STATE OF MICHIGAN

COURT OF APPEALS

BONNIE AMON, Successor Personal Representative of the Estate of ANN MARIE SAMODELL, Deceased, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED December 27, 2005
v	No. 260252 Oakland Circuit Court
BOTSFORD GENERAL HOSPITAL, and ROBERT F. SCHIRMER, D.O., Defendants-Appellants/Cross-Appellees.	LC No. 2002-046057-NH

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

In this wrongful death medical malpractice action, defendants[1] appeal by leave granted the trial court's order denying their motion for summary disposition. Plaintiff has filed a cross-appeal in response to defendants' brief on appeal. We reverse the trial court's order denying defendants' motion for summary disposition.

I. Material Facts

The complaint in this action alleged that Ann Marie Samodell, the decedent, suffered from complications during her hospitalization from February 1, 2000, through February 6, 2000, the latter date also being the date of the decedent's death. On June 21, 2000, Jo Ellen Prior was issued letters of authority and appointed the personal representative of the decedent's estate. On February 5, 2002, Prior served a notice of intent to file a claim pursuant to MCL 600.2912b. On December 12, 2002, Prior filed a complaint in this matter, raising claims of negligence against defendants.

On May 13, 2004, defendants brought a motion for summary disposition pursuant to MCR 2.116(C)(7), contending that the claims raised in this case were barred by the applicable

[1] Defendant Robert Schirmer was previously dismissed and was not a party to this appeal.

statute of limitations. Defendants, relying on *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004), argued that the wrongful death saving provision was not tolled by MCL 600.5852, and that because Prior did not file a complaint until December 12, 2002, the action had expired. After defendants filed their motion for summary disposition, plaintiff was appointed as the successor personal representative of the decedent's estate on June 23, 2004. The trial court denied defendants' motion for summary disposition, and held that plaintiff would be within the statute if she filed a new complaint, and that complaint was "pled before February 6, 2005."

II. Standard of Review

This Court reviews motions for summary disposition de novo. *Waltz*, *supra* at 647. "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations." *Id*. Questions regarding whether a statute of limitation bars a claim and questions of statutory interpretation are also reviewed de novo. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005).

III. Analysis

The primary issue in this case is whether the wrongful death action in this case was time barred, and determination of that issue involves the consideration of interplay between the notice tolling provision and the wrongful death saving provision. We find that the original action was not timely filed, and that summary disposition should have been granted pursuant to MCR 2.116(C)(7) in this case.

"'[I]n all actions brought under the wrongful death statute, the limitations period will be governed by the provision applicable to the liability theory of the underlying wrongful act.'" Accordingly, we must apply the two-year medical malpractice statute of limitations. See MCL 600.5805(1), (6); MCL 600.5838a(2); *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004) (citation omitted).

Here, it is undisputed that the complaint in this case was not filed until December 12, 2002, whereas the two-year statute of limitations was set to expire on February 6, 2002. As Prior, who filed the complaint in this action, did not file an action on behalf of the decedent before the two-year statute of limitations ran, plaintiff must demonstrate that one of the statutory exceptions to the limitations period applies. See *Farley*, *supra* at 571. There are two exceptions relevant to this case, which include the notice tolling provision, MCL 600.5856(c), and the wrongful death saving provision, MCL 600.5852.

Turning first to the notice tolling provision, we find that the complaint filed in this case was untimely in accordance with that statute. The notice tolling provision provides that the "statutes of limitations or repose" are tolled under the following relevant circumstance:

> At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given. [MCL 600.5856(c).]

It is undisputed that the applicable notice period in this case is 182 days. MCL 600.2912b(1).

Pursuant to the statutory provisions, plaintiff's action was not timely filed. Here, the latest date of alleged malpractice occurred on February 6, 2000, and the corresponding statute of limitations was set to expire on February 6, 2002. Prior, plaintiff's predecessor, filed the notice of intent on February 5, 2002, thus tolling the action for a period of 182 days, i.e., until August 5, 2002. Because there was one day remaining before the statute of limitations was set to expire, the limitations period was tolled to August 6, 2002. MCL 600.5856(c). However, because this action was not filed until December 12, 2002, the complaint was not timely filed under this exception. *Farley*, *supra* at 573.

Turning next to the wrongful death saving provision, we again find that the complaint was not timely filed in accordance with this statutory exception. Under the wrongful death saving provision, where a death occurs before the statute 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.]

"Section 5852 is 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 (citation omitted). Thus, as stated in *Farley*, "a personal representative may file a medical malpractice suit on behalf of a deceased person for two years after letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired." *Farley*, *supra* at 572-573.

Here, the letters of authority were issued to Prior on June 21, 2000, giving plaintiff's predecessor until June 21, 2002, to file suit. Therefore, if plaintiff intends to rely on the saving provision, the action would also be untimely because it was filed almost six months after the expiration of the saving provision. Plaintiff, relying on footnote fourteen in *Waltz*, contends that because Prior filed the notice of intent within two years of the date of defendants' alleged malpractice, she is entitled to the 182-day tolling period, which may be added to the period of time allowed for filing a wrongful death action under § 5852. We reject this argument. In *Waltz*, our Supreme Court specifically held that § 5856(c), which explicitly applies only to statutes of limitation or repose, "does not operate to toll the additional period permitted under § 5852 for filing wrongful death actions." *Id*. at 655; see also *McLean v McElhaney*, __ Mich App __; __ NW2d __ (Docket No. 257540, issued December 13, 2005), slip op., p 2; *Farley*, *supra* at 575. Thus, contrary to plaintiff's argument, the tolling statute does not toll the wrongful death saving provision in any instance, as it is not a statute of limitations or repose. Accordingly, the trial court erred in denying defendants' motion for summary disposition on the basis that the action was time-barred pursuant to the applicable statute of limitations.

Given this conclusion, we find that, to the extent that the trial court determined that the appointment of a successor personal representative rendered the action timely under *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), such ruling was erroneous. In *Eggleston*, the Court addressed the issue of whether a successor personal

representative had two years after appointment to file an action on behalf of an estate under the wrongful death saving statute where the initial personal representative died before a complaint was filed. *Id*. at 30. The Court, relying on the plain language of the statute, concluded that the "language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative." *Id*. at 33. In that case, because the successor representative filed the complaint within two years after letters of authority were issued and within three years after the period of limitations had run, the action was deemed timely. *Id*.

This case differs from the situation in *Eggleston*, however. Here, as stated above, the original personal representative failed to comply with the statutory provisions, thus rendering the complaint filed in this case untimely.[2] Accordingly, we are faced with a different issue—whether an untimely complaint may be revived by the appointment of a successor personal representative. This precise issue was addressed by this Court in the recent case, *Harris v Bolling*, 267 Mich App 667; 705 NW2d 720 (2005). In *Harris*, this Court held that MCL 700.3701, which provides that the successor personal representative's powers "'relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment," does not support the conclusion that the appointment of a successor personal representative can render timely an untimely complaint filed by the original personal representative. *Harris*, *supra*, slip op at 5. The Court indicated that the original personal representative's act of filing an untimely complaint was not beneficial to the estate, and even if the successor personal representative ratified that act, she would only be ratifying the filing of an untimely complaint. *Id*. Accordingly, because the complaint filed in this case was untimely, the appointment of plaintiff does not render the untimely complaint timely.

Plaintiff argues on cross-appeal, that this Court should give *Waltz* prospective effect, contrary to *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), lv den 472 Mich 927 (2005); see also *Farley*, *supra*. We disagree, and decline plaintiff's invitation to convene a special panel pursuant to MCR 7.215(J). We also decline plaintiff's invitation to express disagreement with *Waltz.*

In *Ousley*, the Court indicated that, in order to avoid the general rule that judicial decisions are to be given complete retroactive effect, the decision must either overrule clear and uncontradicted case law, or decide an issue of first impression whose resolution was not clearly foreshadowed. *Ousley*, *supra* at 493. Finding that *Waltz* met neither of those criteria, the Court noted that the only case law that *Waltz* arguably overruled was *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000). *Ousley*, *supra* at 493. However, the Court further stated

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[2] Defendants indicate that plaintiff filed a second lawsuit against Botsford General Hospital on January 31, 2005, alleging the same claims as those alleged in this case, LC Docket No. 05-063955-NH. Issues surrounding the filing of that complaint are not presently before us, and we will not address the implications raised by the filing of that complaint. Instead, we address only the issues involving the filing of the December 12, 2002, complaint in the case presently before us.

that the Supreme Court explained that what *Waltz* actually overruled was confusing and imprecise dicta, as the question whether the 182-day notice tolling provision applied to the wrongful death saving provision was not before the *Omelenchuk* Court. *Ousley*, *supra* at 494-495. Concluding that *Waltz* met neither of the two exceptions to the general rule requiring retroactive application of judicial decisions, the Court concluded that *Waltz* applies retroactively. *Id*. at 495; see also *McLaren*, *supra*.

Regardless of the holding in *Ousley*, however, this Court has also been directed by our Supreme Court to give the holding in *Waltz* full retroactive application. *Evans v Hallal*, 472 Mich 929; 697 NW2d 526 (2005); *Forsyth v Hopper*, 472 Mich 929; 697 NW2d 526 (2005); *Wyatt v Oakwood Hosp & Medical Ctrs*, 472 Mich 929; 697 NW2d 528 (2005); but see *Chernoff v Sinai Hosp of Greater Detroit*, 471 Mich 910; 688 NW2d 284 (2004) (denying leave to appeal where the complaint was filed two years after the expiration of the statute of limitations and five months after the expiration of the saving period, with no discussion on application of *Waltz*); see also *McLaren*, *supra* at 3-4 (acknowledging Supreme Court's direction to give *Waltz* retroactive effect). This Court is bound to follow decisions of the Supreme Court. "[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [that] Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).[3] Accordingly, we must give *Waltz* retroactive application.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[3] Plaintiff also argues on cross-appeal that the decision in *Waltz* should be reconsidered and reversed. Again, as plaintiff correctly notes, it is not within the province of this Court to overrule precedent set forth by our Supreme Court as we are bound to follow its decisions. *Boyd*, *supra* at 523.