J)(1). Plaintiffs' act of filing a NOI on June 10, 2002, did not toll the two-year grace period provided for in MCL 600.5852. *Waltz, supra* at 650.

Furthermore, plaintiffs' arguments regarding waiver and estoppel are without merit. An affirmative defense that is not raised in a party's responsive pleading is waived. MCR 2.111(F)(2). Defendants raised the statute of limitations as an affirmative defense in their answers to plaintiff's complaint; however, MCL 600.5852 is a savings statute and not a statute of limitations. *Miller v Mercy Memorial Hosp*, 466 Mich 196, 202; 644 NW2d 730 (2002). Plaintiffs have cited no authority for their proposition that a defendant must assert the non-applicability of a savings statute as an affirmative defense.

The doctrine of equitable tolling has been applied under extraordinary circumstances, such as when the failure to comply with the applicable statute of limitations was due to understandable confusion regarding the nature of the claim to be asserted, i.e., whether the claim

(...continued)

However, because the case law at issue and the statute at the relevant time were based on MCL 600.5856(d), for ease of reference, we will utilize the former statutory cite.

sounded in medical malpractice or ordinary negligence, as in *Bryant v Oakpointe Villa Nursing Centre, Inc.*, 471 Mich 411, 432-433; 684 NW2d 864 (2004). No evidence showed that plaintiffs were confused as to the nature of the action.

Decedent died on May 27, 1998; thus, the cause of action accrued on that date. See *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997). Plaintiffs' letters of authority were issued on June 15, 2000. Plaintiffs did not file suit on or before either May 27, 2000, the date the two-year statute of limitations applicable to medical malpractice actions expired, or June 15, 2002, the date the two-year savings provision window expired. Therefore, in light of *Waltz, supra*, *Ousley, supra*, and *Farley, supra*, plaintiffs' suit was not filed in a timely manner, notwithstanding the fact that it was filed within three years after the expiration of the two-year statute of limitations applicable to medical malpractice actions. Neither defendants' citation of MCL 600.5852 as an affirmative defense nor their filing of motions for summary disposition at an earlier stage of the proceedings could have changed the outcome of this case. Defendants were entitled to summary disposition.

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood